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BEING A

Complete Encyclopedia of All the Case Law of the Federal
Supreme Court up to and including Volume 206 U. S.
Supreme Court Reports (Book 51 Lawyers' Edition)

UNDER THE EDITORIAL SUPERVISION OF
THOMAS JOHNSON MICHIE

Volume II

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1908

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CROSS REFERENCES.

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V. Certificate of Division of Opinion.

A. Under the Acts of 1802 and 1872—1. **IN GENERAL.**—The sixth section of the "act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the supreme court at their next session to be held thereafter; and shall by the said court be finally decided; and the decision of the supreme court and their order in the premises shall be remitted to the circuit court and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."⁵⁷

History and Causes of Legislation.—This statute was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed, in opinion.⁵⁸ And so changed the judicial system that the circuit court, instead of three, was composed of two judges; and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied.⁵⁹

Constitution of the Circuit Court.—The privilege of this statute was not denied to a party because the circuit court consisted of two judges instead of one. Such a result was not in the contemplation of the legislation of 1802, and the language used by it cannot be construed to mean any such thing.⁶⁰

The act of April 10, 1869, c. 22, 16 Stat. 44, provided for the appointment of a circuit judge in each circuit, but this did not repeal the act of 1802, as the same necessity existed as before for the power to certify questions.⁶¹

By the act of June 1, 1872, c. 255, 17 Stat. 196, whenever in any proceedings or suit in a circuit court there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree or order, and a certificate of division of opinion as under the act of 1802, either party might remove the case to this court on writ of error or appeal, according to the nature of the case.⁶² This act continued in force about two years, when it was supplanted by §§ 650, 652, and 693 of the Revised Statutes, by which its provisions were re-

57. Under the acts of 1802 and 1872 in general.—Ex parte Milligan, 4 Wall. 2, 109, 18 L. Ed. 281; Insurance Co. v. Dunham, 11 Wall. 1, 21, 20 L. Ed. 90.

58. Ex parte Milligan, 4 Wall. 2, 111, 18 L. Ed. 281.

In United States v. Daniel, 6 Wheat. 542, 547, 5 L. Ed. 326, Chief Justice Marshall explained that "previous to the passage of that act (Act of April 29, 1802) the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the supreme court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case that opinion should be the judgment of the court." Act of March 2, 1793, 1 Stat., c. 22, §§ 2, 333; Davis v. Braden, 10 Pet.

286, 9 L. Ed. 427, United States v. Rider, 163 U. S. 132, 135, 41 L. Ed. 101.

But continued the chief justice, the act of 1802 made the judges of the supreme court stationary, so that the same judges constantly attended the same circuit and the court being always composed of the same two judges, any division of opinion would remain and the question continue unsettled. "To remedy this inconvenience, the clause under consideration was introduced." United States v. Daniel, 6 Wheat. 542, 548, 5 L. Ed. 324; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; United States v. Rider, 163 U. S. 132, 136, 41 L. Ed. 101.

59. Ex parte Milligan, 4 Wall. 2, 111, 18 L. Ed. 281.

60. Ex parte Milligan, 4 Wall. 2, 111, 18 L. Ed. 281.

61. Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90; United States v. Rider, 163 U. S. 132, 136, 41 L. Ed. 101.

62. United States v. Rider, 163 U. S. 132, 136, 41 L. Ed. 101.

stricted to civil suits and proceedings.⁶³ And by §§ 651 and 697 the provisions of § 6 of the act of 1802 were re-enacted as to criminal cases.⁶⁴

Summary.—In short, under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated, and the provision for a certificate operated to give the benefit of review where the amount in controversy was less than that prescribed as essential to our jurisdiction, while as to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed.⁶⁵

2. TO WHAT COURTS APPLICABLE.—**Circuit Court for District of Columbia.**—This court has no jurisdiction of causes brought before it, upon a certificate of a division of opinion of the judges of the circuit court of the District of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgments and decrees of the circuit court.⁶⁶

3. GENERAL REQUISITES.—a. *In General.*—No party has a right to ask for such a certificate, nor can it be made consistently with the duty of the court, if the judges are agreed and do not think there is doubt enough upon the question to justify them in submitting it to the judgment of this court.⁶⁷

b. *Must Be a Suit or Cause.*—The act of 1802 obviously contemplates a suit in court, in which plaintiff and defendant have both appeared, for it directs the point to be certified at the request of either party.⁶⁸ And the proceeding in which the point of disagreement arises must be a cause.⁶⁹

Ex Parte Proceedings.—Nor is it necessary that there be two parties to the cause, merely because the statute says that the point is to be stated upon the request of "either party or their counsel." Ex parte proceedings such as habeas corpus, come within the meaning of the statute.⁷⁰

c. *Questions Must Arise at Trial of Cause.*—The questions which may be certified are those which may arise at the trial of a case, and are such as may be presented upon the final hearing of a cause, or pleas to the jurisdiction of the court.⁷¹ This court cannot take jurisdiction of a question on which the opinions of the judges of the circuit court are opposed, where the division of opinion arises

63. *United States v. Rider*, 163 U. S. 132, 136, 41 L. Ed. 101.

64. *United States v. Sanges*, 144 U. S. 310, 321, 36 L. Ed. 445; *United States v. Rider*, 163 U. S. 132, 136, 41 L. Ed. 101.

65. *United States v. Rider*, 163 U. S. 132, 137, 41 L. Ed. 101; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875.

66. Not applicable to circuit courts of District of Columbia.—*Ross v. Triplett*, 3 Wheat. 601, 4 L. Ed. 469.

67. General requisites.—*Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134.

68. Must be a suit or cause.—*Ex parte Milligan*, 4 Wall. 2, 110, 18 L. Ed. 281.

Summary motion to vacate decree.—"But here there is no party but the one in whose behalf the motion is made. No defendant is named, and no process prayed for. And if, in this stage of the case, the legality of this proceeding can be certified to this court for its opinion, the same thing may be done at the commencement of any other equity proceeding, and this court called on to decide in advance, before any process is issued or any party brought into court, whether a motion or an original bill, or any other of the many description of bills known in

equity practice, was the proper and appropriate remedy in the case which a party was about to bring before the circuit court. No one will suppose that such a practice was intended to be established by the act of 1802." *Wiggins v. Gray*, 24 How. 303, 306, 16 L. Ed. 688.

69. A petition for a writ of habeas corpus duly presented is the institution of a "cause," within the meaning of the judiciary act of 1802, allowing certificates of division in opinion between the judges. And a certificate of division of opinion on such petition is within the jurisdiction of the supreme court. And it is not necessary that a return be made of the writ, and the parties appear and begin to try the cause before it is a suit. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

70. *Ex parte proceedings.*—*Ex parte Milligan*, 4 Wall. 2, 113, 18 L. Ed. 281.

71. Questions must arise at trial of cause.—*Davis v. Braden*, 10 Pet. 286, 9 L. Ed. 427.

The act of congress seems to reach only matter arising in the progress of the cause, and not afterwards, because the proviso is, "that nothing herein contained shall prevent the cause from proceeding," etc., and hence implies it must be in the

upon some proceeding subsequent to the decision of the cause in that court.⁷²

d. *"Upon the Request of Either Party or Their Counsel."*—The omission to state in the certificate of division of opinion that the point of difference between the judges was certified "upon the request of either party or their counsel," is not fatal to our jurisdiction, where it appears from the certificate that the point upon which the judges differed in opinion was stated, under their direction, in the presence of the counsel of both parties, without objection from either, and where it is expressly stated that the cause was continued until the decision of this court upon the point of difference between the judges could be rendered.⁷³

e. *Invalidity of Proceedings Below.*—Where the certificate of division relates to a matter in which the court below had no right to act or to make such a certificate, it brings nothing before this court for review.⁷⁴ When, on a view of the record, it appears that from some fatal defect in the proceedings, no judgment can be entered against the defendant in the court below, on a suit there pending, this court will decline to answer a question certified to it on division of opinion between the judges of the circuit court, upon a contrary assumption.⁷⁵

f. *Necessity for Finality of Judgment.*—**Meaning of Term Final Decision.**—In the sense of the law of 1802 which authorized a certificate of division, a final decision means final upon the points certified; final upon the court below, so

progress of the cause. See act of congress, April 29th, 1802, 2 Stat. at L., 159, 160; 6 Wheat. 548. But the present question, occurring before a final decision, comes expressly within the words of the law,—“that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point” of disagreement shall be certified, etc. (2 Stat. at L. 159.) *United States v. Chicago*, 7 How. 185, 191, 12 L. Ed. 660.

“The court do not mean to decide, definitely, that no question can be brought here upon a certificate of a division of opinion, unless the point arose upon the trial of the cause, but are very much induced to think that such is the true construction of the act; but from the general words used, cases may possibly arise that we do not foresee.” *Davis v. Braden*, 10 Pet. 286, 9 L. Ed. 427.

72. *Devereaux v. Marr*, 12 Wheat. 212, 6 L. Ed. 605.

It must under sixth section of the act of the 29th of April 1802, appear in the certificate that the point upon which the disagreement of the judges occurs arose in the progress of the cause, and not incidentally, or in relation to a collateral matter, after the rendition of the judgment or decree. Where the question certified was as to the amount of the bond to be given upon the allowance of a writ of error, and where it was as to the taxation of costs after the principal of the judgment had been collected, this court held that it could not take jurisdiction. *Devereaux v. Marr*, 12 Wheat. 212, 213, 6 L. Ed. 605; *Bank of United States v. Green*, 6 Pet. 26, 8 L. Ed. 307; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 254, 18 L. Ed. 224.

Upon a motion of the defendants, a rule was given in the circuit court of the

United States for the District of Ohio, on the marshal, to show cause why the taxation of costs in the case, upon execution, should not be reversed and corrected, in respect to the marshal's poundage taxed against the defendants. The judges of the circuit court were divided in opinion upon the question of costs presented on the hearing of the rule, and certified the division to this court. Held, that this court had not jurisdiction of the cause. Because the division was not upon any matter arising at the trial of the cause, but upon a collateral contest between the marshal and the bank, as to his right to fees. *Bank of United States v. Green*, 6 Pet. 26, 8 L. Ed. 307.

73. *"Upon the request of either party or their counsel."*—*United States v. Harris*, 106 U. S. 629, 27 L. Ed. 290. The court in this case distinguishes the practice under § 649 of the Revised Statutes which provides for the waiver of a trial by jury in civil cases, and says: “The section which provides for a certificate of division of opinion makes no such requirement in relation to the request for a certificate.”

74. *Invalidity of proceedings below.*—*United States v. Pile*, 130 U. S. 280, 283, 32 L. Ed. 904.

75. *United States v. Buzzo*, 18 Wall. 125, 21 L. Ed. 812.

Where an answer to a question certified to this court in a criminal case is fatal to the indictment, and no good indictment can be framed upon the facts as they appear therein, it is unnecessary and this court will decline to answer the other questions submitted to us by the judges of the circuit court. *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698, citing *United States v. Buzzo*, 18 Wall. 125, 21 L. Ed. 812.

that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.⁷⁶

When Decision Must Be Final.—No case can be brought up under § 693 of the Revised Statutes, until there has been a final judgment or decree in the suit.⁷⁷ Under § 693 of the Revised Statutes, final judgments or decrees of the circuit courts in civil suits or proceedings, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal,⁷⁸ except in a criminal proceeding.⁷⁹

The sixth section of the act of 1802, c. 31 (2 Stat. 159), which allowed the questions to be certified up before judgment, was superseded by the first section of the act of July 1, 1872, c. 255 (17 Stat. 196).⁸⁰

g. Competency of Judges of Circuit Court.—The office and object of a certificate of division of opinion are to bring to this court for determination a question of law upon which the opinions of two judges, competent to take part in the judgment of the circuit court, are opposed to each other.⁸¹ Therefore, a case cannot be brought to this court upon a certificate of division of opinion, between the district and the circuit judge, under the provisions of § 4 of the act of Sept.

76. Meaning of term final decision in act of 1802.—Ex parte Milligan, 4 Wall. 2, 117, 18 L. Ed. 281.

77. Morey v. Lockart, 123 U. S. 56, 31 L. Ed. 68.

78. Bartholow v. Trustees, 105 U. S. 6, 26 L. Ed. 937. But see the opinion of Potter, J., in *State v. Crocker* (Wyoming), 40 Pac. 683, 684.

Under § 693 of the Revised Statutes, final judgments or decrees of the circuit courts in civil suits or proceedings, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal. The sixth section of the act of 1802, ch. 31 (2 Stat. 159), which allowed the questions to be certified up before judgment, was superseded by the first section of the act of July 1, 1872, ch. 255 (17 Stat. 196). *Bartholow v. Trustees*, 105 U. S. 6, 26 L. Ed. 937.

Section 650 of the Revised Statutes provides that whenever, in any civil suit or proceeding in a circuit court, there occurs a difference of opinion between the judges holding the court as to any matter to be decided, ruled, or ordered, the opinion of the presiding judge shall prevail and be considered the opinion of the court for the time being; and § 652, that when final judgment or decree is rendered, the points of disagreement shall be certified and entered of record under the direction of the judges. That being done, the judgment or decree may, under the provisions of § 693, be brought here for review by writ of error or appeal, as the case may be. By § 651 it is provided that whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court, and the judges are divided in opinion, the point on which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified under the seal of the court

to this court at its next session. It follows, from these provisions of the statutes, that, in a civil suit or proceeding, this court has no jurisdiction until there has been a final judgment in the circuit court, but, if it is a criminal proceeding, we have. Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 826, followed in Ex parte Clodomiro Cota, 110 U. S. 385, 28 L. Ed. 172.

A writ of habeas corpus is a civil proceeding within the meaning of this rule, and hence can be reviewed only after final judgment. Ex parte Tom Tong, 108 U. S. 556, 27 L. Ed. 826; Ex parte Clodomiro Cota, 110 U. S. 385, 28 L. Ed. 172.

An order of a circuit court remanding the cause to a state court is not a final judgment in the action within the meaning of § 693 of the Revised Statutes. *Morey v. Lockart*, 123 U. S. 56, 31 L. Ed. 68, citing *Railroad Co. v. Wiswall*, 23 Wall. 507, 22 L. Ed. 103.

79. The questions that may be certified to us on a division of opinion before judgment are those which occur on the trial or hearing of a criminal proceeding before a circuit court. Ex parte Tom Tong, 108 U. S. 556, 560, 27 L. Ed. 826, followed in Ex parte Clodomiro Cota, 110 U. S. 385, 28 L. Ed. 172.

Habeas corpus.—It was decided at the last term in Ex parte Tom Tong, 108 U. S. 556, 27 L. Ed. 826, that this court could not take jurisdiction of a certificate of division in opinion between the judges of a circuit court in proceedings under a writ of habeas corpus until final judgment had been rendered in accordance with the opinion of the presiding justice or judge. Ex parte Clodomiro Cota, 110 U. S. 385, 28 L. Ed. 172.

80. Bartholow v. Trustees, 105 U. S. 6, 26 L. Ed. 937.

81. Competency of judges of circuit court.—*United States v. Emholt*, 105 U. S. 414, 415, 26 L. Ed. 1077.

24, 1789, c. 20, and of § 5 of the act of April 29, 1802, c. 31, re-enacted in the Revised Statute, § 614, providing that upon the hearing in the circuit court of an appeal from a judgment of the district court, the district judge will render the decision appealed from, for although he may, for the information of the circuit court, assign his reasons for that decision, he is prohibited from voting or taking part in the judgment of the circuit court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified.⁸²

The district judge cannot sit in the circuit court in a cause brought by writ of error from the district to the circuit court, and the cause cannot in such a case be brought from the circuit to this court upon a certificate of a division of opinion of the judges.⁸³

Where Justice of This Court Sits in His Circuit.—This court has jurisdiction, under the act of 1802, of a certificate of division of opinion between the associate justice of the supreme court and the circuit judge, together holding the circuit court, under the act of 1869, as well as between either of the said judges, and the district judge.⁸⁴

4. WHERE DISAGREEMENT IS AS TO PART OF CASE ONLY.—Where the circuit and district judge agree in parts of a case, and dispose of them by decree finally, but are unable to agree as to others; and certify as to them a division of opinion, both parts of the case may be brought to the supreme court at once and heard on the same record.⁸⁵

5. CERTIFYING WHOLE CASE FOR DECISION.—In General.—The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division.⁸⁶ The certificate of division of opinion in civil cases under

^{82.} *United States v. Emholt*, 105 U. S. 414, 26 L. Ed. 1077.

By the provisions of § 4 of the act of September 24, 1789, ch. 20, and of § 5 of the act of April 29, 1802, ch. 31, re-enacted in the Revised Statutes, § 614, upon the hearing in the circuit court of an appeal from a judgment of the district court, the district judge who rendered the decision appealed from, although he may, for the information of the circuit court, assign his reasons for that decision, is prohibited from voting or taking part in the judgment of the circuit court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified. The provision of § 2 of the act of March 2, 1867, ch. 185, also incorporated in the same section of the Revised Statutes, which, in order to prevent failure or delay to justice, permits such a case, by consent of parties, to be heard and disposed of by the district judge when alone holding the circuit court, has no application when another judge is present. And the provisions of § 6 of the act of April 29, 1802, ch. 31, and of § 1 of the act of June 1, 1872, ch. 255, embodied in §§ 650, 652, 693, 697 of the Revised Statutes, do not enlarge the authority of the district judge in this respect. It necessarily follows that the case cannot be brought to this court upon a certificate of division of opinion between the judge who is qualified and the judge who is disqualified to take part in the judgment. *United States v. Lancaster*, 5 Wheat. 434, 5 L. Ed. 127; *Nelson v. Carland*, 1 How. 265, 11 L. Ed. 126; *United States v. Emholt*, 105 U. S. 414, 415, 26 L. Ed. 1077.

^{83.} *United States v. Lancaster*, 5 Wheat. 434, 5 L. Ed. 127.

Upon questions adjourned from the district to the circuit court under the "Act to establish a uniform system of bankruptcy throughout the United States" (Act, 1841), the district judge cannot sit as a member of the circuit court, and, consequently, the points adjourned cannot be brought before this court by a certificate of division. *Nelson v. Carland*, 1 How. 265, 11 L. Ed. 126, reaffirmed in *In re Castleman*, 1 How. 281, 11 L. Ed. 132; *Collins v. Blyth*, 1 How. 282, 11 L. Ed. 132, cited in *United States v. Emholt*, 105 U. S. 414, 415, 26 L. Ed. 1077.

^{84.} **Where justice of this court sits in his circuit.**—*Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90.

^{85.} **Where disagreement is as to part of case only.**—*Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 905.

^{86.} **Certifying whole case for decision in general.**—*Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897; *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124; *Harris v. Elliott*, 10 Pet. 25, 9 L. Ed. 333; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119; *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664; *State Nat. Bank v. St. Louis, etc., Co.*, 122 U. S. 21, 30 L. Ed. 1121; *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. Ed. 190; *Fire Ins. Ass'n Co. v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 402, 32 L. Ed. 196; *Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581; *Williamsport Bank*

§§ 650, 652, 693, of the Revised Statutes, could not embrace the whole case, even where its decision turned upon matter of law only, and even though it were split

v. Knapp, 119 U. S. 357, 30 L. Ed. 446; *United States v. Rider*, 163 U. S. 132, 137, 41 L. Ed. 101; *United States v. Perrin*, 131 U. S. 55, 33 L. Ed. 88; *United States v. Reilly*, 131 U. S. 58, 32 L. Ed. 75; *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. Ed. 772; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 27 L. Ed. 99; *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489; *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058.

The question "whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause," is too general to be answered, because it undertakes to refer the whole case to the decision of this court. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 32 L. Ed. 196, citing *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190.

Beginning with the case of *The United States v. Bailey*, 9 Pet. 238, 257, 9 L. Ed. 113, it is in that case declared by the late chief justice, that "the language of the 6th section of the act to amend the judicial system of the United States shows conclusively that congress intended to provide for a division of opinion on single points which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into this court before a final judgment; a construction which would authorize such a transfer would counteract the policy which forbids writs of error or appeals until the judgment or decree be final." To the same effect, and enunciated in language equally if not even more explicit, will be found the decisions of *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058; of *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; of *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; of *Webster v. Cooper*, 10 How. 54, 13 L. Ed. 325. *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489, 490.

The office of a certificate of a division of opinion between two judges in the circuit court is to submit to this court one or more points of law, and not the whole case, nor the general question whether upon all the facts, as agreed by the parties in a case stated, or specially found by the court when a trial by jury has been waived, the judgment should be for the one party or the other. *State Nat. Bank v. St. Louis, etc., Co.*, 122 U. S. 21, 23, 30 L. Ed. 1121, following *Harris v. Elliott*, 10 Pet. 25, 9 L. Ed. 333.

The law which empowers this court to take cognizance of questions adjourned from a circuit, gives jurisdiction over the single point on which the judges were divided, not over the whole cause. *Way-*

man v. Southard, 10 Wheat. 1, 20, 6 L. Ed. 253.

The intention of congress in passing the act authorizing a division of opinion of the judges of the circuit courts of the United States to be certified to the supreme court, was that a division of the judges of the circuit court, upon a single and material point in the progress of the cause, should be certified to the supreme court for its opinion, and not the whole cause. When a certificate of division brings up the whole cause, it would be, if the court should decide it, in effect, the exercise of original, rather than appellate jurisdiction. *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069, citing and approving *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124.

Where the point on which the judges of the circuit court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case. *Wolf v. Usher*, 3 Pet. 269, 7 L. Ed. 675.

New or troublesome cases.—The purpose of the provision is, that where a real question of a difficult point of law, clearly presenting itself and arising in the progress of the case, is such that the two judges sitting on the hearing differ in opinion in regard to that question, they are at liberty to certify it to this court for an answer. But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that, in any event, the whole case shall be thus brought before this court. Such a system converts the supreme court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction. See *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119; *United States v. Northway*, 129 U. S. 327, 30 L. Ed. 664; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 32 L. Ed. 533; *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190; *United States v. Perrin*, 131 U. S. 55, 57, 33 L. Ed. 88, reaffirmed in *In re Robinson*, 200 U. S. 611, 50 L. Ed. 619.

Under the acts of April 29, 1802, and June 1, 1872, the whole case could not be certified up to the supreme court. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

Indictment upon the act of congress of March 3d, 1823, for the punishment of

up in the form of questions.⁸⁷ Chief Justice Marshall says:^{87a} "A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeal until the judgment or decree be final. If an interlocutory judgment or decree could be brought into this court, the same case might again be brought up after a final decision; and all the delays and expense incident to a repeated revision of the same cause be incurred. So if the whole cause, instead of an isolated point, could be adjourned, the judgment or decree which would be finally given by the circuit court might be brought up by writ of error or appeal, and the whole subject be re-examined. Congress did not intend to expose suitors to this inconvenience; and the language of the provision does not, we think, admit of this construction. A division on a point, in the progress of a cause, on which the judges may be divided in opinion, not the whole cause, is to be certified to this court."

In the language of Mr. Justice Miller: "We repeat that this procedure is not intended to enable the parties in the circuit court to bring up the entire case to be retried here. It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case arises, on which, differing, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate, but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained."⁸⁸

frauds committed against the government of the United States. After the whole case had been laid before the circuit court by the United States, the counsel for the prisoner moved the court to instruct the jury that the evidence did not conduce to prove the offense charged under the acts of congress; which was opposed by the United States, and on this question the judges were divided and their opinions opposed. The question and disagreement were stated, and ordered to be certified to the supreme court. The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the circuit court to the supreme court, when the judges of the circuit court are opposed in opinion, shows conclusively that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into the supreme court before a final judgment. A construction which would authorize such transfer would counteract the policy which forbids writs of error or appeals until the judgment or decree be final. *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124.

37. *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 32 L. Ed. 533; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

Section 652 of the Revised Statutes, which declares that when a judgment or decree is entered in a civil suit, in a circuit court held by two judges, in the trial or hearing whereof any question has

occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall be stated and certified, which language is copied from the act of April 29, 1802, § 6, 2 Stat. 159, and shows that the certificate could only be resorted to when "any question" has occurred in which the judges have differed, and where "the point" of disagreement may be distinctly stated. "This court has frequently held that the 'question' referred to must be a question of law, and must be capable of being presented in a single point. Chief Justice Marshall, in *Wavman v. Southard*, 10 Wheat. 1, 20, 6 L. Ed. 253, said: 'The law which empowers this court to take cognizance of questions adjourned from a circuit, gives jurisdiction over the single point on which the judges were divided, not over the whole cause.'" *California, etc., Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106.

It is irregular to send up with the certificate of division of opinion amongst the circuit court authorities, the entire record of the proceedings in that court, including the evidence on the trial and the agreed statement of facts by counsel. "Such matters outside of the certificate, not constituting part of the pleadings in the case or of the public statutes or treaties bearing upon the point certified, cannot be considered by us in disposing of the question presented." *United States v. Thomas*, 151 U. S. 577, 38 L. Ed. 276.

87a. *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124.

88. *Waterville v. Van Slyke*, 116 U. S. 699, 704, 29 L. Ed. 772, cited in *Jewell v. Knight*, 123 U. S. 426, 435, 31 L. Ed. 190.

Under Act of March 3, 1891.—And the same rule applies under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826.⁸⁹

Splitting Up the Cause.—Nor can a splitting up of the whole case into the form of several questions enable the court to take jurisdiction.⁹⁰

Questions Several in Number.—On the other hand, where a case comes up on a certificate of division of opinion, and an objection is made that several questions are certified, covering the whole case rather than a single point, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point.⁹¹ The ob-

89. Where the questions propounded in the certificate do not present distinct points or propositions of law, clearly stated, so that each could be distinctly answered without regard to the other issues of law involved, and they obviously bring the whole case up for consideration and disposition and to answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case, the certificate is insufficient under the statute. *United States v. Union Pac. R. Co.*, 168 U. S. 505, 512, 42 L. Ed. 559.

90. **Splitting up the cause.**—*White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; *Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581; *Webster v. Cooper*, 10 How. 54, 13 L. Ed. 325; *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. Ed. 772; *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489; *Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897; *Williamsport Bank v. Knapp*, 119 U. S. 357, 30 L. Ed. 446; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 27 L. Ed. 99; *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572.

Certificates of division of opinion are insufficient to invoke the jurisdiction of this court, when they are designed to split up the case before the court into fragments upon which, before a trial or decision by that court, it is intended to obtain the opinion of this court. *United States v. Hall*, 131 U. S. 50, 33 L. Ed. 97, reaffirmed in *United States v. Perrin*, 131 U. S. 55, 33 L. Ed. 88; *United States v. Reilly*, 131 U. S. 58, 32 L. Ed. 75, citing *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 32 L. Ed. 533.

Where it appears the whole case has been divided into points—some of which may never arise, if those which precede them in the certificate are decided in a particular way—the case will be dismissed for want of jurisdiction. *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 256, 18 L. Ed. 224.

In *Webster v. Cooper*, decided at December term, 1850, it appearing by the record that the whole case had been divided into points and sent up to this court, and that several of the latter points could not have arisen until the previous ones had been first decided, this court declined to take jurisdiction, and Chief Justice Taney, said: "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise as previous questions were ruled the one way or the other." *Webster v. Cooper*, 10 How. 54, 55, 13 L. Ed. 325; *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. Ed. 190.

91. *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660.

The second ground of objections, that these questions are several in number, and so material as to decide the whole cause, might prevail, if they had not arisen at one time, at one stage in the cause, and involved little beyond one point. Because, if they are several in number and apply to different stages of the trial, and relate to independent points, they are generally not proper. *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124; *Nesmith v. Sheldon*, 6 How. 41, 43, 12 L. Ed. 335; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572; *Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *United States v. Chicago*, 7 How. 185, 192, 12 L. Ed. 660.

Where a case came up on a certificate of division in opinion of the circuit judges on appeal to their discretion, this court will entertain the appeal, where the questions are several in number, and so material as to decide the whole case, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point. *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660, distinguishing *Smith v. Vaughan*, 10

jection to acting on several points which dispose of the whole case, is, not that the whole case may not properly be disposed of by our decision on what is certified, but is that the decision must in substance be, not on several questions arising in various stages of the cause, and some of them anticipated and presented, so as to cover the whole case.⁹²

Disposition of Cause.—And where the certificate does not present a single or specific question of law arising in the progress of the case, but refers to this court the entire law of the case as it might arise upon all the facts supposed by the court, the case will be remanded to the circuit court to be proceeded in according to law, without any answer to the questions propounded.⁹³ Or, where it is evident, from the record that the whole case has been sent up to this court, upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction.⁹⁴

6. QUESTIONS THAT MAY BE BROUGHT UP AND CONSIDERED—*a. In General.*—The act of April 29th, 1802, ch. 32 (2 Stat. at L. 156), which authorizes the certificate of division, evidently did not intend to give this court jurisdiction, in that mode of proceeding, upon any question of common law or equity, that would not be open to revision here upon writ of error or appeal.⁹⁵ The questions which may be certified are those which may arise on the trial of a case, and are such as may be presented upon the final hearing of a cause, or pleas to the jurisdiction of the court.⁹⁶

Cases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation, are those alone which can be reasonably presumed to have been within the purview of the legislature, in allowing an appeal to this court upon certificates of division.⁹⁷ The

Pet. 366, 9 L. Ed. 457; *Packer v. Nixon*, 10 Pet. 408, 411, 9 L. Ed. 473; on the ground that the question presented in this case involved merely a matter of discretion; distinguishing *Bank of United States v. Green*, 6 Pet. 26, 28, 8 L. Ed. 307; *United States v. Daniel*, 6 Wheat. 542, 548, 5 L. Ed. 326; *Devereaux v. Marr*, 12 Wheat. 212, 6 L. Ed. 605; *Henderson v. Moore*, 5 Cranch 11, 187, 3 L. Ed. 22; on the ground that these cases were decided on the ground that they occurred after the merits of the cause were decided and in proceedings subsequent thereto, whether discretionary or not.

92. *Leland v. Wilkinson*, 10 Pet. 291, 9 L. Ed. 430; *United States v. Chicago*, 7 How. 185, 192, 12 L. Ed. 660.

93. *California Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106; *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124; *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; *Webster v. Cooper*, 10 How. 54, 13 L. Ed. 325.

Where the whole cause, and not a point or points in the cause, has been adjourned from the circuit court to this court, the case will be remanded to the circuit court. *Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897, discussing *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347.

94. *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572; *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335.

95. **Questions that may be brought up and considered in general.**—*Davis v. Braden*, 10 Pet. 286, 288, 9 L. Ed. 427; *Packer v. Nixon*, 10 Pet. 408, 410, 9 L. Ed. 473; *Wiggins v. Gray*, 24 How. 303, 16 L. Ed. 688; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 225, 33 L. Ed. 341; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Hepburn v. Ellzey*, 2 Cranch 445, 453, 2 L. Ed. 332; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220; *United States v. Giles*, 9 Cranch 212, 219, 3 L. Ed. 708; *New England, etc., Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90; *Mason v. Haile*, 12 Wheat. 370, 375, 6 L. Ed. 660; *Ward v. Chamberlain*, 2 Black. 430, 17 L. Ed. 319; *Dow v. Johnson*, 100 U. S. 158, 170, 25 L. Ed. 632, 635; *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660; *Shelby v. Bacon*, 10 How. 56, 12 L. Ed. 326; *Gardner v. Collins*, 2 Pet. 58, 94, 7 L. Ed. 347.

96. *Davis v. Braden*, 10 Pet. 286, 9 L. Ed. 427.

Under statute of 1793.—"That act is in terms restricted to questions arising upon a final hearing of a cause or pleas to the jurisdiction of the court. The provision in the present act of 1802 was a substitute for that, as to the mode of disposing of the question. But there is nothing in this act affording grounds for the conclusion that it was intended to enlarge the provision as to the questions that were to be brought up." *Davis v. Braden*, 10 Pet. 286, 289, 9 L. Ed. 427, 429.

97. *United States v. Gooding*, 12 Wheat. 460, 468, 6 L. Ed. 693.

purpose of the provision is, that where a real question of a difficult point of law, clearly presenting itself and arising in the progress of the case, is such that the two judges sitting on the hearing differ in opinion in regard to that question, they are at liberty to certify it to this court for an answer. But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that, in any event, the whole case shall be thus brought before this court. Such a system converts the supreme court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction.⁹⁸

Dismissal.—Where the questions certified to this court under the 6th section of the act of April 29th, 1802, are not such that that court can consider them, it is a settled practice to dismiss the case for want of jurisdiction and remand it to the circuit court, with an order to proceed in it according to law.⁹⁹

b. *Abstract or Hypothetical Questions.*—**In General.**—The question must not be general nor abstract. If it be such, this court cannot take jurisdiction.¹ The court will decline to answer a question certified to it by the circuit court when it rests upon an hypothesis.²

Effect of Change in Law.—Where a certified question has been so modified by subsequent legislation that it has ceased to be of any importance, no comment will be made thereon by this court.³ Where the questions presented have ceased to be material, because, since they arose in the circuit court, congress has passed a statute amending or repealing the laws under which they arose, this court will decline to consider or determine them.⁴

Stare Decisis.—Where a question is certified, the law and principle of which have been settled in another case, the question is not open for argument again.⁵

c. *Questions of Law or Fact.*—The jurisdiction given to this court by statute, in certified cases, only extends to points of law.⁶ The rule is well settled that, to give us jurisdiction on a certificate of division of opinion, the questions certified must be of law and not of fact.⁷ “Nor such as involve or imply conclusions or

98. See *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664; *Dublin Township v. Milford Institution*, 128 U. S. 510, 32 L. Ed. 531; *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190; *United States v. Perrin*, 131 U. S. 55, 57, 33 L. Ed. 88, reaffirmed in *United States v. Reilly*, 131 U. S. 58, 32 L. Ed. 75.

99. *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224.

1. **Abstract or hypothetical questions in general.**—*Ogilvie v. Knox Ins. Co.*, 18 How. 577, 15 L. Ed. 490; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 256, 18 L. Ed. 224.

Where the judges of the circuit court certify a division of opinion to this court for its judgment, this court will not return an answer unless the question raised involves a distinct legal point, and sufficient facts are set forth to show its bearing on the rights of the parties. Hence, no answer will be given to a proposition merely abstract. *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38.

A case certified, on account of a division of opinion between circuit judges,

being a question of fraud, by agent of insurance company, and the liability of the company for such fraud, and there being no fact shown by which the precise connection of the agent with the company is established, or the character or extent of his representations upon which the company was claimed to be bound. Held, that the question was abstract and general; and there is nothing before the court upon which the court could deduce any conclusion applicable to the case, and the case was remanded. *Ogilvie v. Knox Ins. Co.*, 18 How. 577, 15 L. Ed. 490.

2. *Pelham v. Rose*, 9 Wall. 103, 19 L. Ed. 602.

3. *United States v. Stafford*, 154 U. S. App. 590, 21 L. Ed. 117.

4. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

5. *Smith v. Ely*, 15 How. 137, 14 L. Ed. 634.

6. **Questions of law or fact.**—*Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070.

7. **Questions of fact not reviewable.**—*Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070; *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489; *Sillman v. Hudson*

judgment by the court upon the weight or effect of testimony or facts adduced in the cause."⁸ Nor the general question whether upon all the facts, as agreed by the parties in a case stated, or specially found by the court when a trial by jury has been waived, the judgment should be for the one party or the other.⁹

Under §§ 650, 652, 693, of the Revised Statutes, each question had to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the case.¹⁰

River Bridge Co., 1 Black 582, 17 L. Ed. 81; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224; *Brobst v. Brobst*, 4 Wall. 2, 18 L. Ed. 387; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 606, 27 L. Ed. 99.

8. *Dennistoun v. Stewart*, 18 How. 565, 568, 15 L. Ed. 489; *Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070; *Silliman v. Hudson River Bridge Co.*, 1 Black 582, 17 L. Ed. 81; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224; *Brobst v. Brobst*, 4 Wall. 2, 18 L. Ed. 387; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 27 L. Ed. 99; *California Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106; *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. Ed. 772; *Williamsport Bank v. Knapp*, 119 U. S. 357, 30 L. Ed. 446; *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 451, 51 L. Ed. 875.

The question certified must be a "question of law only, and not a question of fact, or of the mixed law and fact;" hence it must not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the cause—as, for example, a question of fraud, which is necessarily compounded of fact and of law. *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 434, 32 L. Ed. 503, following *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190.

Under the acts of congress, authorizing questions arising on a trial or hearing before two judges in the circuit court, and upon which they are divided in opinion, to be certified to this court for decision, it has always been held that each question certified must be one of law, and not of fact, nor of mixed law and fact, and that it must be a distinct point or proposition, clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other. *Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897; *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 27 L. Ed. 99; *California Paving Co. v. Molitor*, 113 U. S. 609, 615, 617, 28 L. Ed. 1106; *Waterville v. Van Slyke*, 116 U. S. 699, 704, 29 L. Ed. 772; *Williamsport Bank v. Knapp*, 119 U. S. 357, 360, 30 L. Ed. 446.

This court cannot take jurisdiction on a certificate of division in a case where the question certified is one of fact, and can only be determined by an examination of

the evidence in the record. *Brobst v. Brobst*, 4 Wall. 2, 18 L. Ed. 387, citing *Wilson v. Barnum*, 8 How. 258, 261, 12 L. Ed. 1070.

Whether the evidence is sufficient to prove an averment in the pleadings, is a question of fact, and cannot, therefore, be brought into this court upon a certificate of division. *Silliman v. Hudson River Bridge Co.*, 1 Black 582, 17 L. Ed. 81, citing *Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070.

What constitutes an infringement.—The following question, sent up to this court upon a certificate of division in opinion between the judges of the circuit court, viz: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent," is a question of fact, over which this court has no jurisdiction. *Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070. See *California Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106.

The question of fraud or no fraud is one necessarily compounded of fact and of law, and the fact must be distinctly found before this court can decide the law upon a certificate of division of opinion. *Ogilvie v. Knox Ins. Co.*, 18 How. 577, 581, 15 L. Ed. 490; *United States v. City Bank*, 19 How. 385, 15 L. Ed. 662; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Watson v. Taylor*, 21 Wall. 378, 22 L. Ed. 576; *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190.

Whether a sale and delivery of a debtor's stock of goods, by way of preference of a bona fide creditor, is fraudulent against other creditors, involves a question of fact, depending upon all the circumstances and cannot be referred to this court by certificate of division of opinion. *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190, followed in *Smith v. Craft*, 123 U. S. 436, 31 L. Ed. 267.

9. *State Nat. Bank v. St. Louis, etc., Co.*, 122 U. S. 21, 23, 30 L. Ed. 1121.

10. *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

This court cannot consider on a certificate of division of opinion mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a

d. *Questions Relating to Matters of Discretion*—(1) *In General*.—The general rule undoubtedly is that matters resting in the discretion of the trial court, cannot be re-examined in this court on a certificate of division of opinion.¹¹ But if in connection with the discretion which the court below is asked to exercise, questions are presented which involve the right of the matter in controversy, this court will entertain them.¹² This provision, manifestly, is broad enough to cover any material question of right thus arising, whether the subject on hearing was one of discretion or of right.¹³

A petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law and not of discretion.¹⁴

(2) *Division on a Motion*—aa. *In General*.—A division on a motion, to be

question of law alone. *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. Ed. 772.

11. *Questions relating to matters of discretion in general*.—*Davis v. Braden*, 10 Pet. 286, 9 L. Ed. 427; *Wiggins v. Gray*, 24 How. 303, 16 L. Ed. 688; *United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326; *Jones v. Van Zandt*, 5 How. 215, 12 L. Ed. 122; *Barr v. Gratz*, 4 Wheat. 213, 4 L. Ed. 553; *Daniels v. Chicago*, etc., R. Co., 3 Wall. 250, 255, 18 L. Ed. 224; *United States v. Rosenburgh*, 7 Wall. 580, 581, 19 L. Ed. 263.

It has repeatedly been held, that a decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding, is not open to revision in this court. *Wiggins v. Gray*, 24 How. 303, 16 L. Ed. 688.

A question whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise, in an action of ejectment, is one within the discretion of the court to which a motion for the purpose is submitted; and cannot be certified to the supreme court if the judges of the circuit court are divided in opinion on the motion, under the provisions of the act of congress of the 29th of April, 1802. *Smith v. Vaughan*, 10 Pet. 366, 9 L. Ed. 457.

12. *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660; *Daniels v. Chicago*, etc., R. Co., 3 Wall. 250, 255, 18 L. Ed. 224.

Where a case comes up on the certificate of division in opinion of circuit judges, although the motion under argument in the circuit court was addressed to its discretion yet if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions. *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660.

Cases explained.—“The adjudged cases, where a certificate has not been sustained on account of some discretion connected with the subject, are chiefly those where the question presented involved merely a

matter of discretion, rather than arising in the consideration of a motion or point, which was one of discretion. (*Smith v. Vaughan*, 10 Pet. 366, 9 L. Ed. 457; *Packer v. Nixon*, 10 Pet. 408, 411, 9 L. Ed. 473.) It must be obvious, that, in deciding a matter of discretion, a point may arise which is one of right and very material. Other cases not sustained were decided on the ground that they occurred after the merits of the cause were decided, and in proceedings subsequent thereto, whether discretionary or not. (*Bank of United States v. Green*, 6 Pet. 26, 28, 8 L. Ed. 307; *United States v. Daniel*, 6 Wheat. 542, 548, 5 L. Ed. 326; *Devereaux v. Marr*, 12 Wheat. 212, 6 L. Ed. 605; *Henderson v. Moore*, 5 Cranch 11, 187, 3 L. Ed. 22; *Marine Ins. Co. v. Young*, 4 Wash. C. C., 333.)” *United States v. Chicago*, 7 How. 185, 191, 12 L. Ed. 660.

“There are other cases in which the court has taken cognizance of questions directly affecting the merits of the cause, even though arising, in form, upon motions determinable at discretion. The case of *United States v. Chicago*, 7 How. 185, 190, 12 L. Ed. 660, where the question certified arose on a motion to continue a temporary injunction, granted by the district judge, until final hearing on the merits, must be regarded as one of this character. The continuance of the injunction was clearly matter of discretion with the court; but the question certified involved the right of the United States in the land which was the subject of the suit, and was one proper for consideration upon the motion for continuance. The court held, though not unanimously, that the case was exceptional in its character, and that cognizance of the question certified might be properly taken. It may be doubted whether, in this instance, the exception made to the general rule was quite warranted by the principle established in prior decisions.” *United States v. Rosenburgh*, 7 Wall. 580, 582, 19 L. Ed. 263.

13. *United States v. Chicago*, 7 How. 185, 191, 12 L. Ed. 660.

14. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

granted or refused at the discretion of the court, does not present a point which can be certified under the act of congress.¹⁵

bb. Motion for New Trial.—In General.—It is the general doctrine that there can be no certificate of a division of opinion between the judges of the circuit court on a motion for a new trial, as such motion usually rests in the discretion of the court, and, therefore, properly presents no questions for our determination.¹⁶ And this is the rule under the act of March 3, 1891.¹⁷

But such is not always the case. Sometimes a motion of the kind or of a similar kind may present for consideration a question going directly to the merits and a decision of which may determine the point in controversy. In such instances, the court will consider the question submitted on a certificate of division of opinion between the judges of the court below.¹⁸

15. Division on a motion in general.—*Davis v. Braden*, 10 Pet. 286, 288, 9 L. Ed. 427; *United States v. Rosenburgh*, 7 Wall. 580, 19 L. Ed. 263.

"Although the words of the act are general, that whenever any question shall occur before a circuit court upon which the opinion of the judges shall be opposed the point shall be certified, etc.; yet it is very certain that this cannot embrace every question that may arise in the progress of a cause from its commencement. There may be many motions made in the different stages of a cause, before trial, that could not be brought here under a certificate of division; such as motions for amendments, commissions, for continuances, etc., and various other motions that arise in the progress of a suit; which, if brought up in this manner, would occasion great delay and expense. These, and all other questions resting in the discretion of the circuit court, are not to be reviewed here. The first proviso in this section of the act (3 Laws U. S., 482, § 6) would seem very plainly to indicate that the points which may be certified to this court must arise upon some questions at the trial. 'Provided, that nothing herein contained shall prevent the cause from proceeding; if, in the opinion of the court, further proceedings can be had without prejudice to the merits.' And this construction of the act is in some measure corroborated by the provision in the former act of 1793 (2 Laws U. S., 366) for the like purpose, providing for a division of opinion when the court should be held by the district judge and one of the judges of the supreme court." *Davis v. Braden*, 10 Pet. 286, 289, 9 L. Ed. 427, 428.

16. Motion for new trial in general.—*United States v. Rosenburgh*, 7 Wall. 580, 19 L. Ed. 263; *United States v. Thomas*, 151 U. S. 577, 581, 38 L. Ed. 276; *Jones v. Van Zandt*, 5 How. 215, 223, 12 L. Ed. 122; *United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 255, 18 L. Ed. 224; *Life Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949; *Barr v. Gratz*, 4 Wheat. 213, 4 L. Ed. 553; *Davis v. Braden*, 10 Pet. 286, 9 L. Ed. 427.

A division of the judges of the circuit

court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291. "Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings of the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands." *United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326.

Division of opinion upon a motion for a new trial cannot be brought here on a certificate of division of opinion in the circuit court, for the reason that the granting or refusing a new trial is a mere matter of discretion, and the refusal, although the ground of the motion be spread upon the record, is no sufficient cause for a writ of error. *United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326; *United States v. Thomas*, 151 U. S. 577, 38 L. Ed. 276.

17. *United States v. Hewecker*, 164 U. S. 46, 41 L. Ed. 345.

18. *United States v. Thomas*, 151 U. S. 577, 581, 38 L. Ed. 276.

Thus in *United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640, the question arose between the judges of the circuit court whether a person convicted of a capital offense, who had received a pardon, could derive any advantage from it without bringing the same judiciously before the court by appeal, motion, or otherwise. Upon this question the judges were opposed in opinion, and it was stated under their direction, and certified to this court and here considered and decided. The court regarded the motion as one going to the merits of his case, having a direct bearing upon the punishment to be imposed, and not a question determinable in the discretion of the court, and held that it could properly consider the question upon a certificate of division in opinion of the judges of the circuit court. *United States v. Thomas*, 151 U. S. 577, 581, 38 L. Ed. 276.

cc. *Motion to Quash Indictment or Information*.—The court cannot take cognizance of a division of opinion under the judiciary act of 1802, between the judges of the circuit court on a motion to quash an indictment, even when the motion presents the question of the jurisdiction of the circuit court to try the offense charged.¹⁹ Where a case comes here on a certificate of division as to questions arising on a motion to quash an information, must be dismissed for want of jurisdiction.²⁰

dd. *Motions to Revive*.—Since the granting or refusing of a motion to revive a suit rests in the discretion of the court, where the judges of the circuit court are opposed in opinion on this question, it cannot be brought to this court on a certificate of division of opinion.²¹

(3) *Separate Trials*.—The question, whether two or more persons, jointly charged in the same indictment with a capital offense, have a right, by the laws of the country, to be tried severally, and apart, is a matter of discretion in the court, and not of right in the parties.²²

(4) *Opening and Vacating Judgments and Decrees*.—A question whether a party has a right to proceed summarily on motion to vacate a decree in the circuit court is merely one of practice, to be governed by the rules prescribed by this court, and the established principles and usages of a chancery court. And even if a summary proceeding on motion might have been a legitimate mode of proceeding, yet the court, in its discretion, had a right to refuse, and to order a plenary proceeding by bill and answer. The exercise of such a discretionary power by the court below cannot be revised in this court upon appeal or certificate of division.²³

19. Motion to quash indictment or information.—United States *v.* Rosenburgh, 7 Wall. 580, 19 L. Ed. 263; United States *v.* Avery, 13 Wall. 251, 20 L. Ed. 610; United States *v.* Canada, 154 U. S. appx., 674, 26 L. Ed. 1069; United States *v.* Hamilton, 109 U. S. 63, 27 L. Ed. 857; United States *v.* Tynen, 11 Wall. 88, 91, 20 L. Ed. 153.

This court cannot take cognizance, under the judiciary act of 1802, of a division of opinion between the judges of the circuit court, upon a motion to quash an indictment. "The motion to quash, upon which the question now before us arose, was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers, 1 Colby's Crim. Stat. 268 and 269; 1 American Crim. Law, 518 and 519, is, that 'a motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception.'" United States *v.* Rosenburgh, 7 Wall. 580, 583, 19 L. Ed. 263.

20. United States *v.* Canada, 154 U. S. appx., 26 L. Ed. 1069, citing United States *v.* Rosenburgh, 7 Wall. 580, 19 L. Ed. 263; United States *v.* Avery, 13 Wall. 251, 20 L. Ed. 610.

21. Motions to revive.—Davis *v.* Braden, 10 Pet. 286, 9 L. Ed. 427.

"The motion in the present case does not stand on stronger grounds than a motion for a new trial, and it has been decided in this court, in the case of the United States *v.* Daniel (6 Wheat. 542), 5

L. Ed. 326, that a division of opinion upon such a motion cannot be brought here by a certificate of a division of opinion in the circuit court, and the reason assigned is that the granting or refusing a new trial is a mere matter of discretion; and the refusal, although the grounds of the motion be spread upon the record, is no sufficient cause for a writ of error. The effect of the division is that the motion is lost; so in the present case, the effect of the division of opinion is that the motion is lost and the plaintiff is driven to a new suit." Davis *v.* Braden, 10 Pet. 286, 289, 9 L. Ed. 427, 429.

"In the opinion then delivered, the court took notice of the case of the United States *v.* Wilson, 7 Pet. 150, 8 L. Ed. 64, supposed to be an authority for taking cognizance of the question made by the motion to revive. In that case the question certified was, whether a prisoner, convicted of a capital crime, could have any advantage from a pardon without bringing it judiciously before the court; and it arose upon a motion of the district attorney for sentence. The court regarded this as a question going to the merits, and not determinable in the exercise of mere discretion; and, therefore, held this case not to be an authority for another, in which the merits were not involved in the question certified." United States *v.* Rosenburgh, 7 Wall. 580, 582, 19 L. Ed. 263.

22. Separate trials.—United States *v.* Marchant, 12 Wheat. 180, 6 L. Ed. 700.

23. Opening and vacating judgments and decrees. Wiggins *v.* Gray, 24 How. 303, 16 L. Ed. 688.

(5) *Matters of Practice*.—This court cannot, upon a certificate of division of opinion, acquire jurisdiction of any question in any equity cause relating to the practice in the circuit court, and depending on the exercise of sound discretion in the application of the rules which regulate the course of equity to the circumstances of the particular cause.²⁴

e. *Jurisdiction of Circuit Court*.—And prior to the act of February 25, 1889, this court had jurisdiction of a case brought up on certificate of division of opinion on the question whether the circuit court had jurisdiction of it.²⁵

7. REVIEW OF PARTICULAR PROCEEDINGS—*a. Cases in Bankruptcy*.—The act of congress of 1802, authorizing the certificate of division of opinion where the judges of the circuit court are opposed in opinion, does not apply to the peculiar and summary jurisdiction directed to be exercised in cases of bankruptcy.²⁷

b. *Criminal Cases*.—The act of congress passed April 29th, 1802 (2 Stat. at Large 156), which provided for a certificate to this court of the point, in case of a division of opinion in the circuit court, embraced cases in which the opinions were opposed in criminal as well as in civil trials; and since that act, questions of law in criminal cases have occasionally been the subject of examination here for the instruction of the courts below.²⁸ However this may have been under the act of 1802, by § 651 and § 697 of the Revised Statutes the provisions

24. Matters of practice.—*Packer v. Nixon*, 10 Pet. 408, 410, 9 L. Ed. 473; *United States v. Rosenburgh*, 7 Wall. 580, 581, 19 L. Ed. 263.

It has repeatedly been held that the decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding is not open to revision in this court. *Wiggins v. Gray*, 24 How. 303, 16 L. Ed. 688, 689.

Questions respecting the practice of the circuit court in equity causes, which depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings, to the circumstances of such particular case, are not questions which can be certified on a division of opinion of the judges of the circuit court, under the act of 1802 (ch. 32). *Packer v. Nixon*, 10 Pet. 408, 9 L. Ed. 473.

26. Jurisdiction of circuit court.—*Baltimore, etc., R. Co. v. Marshall County Supervisors*, 131 U. S. appx. xcix, 19 L. Ed. 452; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

27. Cases in bankruptcy.—*Nelson v. Carland*, 1 How. 265, 266, 11 L. Ed. 126; reaffirmed in *In re Castleman*, 1 How. 281, 11 L. Ed. 132; *Collins v. Blyth*, 1 How. 282, 11 L. Ed. 132.

Upon the questions adjourned from the district to the circuit court under the "act to establish a uniform system of bankruptcy throughout the United States," the district judge cannot sit as a member of the circuit court, and consequently, the points adjourned cannot be brought before this court by a certificate of division. "The act of congress of 1802, authorizing the certificate of division where the judges of the circuit court are opposed in opin-

ion, does not apply to the peculiar and summary jurisdiction directed to be exercised in cases of bankruptcy." *Nelson v. Carland*, 1 How. 265, 11 L. Ed. 126; *In re Castleman*, 1 How. 281, 11 L. Ed. 132; *Collins v. Blyth*, 1 How. 282, 11 L. Ed. 132. See the title BANKRUPTCY.

28. Criminal cases.—*United States v. Tyler*, 7 Cranch 285, 3 L. Ed. 344; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *United States v. Smith*, 5 Wheat. 153, 5 L. Ed. 57; *United States v. Holmes*, 5 Wheat. 412, 5 L. Ed. 122; *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257; *Forsyth v. United States*, 9 How. 571, 572, 13 L. Ed. 262, reaffirmed in *Simpson v. United States*, 9 How. 578, 13 L. Ed. 265; *Cotton v. United States*, 9 How. 579, 13 L. Ed. 265.

Criminal proceedings were brought to this court upon the certificate of division of opinion, though neither a writ of error nor an appeal would lie. *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957; *United States v. Emholt*, 105 U. S. 414, 26 L. Ed. 1077; *Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134.

"It is sufficient to say that the system of criminal law of the United States does not contemplate a general right of appeal from the courts trying criminals to this court; it does not intend that in all cases before the trial is had the instructions of this court, concerning matters which may come in issue, shall be delivered as a guide to the court that is to try the cause. The purpose of the provision is, that where a real question of a difficult point of law, clearly presenting itself and arising in the progress of the case, is such that the two judges sitting on the hearing differ in opinion in regard to that question, they are at liberty to certify it to this court for an answer. But it never was designed that, because a case is a troublesome one,

of § 6 of the act of 1802 were re-enacted as to criminal cases.²⁹ But §§ 651 and 697 of the Revised Statutes were impliedly repealed by the act of March 3, 1891, and since that time this court has had no jurisdiction of criminal cases upon a certificate of division of opinion.³⁰

c. Where Disagreement Arises on Special Verdict or Motion in Arrest of Judgment.—Under the 6th section of the act of the 29th of April, 1802, the point upon which the disagreement of the judges occurs may arise upon a special verdict, or a motion in arrest of judgment.³¹

8. DIVISION PRO FORMA.—*In General.*—Except under peculiar circumstances,

or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that, in any event, the whole case shall be thus brought before this court." *United States v. Perrin*, 131 U. S. 55, 32 L. Ed. 88, reaffirmed in *United States v. Reilly*, 131 U. S. 58, 32 L. Ed. 75.

Habeas corpus.—When the circuit court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the circuit court being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal. *Ex parte Milligan*, 4 Wall. 3, 18 L. Ed. 281.

Judicial definition of a crime.—Where defendants were found guilty in the circuit court for endeavoring to make a revolt on board a vessel, and moved the court in arrest of judgment upon the ground that the act of congress does not define the offense of endeavoring to make a revolt, and that it was not competent for the court to give a judicial definition of a crime heretofore unknown, this court, on a certificate of division of opinion of the judges of the circuit court, will give a judicial definition of it. *United States v. Kelley*, 11 Wheat. 417, 6 L. Ed. 508.

But these rulings were criticised by Mr. Justice Gray in a learned opinion. He says: "The manner of bringing up criminal cases from the circuit courts of the United States upon a certificate of division of opinion has undergone some changes by successive acts of congress. Under the act of April 29, 1802, c. 31, sec. 6, whenever there was a division of opinion in the circuit court upon a question of law, the question was certified to this court for decision; provided that the case might proceed in the circuit court if in its opinion further proceedings could be had without prejudice to the merits, and that no imprisonment should be allowed or punishment inflicted, upon which the judges were divided in opinion. 2 Stat. 159; *United States v. Tyler*, 7 Cranch 285, 3 L. Ed. 344; *United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326; *United States v. Bailey*, 9 Pet. 267, 9 L. Ed. 124. By the act of June 1, 1872, c. 255, sec. 1; 'whenever, in any suit or proceeding' in a

circuit court, there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree or order, and a certificate of division of opinion as under the act of 1802, 'Either party' might remove the case to this court 'on writ of error or appeal, according to the nature of the case.' 17 Stat. 196. That act continued in force only about two years, when it was repealed by the Revised Statutes. By sections 650, 652, and 693 of those statutes, its provisions were restricted to civil suits and proceedings; and by sections 651 and 697 the provisions of section 6 of the act of 1802 were re-enacted as to criminal cases. *Ex parte Tom Tong*, 108 U. S. 556, 559, 27 L. Ed. 862; *In United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; and in *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; argued at October term, 1874, and decided at October term, 1875, which were brought to this court by the United States, by writ of error and certificate of division of opinion, after judgment according to the opinion of the presiding judge, sustaining a demurrer to the indictment, or a motion in arrest of judgment, it appears, by the records and briefs on file, that the judgment below was entered and the certificate of division made under the act of 1872, and that no objection was taken to the jurisdiction of this court. The exercise of jurisdiction over those cases on writ of error is therefore entitled to no more weight by way of precedent than the exercise of appellate jurisdiction sub silentio in the cases. *United States v. Simms*, 1 Cranch 252, 2 L. Ed. 98 and *Cannon v. United States*, 116 U. S. 55, 29 L. Ed. 561." *United States v. Sanges*, 144 U. S. 310, 320, 321, 36 L. Ed. 445.

29. *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445; *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101.

30. *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101; *Trenchard v. Kell*, 202 U. S. 613, 50 L. Ed. 1171; *In re Robinson*, 200 U. S. 611, 50 L. Ed. 619.

31. *Where disagreement arises on special verdict, etc.*—*Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224; *Summerville v. Hamilton*, 4 Wheat. 230, 4 L. Ed. 558; *United States v. Kelley*, 11 Wheat. 417, 6 L. Ed. 508.

this court will not take cognizance of a question certified upon a division pro forma.³² In the earliest case on this point it was said: "In some cases, where the point arising is one of importance and difficulty, and it is desirable for the purposes of justice to obtain the opinion of this court, the judges of the circuit court have sometimes, by consent, certified to the point in this court, as upon a division of opinion; when in truth they both rather seriously doubted than differed about it. We do not object to a practice of this description, when applied to proper cases, and on proper occasions. But they must be cases sanctioned by the judgment of one of the judges of this court, in his circuit. A loose practice in this respect might render this court substantially a court for the original decision of all causes of importance; when the constitution and the laws intended to make it altogether appellate in its character, except in the few cases of original jurisdiction enumerated in the constitution."³³

In the language of Mr. Justice Woodbury, there has justly been a leaning in this court to decline jurisdiction in cases of decisions below where it is doubtful; because the power vested here in such cases, it is believed, was meant to be much more restricted than is often practiced, and is in the most favorable view rather an anomaly. But by considering questions, if certified here, only when real divisions of opinion occur on them, and at one and the same time, no danger exists of extending this branch of our jurisdiction beyond what congress intended. On the contrary, it is divisions of opinion pro forma, and from courtesy to counsel, and on a variety of points, and at times, some not then having actually arisen, but being anticipated, which appear to transcend the original design of vesting such a power here.³⁴

Remand for Further Proceedings.—And where it appears that the whole case has been certified pro forma, in order to take the opinion of this court, without any actual division of opinion in the circuit court, the practice is irregular, and the case must be remanded to the circuit court to be proceeded in according to law.³⁵

32. Division pro forma.—*Webster v. Cooper*, 10 How. 54, 13 L. Ed. 325; *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572; *Daniels v. Chicago*, etc., R. Co., 3 Wall. 250, 255, 18 L. Ed. 224; *United States v. Gleeson*, 124 U. S. 255, 260, 31 L. Ed. 421; *The Steamer Oregon v. Rocca*, 18 How. 570, 15 L. Ed. 515; *Colorado*, etc., R. Co. v. *White*, 101 U. S. 98, 25 L. Ed. 860; *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335; *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 269, 37 L. Ed. 445; *Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581.

Where, upon an examination of the whole record of a civil suit or proceeding, it appears that the opinions of the judges of the circuit court were not actually opposed upon any question of law material to the determination of the cause, and the amount in controversy is not sufficient to give this court jurisdiction, the writ of error will be dismissed, even though a disagreement in opinion be certified in form. *Colorado*, etc., R. Co. v. *White*, 101 U. S. 98, 25 L. Ed. 860.

33. *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572. But this language is criticised by Mr. Justice Gray in *United States v. Gleeson*, 124 U. S. 255, 259, 31 L. Ed. 421.

"Although an indulgence has sometimes been given to certificates, where, in important cases, a division was certified pro

forma (*Jones v. Van Zandt*, 5 How. 215, 224, 12 L. Ed. 122), yet we do not feel justified in repeating it." *United States v. Chicago*, 7 How. 185, 192, 12 L. Ed. 660.

34. *United States v. Chicago*, 7 How. 185, 192, 12 L. Ed. 660.

35. *Webster v. Cooper*, 10 How. 54, 13 L. Ed. 325, following *Nesmith v. Sheldon*, 6 How. 41, 12 L. Ed. 335.

Action in the district court of the United States for the Southern District of New York, by the United States against the defendant, for a penalty under the act of 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." A verdict was rendered for the United States, and without a judgment on the verdict, the case was, by consent, removed to the circuit court of the United States. In the circuit court certain questions were presented on the argument, and a statement was made of those questions, and they were certified, pro forma, at the request of the counsel for the parties to the supreme court, for their decision. No difference of opinion was actually expressed by the judges of the circuit court. By the court: "The judgment or other proceedings on the verdict ought to have been entered in the district court; and it was altogether irregular to transfer the proceedings in that

9. **FORM, SUFFICIENCY AND CONTENTS OF CERTIFICATE**—a. *In General*.—All of the several particulars mentioned in the act of 1802 must appear in the certificate. They are jurisdictional, and the defect as to either is fatal.³⁶ Under the act of April 29th, 1802, ch. 31, § 6, this court was not authorized to decide in such cases, unless the particular point upon which the judges differed was stated and certified. Nor could this omission in the certificate be supplied by referring to the record.³⁷

b. *Certificate Must Contain Distinct Proposition of Law Clearly Stated*.—Under §§ 650, 652, 693 of the Revised Statutes each question in the certificate of division had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to the other issues of law in the case.³⁸ The questions must be separate and distinct, and each one must

condition to the circuit court." The case was remanded to the circuit court. In some cases, where the point arising is one of importance, the judges of the circuit court have sometimes, by consent, certified the point to the supreme court, as upon a division of opinion; when, in truth, they both rather seriously doubted, than differed about it. They must be cases sanctioned by the judgment of one of the judges of the supreme court, in this circuit. *United States v. Stone*, 14 Pet. 524, 10 L. Ed. 572.

36. Form, sufficiency and contents of certificate in general.—*Daniel v. Chicago*, etc., R. Co., 3 Wall. 250, 18 L. Ed. 224.

37. United States v. Briggs, 5 How. 208, 209, 12 L. Ed. 119, citing *United States v. Bailey*, 9 Pet. 267, 272, 9 L. Ed. 124; *Adams v. Jones*, 12 Pet. 207, 213, 9 L. Ed. 1058; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069.

Questions on which the judges differed must be stated. *California Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106, citing *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119.

"The precise legal point involved, upon which the judges were divided in opinion, should be distinctly stated. The court is not bound to look beyond the certificate to ascertain the point. *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119." *Daniels v. Chicago*, etc., R. Co., 3 Wall. 250, 255, 18 L. Ed. 224.

38. Certificate must contain distinct propositions of law clearly stated.—*Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181; *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855; *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 269, 37 L. Ed. 445; *United States v. Hall*, 131 U. S. 50, 33 L. Ed. 97, reaffirmed in *United States v. Perrin*, 131 U. S. 55, 33 L. Ed. 88; *United States v. Reilly*, 131 U. S. 58, 32 L. Ed. 75, citing *Dublin Tp. v. Milford Savings Institution*, 128 U. S. 510, 32 L. Ed. 533; *United States v. Lacher*, 134 U. S. 624, 33 L. Ed. 1080; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664; *Chicago*, etc.,

R. Co. v. *Williams*, 205 U. S. 441, 51 L. Ed. 875.

As to the character of the certificate on which this court will act, the statute of 1872, and the Revised Statutes have made no change, and the decisions of this court are full on that subject. The substance of these decisions is, that each question so certified must contain a distinct proposition of law which this court can answer negatively or affirmatively, and that the whole case cannot be presented by a recital of the evidence and interrogatories so framed as to require this court to decide the whole case on mixed propositions of law and fact. In short, while such a statement of facts must accompany the certificate as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated. *Waterville v. Van Slyke*, 116 U. S. 699, 700, 29 L. Ed. 772, citing *Wilson v. Barnum*, 8 How. 258, 262, 12 L. Ed. 1070; *Brobst v. Brobst*, 4 Wall. 2, 18 L. Ed. 387; *United States v. Briggs*, 5 How. 208, 210, 12 L. Ed. 119; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *United States v. Bailey*, 9 Pet. 267, 273, 9 L. Ed. 124; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489; *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855.

When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated. *United States v. Bailey*, 9 Pet. 267, 272, 9 L. Ed. 124; *Adams v. Jones*, 12 Pet. 207, 213, 9 L. Ed. 1058; *White v. Turk*, 12 Pet. 238, 9 L. Ed. 1069; *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119.

"It has been repeatedly held in this court that the object of the statute authorizing such certificates is to present some one or more well-defined, clear-cut questions of law which arise in the progress of the case in the circuit court, and on which the opinions of the judges holding it or them are opposed. The first two questions suggest, in each of them, such a point very clearly. The third does not. It leaves us to wander over the whole field of conjecture for any possible objec-

be particularly stated with reference to that part of the case upon which it arose. They must not be "such as involve or imply conclusions or judgment by the judges upon the weight or effect of the testimony of facts adduced in the cause."³⁹

When a question in a certificate of division is stated in broad and indefinite terms, which admit of one answer under one set of circumstances, and of a different answer under another set of circumstances, this court must regard it as immaterial to the decision of the case.⁴⁰

tion to the information, without pointing to any distinct proposition of law on which the judges divided. *De Wolf v. Usher*, 3 Pet. 269, 7 L. Ed. 675; *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855; *Wilson v. Barnum*, 8 How. 258, 12 L. Ed. 1070; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319." *United States v. Waddell*, 112 U. S. 76, 81, 28 L. Ed. 673.

Under the act of April 29, 1802 (§ 6), providing "that whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall * * * be certified * * * to the supreme court, and shall by the said court be finally decided"—the court will not even by consent of parties take jurisdiction, unless the certificate of division present in a precise form, a point of law upon a part of the case settled and stated. Hence, where the record stated certain facts, and with this statement presented the testimony of numerous witnesses which was directed to the establishment of others, the whole case being, in fact, brought up with a purpose, apparently, that this court should decide both fact and law, and the question certified was whether in point of law upon the facts as stated and proved the action should be maintained, the court dismissed the case as not within its jurisdiction. *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224.

The question "whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause," is too general to be answered, because it undertakes to refer the whole case to the decision of this court. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 32 L. Ed. 196, citing *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190.

A question certified as follows: "Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to be prepared or used?" presents a clear and distinct proposition of law. *United States v. Hall*, 131 U. S. 50, 32 L. Ed. 97, reaffirmed in *United States v. Perrin*, 131 U. S. 55, 33 L. Ed.

88; *United States v. Reiley*, 131 U. S. 58, 32 L. Ed. 75.

A question certified which asks us to decide whether, upon all the evidence in the case, the defendant is entitled to a verdict, is obnoxious to this rule. *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503.

Admissibility of parol evidence.—Where the question certified is whether parol evidence may or may not be introduced to explain a written instrument, such certificate presents a single point of law. "If only a single writing had been offered in evidence by the defendant, the question whether parol evidence could have been given to alter or explain it would clearly have been a single question of law. The fact that many writings were offered, all of the same general character, and offered to prove the same fact, does not make the case to differ." *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 435, 32 L. Ed. 503, reaffirmed in *In re Robinson*, 200 U. S. 611, 50 L. Ed. 619.

³⁹. *Denniston v. Stewart*, 18 How. 565, 15 L. Ed. 489; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 256, 18 L. Ed. 224; *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119.

"By the rules often laid down in former cases, and restated at the last term in *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190, and at the present term in *Fire Insurance Association v. Wickham*, 128 U. S. 426, this court cannot take jurisdiction of a case upon a certificate of division of opinion, where besides the manifest attempt to refer to this court for decision substantially the whole case by the device of splitting it up into several questions, neither of the questions certified presents a distinct point or proposition of law, clearly and precisely stated; but each requires this court to find out for itself the point intended to be presented, by searching through the allegations of the answer and the provisions of the statute relied on by the plaintiff, and by also examining either the whole constitution of the state, or else reports or records of decisions of its courts, referred to in the answer and made part thereof." *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 513, 32 L. Ed. 533.

⁴⁰. *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *United States v. Arjona*, 120 U. S. 479, 489, 30 L. Ed. 728, opinion of Mr. Chief Justice Waite.

Sustaining Demurrer.—The question whether a demurrer shall be sustained is not sufficiently definite to be considered by this court under the 6th section of the act of April 29th, 1802.⁴¹

For Whom Decree Should Be Rendered.—Where an appeal from a circuit court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this is not such a distinct statement of the point upon which the judges differed as would give this court jurisdiction.⁴²

Such a statement of facts must accompany the certificate as to show that the question of law is applicable to the case.⁴³

Effect of Imperfect Certificate.—Where a case is certified to this court upon a division of opinions of the judges below, and the points reserved, upon which they were divided, are too imperfectly stated to enable this court to pronounce any opinion upon them, this court will neither award a venire de novo, nor certify any opinion to the court below upon the points reserved, but will merely certify that they are too imperfectly stated.⁴⁴

Dismissal.—Where a cause comes before this court on certificate of division, but upon inspecting the record, it appears that a particular point or points upon which the justices of the circuit court differed in opinion are not distinctly stated, the case must be dismissed for want of jurisdiction, and remanded to the circuit court to be proceeded in according to law.⁴⁵

c. Rule in Criminal Cases.—**In General.**—The same rules were applicable to the certificate of points on division of opinion on the hearing or trial of criminal proceedings under §§ 651 and 697, as were required under §§ 650, 652, 693.⁴⁶

41. Sustaining demurrer.—*Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 18 L. Ed. 224.

The question "whether the demurrer to the said amended bill should be sustained" does not present any such well defined point of law as can be certified to this court for an answer. It merely presents the whole case without showing a distinct point in regard to which the judges were opposed in opinion. *United States v. Minor*, 114 U. S. 233, 29 L. Ed. 110, citing *United States v. Waddell*, 112 U. S. 76, 28 L. Ed. 673.

"Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained. The difference of opinion is indeed stated to have been on the point whether the demurrer should be sustained. But such a question can hardly be called a point in the case, within the meaning of the act of Congress; for it does not show whether the difficulty arose upon the construction of the act of Congress on which the indictment was founded, or upon the form of proceeding adopted to inflict the punishment, or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer and joinder, leaving this court to look into the record, and determine for itself whether any sufficient objection can be made in bar of the prosecution; and with-

out informing us what questions had been raised in the circuit court, upon which they differed. Neither can this omission in the certificate be supplied by the causes of demurrer assigned by the defendant. The judges do not certify that they differed on the points there stated, or on either of them, and indeed the third ground there taken is as vague and indefinite as the certificate itself and could not therefore help it, even if it could be invoked in its aid." *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119.

42. *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855, reaffirmed in *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 454, 51 L. Ed. 875.

43. *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. Ed. 772.

Where the question certified was, whether a letter written by a cashier without the knowledge of the directors was binding on the bank, this court declined to answer, because the solution of the question depended in part upon facts not stated in the certificate. *United States v. Bank of Columbus*, 19 How. 334, 15 L. Ed. 662, cited in *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 255, 18 L. Ed. 224.

44. *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463.

45. *Sadler v. Hoover*, 7 How. 646, 12 L. Ed. 855.

46. Rule in criminal cases.—*United States v. Hall*, 131 U. S. 50, 32 L. Ed. 97; *United States v. Perrin*, 131 U. S. 55,

Whether Indictment Sets Forth Offense.—A certificate undertaking to present the question, arising on demurrer or otherwise, whether an indictment, or a count therein, sets forth any offense, which this court has constantly held not to be a proper subject of a certificate of division of opinion, is irregular and insufficient.⁴⁷ Where the question certified is in this form: "Does the indictment charge the defendant with any offense?" as has been repeatedly held, this is too general to be a subject of a certificate of division.⁴⁸ A question certified to this court from the circuit court as follows: "Whether the said demurrer, so filed, to the first three counts of the indictment aforesaid, ought to be sustained" is too general.⁴⁹ A question certified to this court from a circuit court as follows: "Whether the matters and things alleged and set forth in the first three counts of the said indictment constitute an offense or offenses under § 5515 of the Revised Statutes of the United States, or under any other law or statute of the United States," is too general to be answered.⁵⁰

10. **TRANSFER OF CAUSE**—*a. Proceedings for Transfer.*—The judgment rendered in an action at law where the judges of the circuit court were opposed in opinion cannot be re-examined here otherwise than on a writ of error.⁵¹

b. Effect of Transfer—(1) *On Proceedings in Circuit Court.*—By § 6 of the act of April 29, 1802, c. 31, 2 Stat. 156, 159, whenever there was a division of opinion in the circuit court upon a question of law, the question might be certified to this court for decision; provided that the case might proceed in the circuit court if in its opinion further proceedings could be had without prejudice to the merits; and that no imprisonment should be allowed or punishment inflicted upon which the judges were divided in opinion.⁵² When a certificate of division is brought into this court, only the points certified are before us. The cause remains in the circuit court, and may be proceeded in by that court according to its discretion.⁵³ The defect in the original act of 1802 consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect, the first section of the act of June, 1872, was passed, requiring the case

33 L. Ed. 88; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

47. *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 514, 32 L. Ed. 533.

48. *United States v. Chase*, 135 U. S. 255, 33 L. Ed. 117.

"The question whether either of the counts in the indictment charges the defendant with an offense under the laws of the United States, which is the first one certified, we decline to answer, for the reason that it is too vague and general, within the act of Congress authorizing certificates of this character and the repeated decisions of this court." *United States v. Northway*, 120 U. S. 327, 329, 30 L. Ed. 664.

49. *United States v. Brewer*, 139 U. S. 278, 35 L. Ed. 190, citing *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 514, 32 L. Ed. 533; *United States v. Hall*, 131 U. S. 50, 32 L. Ed. 97; *United States v. Lacher*, 134 U. S. 624, 632, 33 L. Ed. 1080.

50. *United States v. Brewer*, 139 U. S. 278, 286, 35 L. Ed. 190, citing *United States v. Northway*, 120 U. S. 327, 30 L.

Ed. 664; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 514, 32 L. Ed. 533; *United States v. Hall*, 131 U. S. 50, 32 L. Ed. 97; *United States v. Lacher*, 134 U. S. 624, 632, 33 L. Ed. 1080.

51. *Proceedings for Transfer.*—*Bartholow v. Trustees*, 105 U. S. 6, 26 L. Ed. 937.

52. *On proceedings in circuit court.*—*United States v. Rider*, 163 U. S. 132, 135, 41 L. Ed. 101.

53. *Kennedy v. Bank*, 8 How. 586, 610, 12 L. Ed. 1209; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 255, 18 L. Ed. 224.

It is clear, that the statute does not, upon the certificate of division, remove the original cause into this court; on the contrary, it is left in the possession of the court below, for the purpose of further proceedings, if they can be had without prejudice to the merits; so that, in effect, the certified questions only, and not the original cause, are removed to this court. *Veazie v. Wadleigh*, 11 Pet. 55, 60, 9 L. Ed. 630.

When a cause is brought before the court on a division in opinion by the judges of the circuit court, the points certified only are before it. The cause should remain on the docket of the circuit court, and at their discretion may be prosecuted. *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209.

to proceed notwithstanding the division, the opinion of the presiding justice to prevail for the time being; and this feature is retained in the Revised Statutes, §§ 650, 652, 693. The benefit of the certificate can now be had after judgment upon a writ of error or appeal. That is the only material change from the original law.⁵⁴

(2) *How Much of Cause Transferred*.—Where the circuit and district judge agree in parts of a case, and dispose of them by decree finally, but are unable to agree as to others; and certify as to them a division of opinion, both parts of the case may be brought to the supreme court at once and heard on the same record.⁵⁵

(3) *Certificate as Precluding Right to Writ of Error*.—The determination of the questions certified does not affect the right to bring up the whole case, by a writ of error or appeal, after it is terminated in the court below.⁵⁶

(4) *Abiding the Event*.—Where there is a division of opinion between a district and a circuit judge, as to the allowance of a writ of habeas corpus, a decision on the motion for a writ of prohibition against proceeding further under the writ will be withheld until after a decision upon the division of opinion.⁵⁷

c. *Hearing Confined to Questions Certified*.—**In General**.—When a case is brought up to this court on a certificate of division of opinion between the judges of the circuit court, if no such question is certified to us by the judges of the circuit court, we cannot consider it.⁵⁸ The power of the supreme court of the United States to revise the proceedings of a circuit court in a case brought up on a certificate of division is strictly confined to the questions stated in the certificate.⁵⁹ Matters not so certified are not before the court for its consideration, but remain in the court below to be determined by the circuit judges.⁶⁰ Where a case is certified from a circuit court of the United States under the act of 1802, ch. 31, § 6, the judges of the circuit court having differed in opinion upon questions of law which arose on the trial of the cause, the supreme court cannot be called upon to express an opinion on the whole facts of the case, instead of upon particular points of law, growing out of the same.⁶¹

But where the certificate is defective in not certifying the points or questions on which the opinion of this court is desired, such other matters, un-

54. *Dow v. Johnson*, 100 U. S. 158, 164, 25 L. Ed. 632.

55. **How much of cause transferred**.—*Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 985.

56. **Certificate as precluding right to writ of error**.—*Ogle v. Lee*, 2 Cranch 33, 2 L. Ed. 198; *United States v. Bailey*, 9 Pet. 267, 273, 9 L. Ed. 124; *Daniels v. Chicago, etc., R. Co.*, 3 Wall. 250, 255, 18 L. Ed. 224.

If a question upon which the judges below differ in opinion be certified to this court, and here decided, the parties are not precluded from a writ of error on the final judgment, when the whole cause will be before the court. *Ogle v. Lee*, 2 Cranch 33, 2 L. Ed. 198.

57. **Abiding the event**.—*Ex parte State of Virginia*, 131 U. S. appx. lxxxix, 19 L. Ed. 153.

58. **Hearing confined to questions certified**.—*United States v. Ambrose*, 108 U. S. 336, 341, 27 L. Ed. 746, citing *United States v. Briggs*, 5 How. 208, 12 L. Ed. 119; *Dennistoun v. Stewart*, 18 How. 565, 15 L. Ed. 489.

In one case the court considered the

case as coming up upon bills of exception, praying instructions, on which the court divided. It was held that this court can only certify an opinion on the point so raised; and if that part of the agreement stated in the record which relates to the rendering of the judgment on the one side or on the other, must have its operation in the court below. *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

59. *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319; *Ogle v. Lee*, 2 Cranch 33, 2 L. Ed. 198.

60. *Wayman v. Southard*, 10 Wheat. 1, 21, 6 L. Ed. 253; *Saunders v. Gould*, 4 Pet. 399, 7 L. Ed. 897; *Ward v. Chamberlain*, 2 Black 430, 435, 17 L. Ed. 319.

On an indictment for perjury, where it is attempted on argument to raise the question whether the judge of the district court had authority to administer the oath in which the perjury was committed, this court cannot consider that question on a certificate of division of opinion, when no such question is certified to us by the judge of the circuit court. *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

61. *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058.

doubtedly may be brought here for revision by another certificate of division of opinion, or by an appeal after final judgment.⁶²

d. *Right to Withdraw Record or Discontinue Cause.*—It would seem that the party on whose motion questions are certified to the supreme court, under the act of congress, has a right, generally, to withdraw the record, or discontinue the case in the supreme court; the original cause being detained in the circuit court for ulterior proceedings.⁶³ Or in the language of Mr. Justice Story: Upon the true construction of the statute, if a discontinuance has been actually entered in the circuit court in term, the record here ought not to be further acted upon by us, but a withdrawal or dismissal of the certified questions ought to be allowed. If it were necessary to accomplish this object, in the most formal way, this court should order the case to stand continued until the next term of this court; so that the plaintiff might, in the intermediate time, make an application to the circuit court in term, to enter a discontinuance thereof in that court.⁶⁴

In Vacation.—Before trial the plaintiff may, as a matter of right, discontinue his cause according to the practice of the state courts, at any time when he is demandable in court. After a trial or verdict, he can do so only by leave of the court, which it may grant or refuse, in its discretion. But, under ordinary circumstances, before verdict, it is almost a matter of course to grant it, upon payment of costs, when it is not strictly demandable of right.⁶⁵

62. *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319.

"Provision is made by the act of the 29th of April, 1802, that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement may happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court at their next session to be held thereafter, and shall by the said court be finally decided. 2 Stat. at Large, 156. Such certificate, as has repeatedly been held by this court, brings nothing before this court for its consideration but the points of questions certified, as required by the 6th section of the act. Defective certificates are sometimes sent up, but in such case the court uniformly refuses to certify any opinion, and remands the cause for further proceedings, holding, under all circumstances, that nothing can come before this court, under that provision, except such single definite questions as shall actually arise and become the subject of disagreement in the court below, and be duly certified here for decision. *Ogle v. Lee*, 2 Cranch 33, 2 L. Ed. 198; *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *Kennedy v. State Bank*, 8 How. 586, 611, 12 L. Ed. 1029." *Ward v. Chamberlain*, 2 Black 430, 434, 17 L. Ed. 319.

63. **Right to withdraw record or discontinue cause.**—*Veazie v. Wadleigh*, 11 Pet. 55, 60, 9 L. Ed. 630.

64. **Statement of rule by Mr. Justice Story.**—*Veazie v. Wadleigh*, 11 Pet. 55, 60, 9 L. Ed. 630.

Right to a discontinuance.—On the trial

of a cause in the circuit court of the district of Maine, upon certain questions which arose in the progress of the trial, the judges of the court were divided in opinion, and the questions were, at the request of the plaintiff, certified to the supreme court of January term, 1835. In December, 1836, the plaintiff, filed in the office of the clerk of the circuit court of Maine, a notice to the defendant that he had discontinued the suit in the circuit court, and that as soon as the supreme court should meet at Washington, the same disposition would be made of it there, and that the costs would be paid when made up. A copy of this notice was given to the counsel of the defendants. The plaintiff's counsel asked the court for leave to discontinue the cause, and the discontinuance was allowed. *Quære*, whether the party on whose motion questions are certified to the supreme court, under the act of congress, has a right generally to withdraw the record, or discontinue the case in the supreme court; the original cause being detained in the circuit court for ulterior proceedings. "In making this decision we wish to be understood as not meaning to intimate that the party upon whose motion any questions are certified to this court under the statute has a right, generally, to withdraw the record, or discontinue the case here, while the original cause is retained in the circuit court for ulterior proceedings. That is a point of a very different nature from that now before us, and may require very different principles to govern it. It will be sufficient to decide it when it shall arise directly in judgment." *Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630.

65. *Veazie v. Wadleigh*, 11 Pet. 55, 61, 9 L. Ed. 630.

e. *Rule of Decision in Supreme Court.*—On the trial of an action at law, when the judges of the circuit court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails.⁶⁶

11. *AFFIRMANCE OR REVERSAL.*—a. *In General.*—Since the passage of the act which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion, this court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified, which are considered in the final determination of the case here, should be answered.⁶⁷

b. *Division of Opinion.*—Where, on a certificate of division from a circuit court, this court is equally divided in opinion, the case will be remitted to the court below for the purpose of enabling it to take such action as it may be advised.⁶⁸

12. *JURISDICTIONAL AMOUNT.*—The jurisdiction of this court on a certificate of division of opinion between the judges of the circuit court is not dependent on the value of the amount in controversy.⁶⁹ But this rule is based upon a valid

66. Rule of decision in supreme court.—Dow v. Johnson, 100 U. S. 158, 25 L. Ed. 632.

Statutes provide that when, on the trial or hearing of any civil suit or proceeding before the circuit court held by the circuit judge and the district judge, or by either of them and a justice of this court, any question occurs upon which the opinions of the judges are opposed, the opinion of the presiding judge shall prevail and be considered as the opinion of the court for the time being; "the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record;" and the final judgment or decree "may be reviewed, and affirmed or reversed or modified, by the supreme court on writ of error or appeal." Rev. Stat., §§ 650, 652, 693. Jewell v. Knight, 123 U. S. 426, 432, 31 L. Ed. 190.

67. Affirmance or reversal in general.—United States v. Reese, 92 U. S. 214, 215, 23 L. Ed. 563.

68. Division of opinion.—Hannauer v. Woodruff, 10 Wall. 482, 19 L. Ed. 991, citing Silliman v. Hudson River Bridge Co., 1 Black 582, 17 L. Ed. 81.

In a case where the judges of the circuit court have divided in opinion upon several questions, one of them being whether the court has jurisdiction, the question of jurisdiction must be determined before any opinion can be expressed on the others. If the judges of this court, as well as the court below, are equally divided on the question of jurisdiction, the case will be remitted for such further action as may be required by law and the rules of court. Where the record (of an equity case) goes down in this condition, it is the established rule to dismiss the bill and leave the plaintiff to his remedy by appeal. Silliman v. Hudson River Bridge Co., 1 Black 582, 17 L. Ed. 81.

Where a question of jurisdiction is cer-

tified to this court from the circuit court, because of a division of opinion between the judges of the circuit court, if this court is also divided in opinion, no decision can be certified. Somerville v. Hamilton, 4 Wheat. 230, 4 L. Ed. 558.

69. Jurisdictional amount.—Weeth v. New England Mortgage Co., 106 U. S. 605, 27 L. Ed. 99; Waterville v. Van Slyke, 115 U. S. 290, 29 L. Ed. 406; State Nat. Bank v. St. Louis, etc., Co., 122 U. S. 21, 30 L. Ed. 1121; Ex parte Phoenix Ins. Co., 117 U. S. 367, 29 L. Ed. 923; Dow v. Johnson, 100 U. S. 158, 25 L. Ed. 632; Williamsport Bank v. Knapp, 119 U. S. 357, 30 L. Ed. 446; Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 402, 32 L. Ed. 196. But see Colorado, etc., R. Co. v. White, 101 U. S. 98, 25 L. Ed. 860.

Where the plaintiffs appeal from a decree for less than the jurisdictional amount, but a certificate of division of opinion is also filed at the same time, our jurisdiction will be confined to answering questions of law presented by the certificate of division of opinion between the judges before whom the case was heard in the circuit court. Union Bank v. Kansas City Bank, 136 U. S. 223, 35 L. Ed. 341. Rev. Stat., §§ 650, 652, 693, act of Feb. 16, 1875, c. 77, § 3, 18 Stat. 316; Dow v. Johnson, 100 U. S. 158, 25 L. Ed. 632; United States v. Ambrose, 108 U. S. 336, 27 L. Ed. 746; Jewell v. Knight, 123 U. S. 426, 31 L. Ed. 190; Lawrence v. Nelson, 143 U. S. 215, 221, 36 L. Ed. 130.

In civil cases, prior to March 3, 1891, the appellate jurisdiction was limited by the sum or value of the matter in dispute, but the jurisdiction on certificate was not dependent thereon, and, after final judgment or decree, if the amount in controversy reached the jurisdictional amount, the whole case was open for consideration on error or appeal, while if it fell below that, only the questions certified could be examined. Allen v. St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed.

certificate which presents properly questions material to the decision of the case. If this were not necessary to our jurisdiction, a form of certificate, which might present no question that this court can consider, might be used to require of it a review of other matters than those on which the court divided, though the amount in controversy is insignificant. It is, therefore, only where the certificate does present, in accordance with the statute, a division of opinion in such a manner and on such a question as to give this court jurisdiction that the amount in controversy can be disregarded as an element of jurisdiction.⁷⁰

B. Under Circuit Court of Appeals Act—1. IN GENERAL.—By section sixth of the judiciary act of March 3, 1891, establishing circuit courts of appeals (26 Stat. 826, c. 517), it is provided that the judgments or decrees of those courts shall be final in certain enumerated classes of cases, but that, in such cases, the circuit court of appeals may certify to "the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And, thereupon, the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."⁷¹

2. EFFECT ON PRE-EXISTING STATUTES.—It is true that repeals by implication are not favored, but the conclusion is irresistible that, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, covers the whole subject matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.⁷² Its provisions and those of the Revised Statutes in this regard cannot stand together, and the argu-

573; *Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632; *United States v. Rider*, 163 U. S. 132, 137, 41 L. Ed. 101.

70. *Waterville v. Van Slyke*, 116 U. S. 699, 700, 29 L. Ed. 772; *Weeth v. New England Mortgage Co.*, 106 U. S. 605, 27 L. Ed. 99; *Williamsport Bank v. Knapp*, 119 U. S. 357, 361, 30 L. Ed. 446.

71. **Under the circuit court of appeals act in general.**—*Maynard v. Hecht*, 151 U. S. 324, 327, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181; *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 268, 37 L. Ed. 445; *Bowker v. United States*, 186 U. S. 135, 138, 46 L. Ed. 1090, reaffirmed in *Smith v. Iverson*, 203 U. S. 586, 51 L. Ed. 329.

72. **Effect on pre-existing statutes.**—*United States v. Rider*, 163 U. S. 132, 140, 41 L. Ed. 101.

"From the beginning of this century until the passage of the act of 1891, both in civil and in criminal cases, questions of law, upon which two judges of the circuit court were divided in opinion, might be certified by them to this court for decision. Acts of: April 29, 1802, c. 31, § 6; 2 Stat. 159; June 1, 1872, c. 255, § 1; 17 Stat. 196; Rev. Stat., §§ 650-652, 693, 697; *Insurance Co. v. Dunham*, 11 Wall. 1, 21, 20 L. Ed. 90; *United States v. Sanges*, 144 U. S. 310, 320, 36 L. Ed. 445. But in *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101, it was adjudged by this court that the act of 1891 had superseded and repealed the earlier acts authorizing

questions of law to be certified from the circuit court to this court; and the grounds of that adjudication sufficiently appear by the statement of the effect of the act of 1891 in two passages of the opinion: 'Appellate jurisdiction was given in all criminal cases by writ of error, either from this court or from the circuit courts of appeals, and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final, as specified in § 6.' 'It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the act of March 3, 1891, covers the whole subject matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.' *United States v. Rider*, 163 U. S. 132, 138-140, 41 L. Ed. 101. That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the circuit court of appeals, in all criminal cases, and in all civil cases 'without regard to the amount in controversy.' Second, that the act, by its terms, its scope and its obvious purpose, 'furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.'" *The Paquete Habana*, 175 U. S. 677, 684, 44 L. Ed. 320.

ment ab inconvenienti that, in cases of doubt below, the remedy by certificate ought to be available, is entitled to no weight in the matter of construction.⁷³

3. RULE OF DIVISION.—In civil cases the intention of Congress as to the certification provided for in sections five and six of the act of March 3, 1891, 26 Stat. 826, c. 517, is to be arrived at in the light of the rules prevailing prior to that date in relation to certificates of division of opinion under §§ 650, 652 and 693 of the Revised Statutes.⁷⁴ In short, certificates of questions of law by the circuit courts of appeals under the judiciary act of March 3, 1891, are governed by the same general rules as were formerly applied to certificates of division of opinion in the circuit court.⁷⁵

4. CONSTITUTION OF CIRCUIT COURT OF APPEALS.—A certificate of questions or propositions of law concerning which a circuit court of appeals desires the instruction of this court for their proper decision is irregular, when a quorum of its members does not sit in the case.⁷⁶

5. QUESTIONS TO BE BROUGHT UP AND CONSIDERED—*a. In General.*—A question certified must be one the answer to which is to aid the court in determining a case before it.⁷⁷ Our jurisdiction under this section is limited to questions of law in relation to which the advice of this court is sought.⁷⁸

b. Criminal Cases.—After an exhaustive review of the statutes and authorities, it was held, Mr. Chief Justice Fuller delivering the opinion of the court, that the scheme of the act of March 3, 1891, takes away the right to bring criminal cases to this court from the circuit court of the United States, upon a certificate of division of opinion under §§ 651 and 697 of the Revised Statutes.⁷⁹ Sections 651

73. *United States v. Rider*, 163 U. S. 132, 140, 41 L. Ed. 101.

By section fourteen it was provided that "All acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed," and the particular question before us is whether sections 651 and 697 of the Revised Statutes in relation to certificate of division of opinion in criminal cases, though not expressly repealed, still remain in force. If so, and such division of opinion can be certified before final judgment, then all criminal cases, including those in which the judgments and decrees of the circuit courts of appeals are made final (of which the case at bar is one), as well as those which may be brought directly to this court, might, at preliminary stages of the proceedings, be brought before us on certificate, and, after judgment, the whole subject be re-examined on writ of error from one or the other court. This result, in itself, we think could not have been intended, and it is wholly inconsistent with the object of the act of March 3, 1891, which was to relieve this court and to distribute between it and the circuit courts of appeals, substantially, the entire appellate jurisdiction over the circuit courts of the United States. *McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. Ed. 340; *American Construction Co. v. Jacksonville R. Co.*, 148 U. S. 372, 37 L. Ed. 486; *United States v. Rider*, 163 U. S. 132, 139, 41 L. Ed. 101.

74. Rule of decision.—*Maynard v.*

Hecht, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Faurot*, 162 U. S. 435, 437, 40 L. Ed. 1030; *Felsenheld v. United States*, 186 U. S. 126, 134, 46 L. Ed. 1085.

The rules respecting the certification of questions by the circuit court of appeals were thus stated by the present chief justice in *United States v. Union Pac. R. Co.*, 168 U. S. 505, 512, 42 L. Ed. 559.

"It is settled that the certification provided for in §§ 5 and 6 of the judiciary act of March 3, 1891, ch. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 445; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77."

75. *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875; *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101, citing *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 445; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179.

76. Quorum of members must be present.—*United States v. Emholt*, 105 U. S. 414, 26 L. Ed. 1077; *Cincinnati, etc., R. Co. v. McKee*, 149 U. S. 259, 260, 37 L. Ed. 725.

77. Questions to be brought up and considered in general.—*Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 445; *Alabama Southern R. Co. v. Thompson*, 200 U. S. 206, 213, 50 L. Ed. 441.

78. *Blythe v. Hinkley*, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in *Kittanning Coal Co. v. Zabriskie*, 176 U. S. 681, 44 L. Ed. 637.

79. Criminal cases.—*United States v.*

and 697 of the Revised Statutes in relation to certificates of division of opinion in criminal cases were repealed by the judiciary act of March 3, 1891, not only as to the accused, but also as to the prosecution. In short, a certificate which cannot be granted upon the request of the defendants cannot be granted upon the request of the prosecution.⁸⁰

c. *Conflict between Supreme Court Decisions.*—Where the questions or propositions of law on which we are asked to give instruction, amount to no more than an inquiry as to whether in our opinion there is an irreconcilable conflict between two of our previous judgments, and a request is made that if we hold that to be so, that we put an end to that conflict, the certificate will be dismissed.⁸¹

d. *Conflict between Courts of Appeals.*—While the fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals for another, under the same conditions, might furnish ground for a certiorari on proper application, the assertion of the existence of such difference and of the wish that it might be determined by this court, is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. The difference can only exist when the courts have actually reached contradictory results, but each must proceed to its own judgment, unless such grave doubts arise as to induce the conviction that this court should be resorted to for their solution in the manner provided for.⁸²

e. *Discretionary Matters.*—The general rule under the earlier statutes was that this court could not, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the circuit court, and, therefore, that a certificate on a motion for new trial would not lie, but where the questions presented went directly to the merits of the case it was held that jurisdiction might be entertained. The same rule still obtains under the act of March 3rd, 1891.⁸³

6. FORM, CONTENTS AND SUFFICIENCY OF CERTIFICATE—*a. In General.*—It is settled that the certification provided for in §§ 5, 6, of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes.⁸⁴ It was well settled as to them that each question had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the

Rider, 163 U. S. 132, 41 L. Ed. 101; In re Robinson, 200 U. S. 611, 50 L. Ed. 619.

This court held that since the passage of the judiciary act of March 3, 1891, 26 Stat. 826, c. 517, certificates of division of opinion in criminal cases, according to §§ 651 and 697 of the Revised Statutes, were not authorized. *United States v. Rider*, 163 U. S. 132, 139, 41 L. Ed. 101; *Rider v. United States*, 178 U. S. 251, 258, 44 L. Ed. 1057.

80. *United States v. Hewecker*, 164 U. S. 46, 41 L. Ed. 345, citing *Rider v. United States*, 163 U. S. 132, 41 L. Ed. 101; *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445.

81. *Conflict between supreme court decisions.*—*Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030.

Doubtless the determination of contested questions in cases properly brought before us involves the resolution of doubts if any are entertained, in respect of the scope of particular decisions, but

we cannot approve of the mode adopted in this case of ascertaining the precise bearing of former judgments. *Graver v. Faurot*, 162 U. S. 435, 436, 40 L. Ed. 1030.

82. *Conflict between courts of appeals.*—*Columbus Watch Co. v. Robbins*, 148 U. S. 266, 270, 37 L. Ed. 445.

83. *Discretionary matters.*—*United States v. Rosenburgh*, 7 Wall. 580, 19 L. Ed. 263; *United States v. Hewecker*, 164 U. S. 46, 48, 41 L. Ed. 345.

84. *Rules governing certificates under act of March 3rd, 1891.*—*Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 445; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77; *United States v. Union Pac. R. Co.*, 168 U. S. 505, 512, 42 L. Ed. 559; *United States v. Rider*, 163 U. S. 132, 139, 41 L. Ed. 101; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875.

cause; and could not embrace the whole case even where its decision turned upon matter of law only, and even though it were split up in the form of questions.⁸⁵

b. *Statement of Facts.—In General.*—"Rule 37 provides: 'Where, under § 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.'"⁸⁶ A certificate does not comply with rule thirty-seven of this court, where it does not contain a proper statement of the facts on which the questions or propositions of law arise.⁸⁷

Presumptions on Appeal.—Where the statement of facts certified to this court and the certified question contain contradictory statements as to a certain fact, but it appears that it is a mere clerical error, this court will assume that the certified question was correct.⁸⁸

c. *Questions Must Be Clearly and Distinctly Certified.*—In order, however, to invoke the exercise of our jurisdiction in the instruction of the circuit courts of appeals as to the proper decision of questions or propositions of law arising in the classes of cases mentioned, it is necessary that such questions or propositions should be clearly and distinctly certified, and that the certificate should show that the instruction of this court as to their proper decision is desired.⁸⁹ The certificate is essentially defective if it does not specifically set forth the question or questions to be answered, and, apart from that, it does not state that instruction is desired for the proper decision of such question or questions.⁹⁰

d. *Certificate Must Present a District Point or Proposition of Law.*—A question certified to this court from the circuit court of appeals must be a distinct point or proposition of law, clearly stated, so that it can be distinctly answered without regard to the other issues of law in the case.⁹¹

85. *Jewell v. Knight*, 123 U. S. 426, 432, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Graver v. Faurot*, 162 U. S. 435, 437, 40 L. Ed. 1030; *Felsenheld v. United States*, 186 U. S. 126, 134, 46 L. Ed. 1085; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510, 32 L. Ed. 533; *United States v. Union Pac. R. Co.*, 168 U. S. 505, 512, 42 L. Ed. 559.

It is settled as to such certification under § 6 of the judiciary act of March 3, 1891, 26 Stat. 826, ch. 517, that each question propounded must be a definite point or proposition of law clearly stated, so that it can be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact; and that the certificate cannot embrace the whole case, even where its decision turns on matter of law only and even though it be split up in the form of questions. *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030; *Cincinnati, etc., R. Co. v. McKeen*, 149 U. S. 259, 37 L. Ed. 725; *Emsheimer v. New Orleans*, 186 U. S. 33, 42, 46 L. Ed. 1042.

86. *Construction of rule thirty-seven.*—Rule 37, 139 U. S., appx., 706; *Emsheimer v. New Orleans*, 186 U. S. 33, 42, 46 L. Ed. 1042; *Bowker v. United States*, 186 U. S. 135, 138, 46 L. Ed. 1090, reaffirmed in *Smith v. Iverson*, 203 U. S. 586, 51 L. Ed. 329.

87. *Cincinnati, etc., R. Co. v. McKeen*, 149 U. S. 259, 261, 37 L. Ed. 725.

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88. *United States v. Laws*, 163 U. S. 258, 41 L. Ed. 151.

89. *Questions must be clearly and distinctly certified.*—*Columbus Watch Co. v. Robbins*, 148 U. S. 266, 269, 37 L. Ed. 445.

In *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 445, it was held that in order to give this court jurisdiction over questions or propositions of law sent up by a circuit court of appeals for decision, it was necessary that the questions or propositions should be clearly and distinctly certified to, and should show that the instruction of this court was desired in a particular case as to their proper decision. *Maynard v. Hecht*, 151 U. S. 324, 327, 38 L. Ed. 179; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

A question certified to this court from the circuit court of appeals as follows: Should the rates of duty prescribed by the first section of the tariff act of August, 1894 (unless otherwise specially provided for in said act), be levied, collected, and paid upon all articles imported from foreign countries or withdrawn for consumption on and after August 1, 1894, and prior to August 28, 1894? is too general, and therefore will not be answered. *United States v. Burr*, 159 U. S. 78, 81, 40 L. Ed. 82.

90. *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 269, 37 L. Ed. 445.

91. *Certificate must present a distinct point or proposition of law.*—*McHenry v.*

7. **REVIEW OF QUESTIONS OF FACT.**—A certification to this court from the circuit court of appeals under §§ 5 and 6 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, must be a question of law only and not a question of fact, or of mixed law and fact, and hence cannot involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case.⁹²

8. **RIGHT TO CERTIFY THE WHOLE CASE TO THIS COURT.**—A certification to this court from the circuit court of appeals under §§ 5 and 6 of the judiciary act

Alford, 168 U. S. 651, 42 L. Ed. 614, citing *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Fautrot*, 162 U. S. 435, 40 L. Ed. 1030; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77; *United States v. Union Pac. R. Co.*, 168 U. S. 505, 42 L. Ed. 539; *Felsenheld v. United States*, 186 U. S. 126, 46 L. Ed. 1085; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875.

Where the questions propounded in the certificate do not present distinct points or propositions of law, clearly stated, so that each can be distinctly answered without regard to the other issues of law involved, and they obviously bring the whole case up for consideration and disposition, and to answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case, the certificate is insufficient under the statute and will be dismissed. *United States v. Union Pac. R. Co.*, 168 U. S. 505, 512, 42 L. Ed. 539, reaffirmed in *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180.

Where the question certified puts the facts of the one case over against the facts of the other, and asks us to search the record in each to see whether the one case operates to bar the other, this court will decline to answer it. "Surely that is practically submitting the whole case instead of certifying a distinct question of law." *Warner v. New Orleans*, 167 U. S. 467, 478, 42 L. Ed. 239, reaffirmed in *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180.

Jurisdiction of circuit court.—A question certified as follows: "Has the United States circuit court for the district of North Dakota jurisdiction to hear and decide said case?" does not comply with the requirement that each question must be a distinct point or proposition of law, clearly stated, so that it can be distinctly answered without regard to the other issues of law in the case. *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614.

Taxation.—A question certified to this court from the circuit court of appeals as follows: "Conceding the lands in controversy to have been subject to taxation

for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?" cannot be answered because there is no plain statement or distinct proposition of law. *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614.

A question certified as follows: "Were or were not the lands described in the bill of complaint subject to taxation under the laws of the territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?" does not comply with the requirement that the question certified must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered without regard to the other issues of law in the case. *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614.

Forfeiture for violation of revenue laws.—A question certified by the court of appeals as follows: "Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under § 3453 of the Revised Statutes?" does not present a distinct point or proposition of law, and therefore this court will decline to answer it. *Felsenheld v. United States*, 186 U. S. 126, 46 L. Ed. 1085.

A question certified by the court of appeals as follows: "Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under § 3456 of the Revised Statutes?" does not present a distinct point or proposition of law, and therefore this court will decline to answer it. *Felsenheld v. United States*, 186 U. S. 126, 46 L. Ed. 1085.

92. **Review of questions of fact.**—*McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614, citing *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Fautrot*, 162 U. S. 435, 40 L. Ed. 1030; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77; *United States v. Union Pac. R. Co.*, 168 U. S. 505, 42 L. Ed. 539; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875.

of March 3, 1891, c. 517, 26 Stat. 826, must not embrace the whole case, even where its decision turns upon a matter of law only, and even though it is split up in the form of questions,⁹³ though we may require that to be done when questions are certified, or may bring up by certiorari any case in which the decision of that court would otherwise be final.⁹⁴ Where the entire record is transmitted as a part of the certificate, and the answer to the question contemplates an examination of the whole case, the certificate will be dismissed.⁹⁵

9. PRESUMPTIONS ON APPEAL.—In an action at law, we are bound to assume that the testimony of the plaintiff contained in the certificate of the circuit court of appeals, and recited to have been given on the trial, was preserved in a bill of exceptions, which formed part of the transcript of the record filed in the circuit court of appeals.⁹⁶

93. Cannot certify whole case to this court.—*McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614; *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 32 L. Ed. 503; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179; *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77; *United States v. Union Pac. R. Co.*, 168 U. S. 505, 42 L. Ed. 559; *Felsenheld v. United States*, 186 U. S. 126, 134, 46 L. Ed. 1085; *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1042; *Cincinnati, etc., R. Co. v. McKeen*, 149 U. S. 259, 37 L. Ed. 725; *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239; *Packer v. Nixon*, 10 Pet. 408, 9 L. Ed. 473; *Wiggins v. Gray*, 24 How. 303, 16 L. Ed. 688; *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180; *Quinlan v. Green County*, 205 U. S. 410, 418, 51 L. Ed. 860; *Chicago, etc., R. Co. v. Williams*, 205 U. S. 444, 51 L. Ed. 875; *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101.

A circuit court of appeals has no power under the judiciary act of 1891 to certify the whole case to this court, but can only certify distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact. *Cross v. Evans*, 167 U. S. 60, 63, 42 L. Ed. 77, reaffirmed in *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180, followed in *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239; *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030.

It is true, power was given to the courts of appeal to certify questions, but it is only "questions or propositions of law" which they are authorized to certify. And such questions must be "distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact." It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon which that question is based. But care must always be taken that under the guise of certifying questions the courts of appeal do not transmit the whole case to us for

consideration. *Warner v. New Orleans*, 167 U. S. 467, 475, 42 L. Ed. 239, reaffirmed in *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180.

Where the entire record is sent up, and by the general questions propounded, the labor is imposed upon this court of determining the whole case and all questions of law which may be lurking in the record, the certificate is violative of the rule that the circuit court of appeals has no power under the judiciary act of 1891 to certify the whole case to this court, but can only certify distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact. *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77, followed in *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239.

94. *Graver v. Faurot*, 162 U. S. 435, 437, 40 L. Ed. 1030.

95. *Graver v. Faurot*, 162 U. S. 435, 40 L. Ed. 1030.

Where the questions propounded are general in their nature, and amount simply to submitting the whole case upon the entire record to this court for decision, the questions certified can in no sense be treated as stating distinct propositions of law. In such case the certificate does not comply with the rules of law controlling the subject, and it must, therefore, be dismissed. *Cross v. Evans*, 167 U. S. 60, 65, 42 L. Ed. 77, reaffirmed in *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180, followed in *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239.

Where the certificate under § 6 of the judiciary act of March 3, 1891, 26 Stat. 826, ch. 517, of questions for the determination of the supreme court of the United States is not in compliance with rule 37 of that court, but the entire record is certified, and the questions contemplate an examination of the whole case and in large part its decision on the merits, the questions presented will not be determined. *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1042.

96. Presumptions on appeal.—*Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 382, 48 L. Ed. 1027.

10. RULES OF COURT AS TO BRINGING UP THE RECORD.—If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.⁹⁷ Where application is made to this court under § 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.⁹⁸ While we have the power to require the whole record and cause to be sent up to us for consideration and decision, the sixth section of the judiciary act of March 3, 1891, does not contemplate that questions or propositions of law shall be propounded and the entire record thereupon transmitted for us to answer such questions or propositions in view thereof. It is for us, when questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, to determine whether we will answer them as propounded or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal.⁹⁹

VI. Parties and Persons Entitled to Appeal.

A. Who Entitled to Appeal—1. IN GENERAL.—No persons but those appearing to be parties on the record, can be permitted to be heard on an appeal or writ of error.¹ A person not a party nor privy to a judgment or decree cannot appeal therefrom.² Writs of error to remove the judgment of an inferior

97. Rules of court as to bringing up the record.—Rule 36, 139 U. S., appx., 706, 707.

98. Rule 36, 139 U. S., appx., 707.

99. *Cincinnati, etc., R. Co. v. McKeen*, 149 U. S. 259, 261, 37 L. Ed. 725.

So in *Cincinnati, etc., R. Co. v. McKeen*, 149 U. S. 259, 37 L. Ed. 725, it was held that the act of March 3, 1891, does not contemplate the certification of questions of law to be answered in view of the entire record in the cause, although this court may, if it sees fit, order the entire record to be sent up, and thereupon decide the case as if it had been brought up by writ of error or appeal. *Maynard v. Hecht*, 151 U. S. 324, 327, 38 L. Ed. 177; *Moran v. Hagerman*, 151 U. S. 329, 38 L. Ed. 181.

1. Who entitled to appeal in general.—*Harrison v. Nixon*, 9 Pet. 483, 484, 9 L. Ed. 201, 202; *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998, citing *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Ex parte Cockcroft*, 104 U. S. 578, 26 L. Ed. 856; *Guion v. Liverpool, etc., Ins. Co.*, 109 U. S. 173, 27 L. Ed. 895; *Connellsville, etc., R. Co. v. Baltimore*, 154 U. S. 553, 38 L. Ed. 1087.

The writ of error, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

2. *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Guion v. Liverpool, etc., Ins. Co.*, 109 U. S. 168, 173, 27 L. Ed. 895; *Elwell v. Fosdick*, 134 U. S. 500, 513, 33 L. Ed. 998; *Farmers' Loan, etc., Co. v. Waterman*, 105 U. S. 265, 269, 27 L. Ed. 115; *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

Where the party appealing was not a party to the suit, nor does it appear that he ever asked to be made a party, his application for an appeal will be denied. *Ex Parte Cockcroft*, 104 U. S. 578, 26 L. Ed. 856, citing *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49.

It is a well-settled maxim of the law, that "no person can bring a writ of error to reverse a judgment who is not a party or privy to the record." "A writ of error lies when a man is grieved by an error in the foundation, proceeding, judgment, or execution" in a suit. *Boyle v. Zacharie*, 6 Pet. 635, 646, 8 L. Ed. 527, 532; *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245.

A writ of error cannot be sued out by persons who are not parties to the record, in a matter arising after execution, by strangers to the judgment and proceedings, and where the error assigned is in an order of the court disposing of certain funds in their possession accidentally connected with the record. *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245.

Where the only party to the decree in the lower court is a railroad company, and it is a decree of that court which the writ of error seeks to review, it is properly brought in the name of the railroad company alone. *Railroads v. Johnson*, 15 Wall. 8, 21 L. Ed. 118.

In ejectment, the tenant in possession having neglected to appear and have herself made defendant in the court below, cannot have a writ of error to the judgment against the casual ejector. "No one but a party to the suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the

tribunal to this court are, under the act of congress, governed by the principles and usages of the common law. And it is very well settled in all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error, who was not a party to the judgment in the inferior court.³ But parties to a suit, by order of court, and affected by the judgment against them, are entitled to sue out a writ of error, although they failed to appear and plead to the suit in the court below.⁴ So, also, a motion to dismiss an appeal as to all the parties named in the citation, who are not parties to the decree, will be denied, where the names are found on the record, as parties to one or more of the several decrees entered.⁵

2. **MUTUALITY OF RIGHT.**—The right of appeal must be reciprocal, and the statute does not give to one party an advantage over the other party, under the same circumstances.⁶

3. **PARTY AGGRIEVED.**—If a party is in no manner affected by what is decreed, he cannot be said to be a party to the decree.⁷ But where each party is prejudiced by the judgment of the court below, either is entitled to have the judgment reversed by writ of error.⁸

4. **APPEALABLE INTEREST.**—a. *In General.*—To entitle an appellant to an appeal he must have some interest in the subject matter of the suit.⁹ Persons who have no legal interest, either in maintaining or reversing the decree, are not necessary parties to the appeal.¹⁰

casual ejector." *Connor v. Peugh*, 18 How. 394, 15 L. Ed. 432.

Where the person filing a petition for a writ of mandamus requiring the court to allow an appeal, was not made a party to the suit, either by an express order of the court to that effect, or by being treated as such, his application for an appeal will be denied. *Ex parte Cockcroft*, 104 U. S. 578, 26 L. Ed. 856.

3. *Payne v. Niles*, 20 How. 219, 15 L. Ed. 895, 896.

4. *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515.

5. *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398.

6. **Mutuality of right.**—*Hilton v. Dickinson*, 108 U. S. 165, 27 L. Ed. 688; *The Jessie Williamson, Jr.*, 108 U. S. 305, 311, 27 L. Ed. 730; *The Sydney*, 139 U. S. 331, 336, 35 L. Ed. 177.

Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the case from the subordination to the appellate court for re-examination is secured to both parties by the act of congress allowing appeals, instead of writs of error, in cases of equity or of admiralty and maritime jurisdiction, or of prize or no prize, as provided in the second section of the act allowing such appeals. 1 Stat. at Large 84; 2 Stat. at Large 244. Subject to the same rules and regulations as in cases of writs of error, both parties may appeal, in an equity, admiralty, or prize suit, from the final decree of the subordinate court, but the appeal, when entered in the appellate court, is also subject to the same restrictions as

are prescribed in case of writs of error. *The Maria Martin*, 12 Wall. 31, 40, 20 L. Ed. 251.

7. **Party aggrieved.**—*Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265, 269, 27 L. Ed. 115.

Where the final decree of the circuit court is inconsistent with an interlocutory decree granting affirmative relief upon a cross bill in the same suit, a party adversely affected by such final decree, where the matter in dispute is sufficient, has a right to appeal to this court, which, if withheld, may be enforced by mandamus. *Ex parte The South, etc., R. Co.*, 95 U. S. 221, 24 L. Ed. 355.

Where in a suit for the foreclosure of a mortgage, the mortgagee is satisfied with the decree as entered, the mortgagor cannot appeal from the decree of foreclosure. *Indiana Southern R. Co. v. Liverpool, etc., Ins. Co.*, 109 U. S. 168, 27 L. Ed. 895.

No party to a decree can, by the general principles of equity, claim a reversal of a decree, upon a bill of review, unless he has been aggrieved by it; whatever may have been his rights to insist on the error, at the original hearing, or on an appeal. *Whiting v. United States Bank*, 13 Pet. 6, 14, 10 L. Ed. 33.

8. *Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110.

9. **Appealable interest in general.**—*Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276; *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245.

10. *Basket v. Hassell*, 107 U. S. 602, 608, 27 L. Ed. 500, citing *Foray v. Conrad*, 6 How. 201, 203, 12 L. Ed. 404; *Cox v. United States*, 6 Pet. 181, 182, 8 L. Ed. 363; *Germain v. Mason*, 12 Wall. 259, 261,

b. *Devolution of Interest*.—An assignment by a defendant of his interest in the subject matter of a pending suit does not necessarily defeat the suit. The assignee is bound by what is done against the assignor; and may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor.¹¹ But a party to a judgment or decree who disposes of all his interest in the subject matter affected thereby and before the appeal is taken loses his right of appeal.¹² And where the plaintiff has waived or released his right to appeal, the appeal will be dismissed.¹³

5. PARTICULAR PARTIES AND PERSONS CONSIDERED—*a. Claimants to Funds and Deposits in Court*.—Claimants to a fund, made parties to the original proceeding, have a right to appeal from a judgment or decree adversely affecting their interests therein.¹⁴

20 L. Ed. 393; *Simpson v. Greeley*, 20 Wall. 152, 22 L. Ed. 338.

One seaman cannot appeal from a decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. *Oliver v. Alexander*, 6 Pet. 143, 8 L. Ed. 349.

Neither the purchasers nor the assignee of the purchasers under a foreclosure sale have an appealable interest, where the decree orders the purchasers to pay such portion of their bid in cash as the court may direct, to meet other claims, and a balance as may be deemed necessary, because whether the payments of their bids were to be made for the benefit of the bondholders, or partly for the bondholders and partly for the benefit of the appellees, it is clear that they, as purchasers, and the railroad company, as their assignee, have no interest in the matters affected by the decrees appealed from. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97, citing *Swann v. Wright*, 110 U. S. 590, 28 L. Ed. 252.

In *Stuart v. Gay*, 127 U. S. 518, 32 L. Ed. 191, under a decree for the foreclosure of certain liens, which contemplated the payment of the purchase money, on the sale, in money, in annual installments, Stuart purchased, and by a subsequent order was allowed to be credited on unpaid purchase money with various liens he had acquired. From a later order in respect to allowances of interest upon certain prior liens he appealed to this court, and it was held he had no appealable interest, as a purchaser of property, because it was a matter of indifference to him as such how the proceeds of the sale should be distributed among the creditors.

Where a mortgagee on a bill of foreclosure filed in an inferior state court against his mortgagor and certain trustees holding collateral securities, obtains in that court a decree against the mortgagor personally and against the trustees as trustees, and the mortgagor alone appeals to the supreme court of the state, to which, on affirmation of the decree, he alone takes a writ of error here, it is no ground to dismiss the writ that the trustees are not joined with him as plain-

tiffs in error in this court, because they had no interest in the controversy. *Railroads v. Johnson*, 15 Wall. 8, 21 L. Ed. 118.

A receiver, appointed in a suit for the foreclosure of a mortgage may appeal from a decree against him to pay a sum of money in the cause in which he was appointed, because so far as relates to the settlement of his accounts he has been subjected to the jurisdiction of the court and made liable to its order and decree, and therefore is an interested party to the suit. *Hinckley v. Gilman, etc., R. Co.*, 94 U. S. 467, 24 L. Ed. 166.

Persons liable only for costs.—The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants. All the defendants appealed together, to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantees and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs, yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened. *Findlay v. Hinde*, 1 Pet. 241, 7 L. Ed. 128.

11. Devolution of interest.—*Ex parte The South, etc., R. Co.*, 95 U. S. 221, 24 L. Ed. 355.

12. Amadeo v. Northern Assur. Co., 201 U. S. 194, 50 L. Ed. 722.

13. Elwell v. Fosdick, 134 U. S. 500, 33 L. Ed. 998.

14. Claimants to funds and deposits in court.—*Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, cited in *Hovey v. McDonald*, 109 U. S. 150, 155, 27 L. Ed. 888.

Where a decree is rendered in favor of a receiver, directing him to pay into court a certain sum of money being the balance found due from him on the settlement of his account, the opposite parties have the right to appeal to this court from that decree. *Hovey v. McDonald*, 109 U. S. 150, 151, 27 L. Ed. 888, citing as au-

b. *Parties by Representation.*—**In General.**—Persons representing parties to the proceeding below may appeal.¹⁵

Executors and Administrators.—An appeal by an administrator de bonis non is irregular, unless he is first made a party in the court below, either upon his own application or that of the complainant's according to the rules and practice in chancery proceedings.¹⁶

Stockholders.—The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit, for the purpose of protecting their own interests in the corporation against unfounded and illegal claims against it, but this "remedy is an extreme one, and should be admitted by the court with hesitation and caution."¹⁷

c. *Municipal Corporations.*—Where a municipal corporation puts in a claim for taxes in a foreclosure proceeding in a circuit court to subject the mortgaged property, an order of the circuit court is binding upon the municipality, giving it a right to appeal to this court.¹⁸

d. *Natural and Artificial Persons.*—A writ of error or appeal to this court cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons. The acts of the state legislatures authorizing suits to be sustained by or against steamboats by name, confer no right so to sustain them in the federal courts.¹⁹

e. *Parties to Bankruptcy Proceedings.*—Undoubtedly the assignee in bankruptcy is the proper party to prosecute an appeal or writ of error, so far, at least, as it concerns those whom he represents, because a bankrupt is civiliter mortuus with respect to his assigned estate.²⁰ And it would seem that the bankrupts themselves, under some circumstances, might properly sue out the writ of error after their discharge. And they certainly have this right upon application of the assignee for an order substituting the bankrupt as plaintiff in error.²¹ Thus, where the judgment is rendered after the adjudication in bankruptcy, the bankrupt may prosecute the writ of error in his own name.²² But a party to an action

thority *Hinckley v. Gilman, etc., R. Co.*, 94 U. S. 467, 24 L. Ed. 166.

15. See cases cited in note following.

16. **Administrator de bonis non.**—Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator de bonis non with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit. If an execution be issued before the proper parties are thus made, it is unauthorized and void; and no right of property will pass by a sale under it. The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side. *Taylor v. Savage*, 1 How. 282, 11 L. Ed. 132.

17. *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725; *Ex parte Cutting*, 94 U. S. 14, 22, 24 L. Ed. 49.

18. **Municipal corporations.**—*Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276, citing *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322.

19. **Natural and artificial persons.**—*Steamboat Burns*, 9 Wall. 237, 19 L. Ed. 620.

20. **Parties to bankruptcy proceedings.**

—*Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809; *Knox v. Exchange Bank*, 12 Wall. 379, 381, 20 L. Ed. 414.

Where an appellant in this court becomes bankrupt after his appeal taken, his assignee in bankruptcy upon the production of the deed of assignment of the register in bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant in the case. *Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809.

21. *Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895, approved in *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386.

Where the defendant in error moved to dismiss a writ sued out by three partners, two of whom had previously received their discharges in bankruptcy, on the ground that the assignee alone could prosecute it, the court grants the application of the latter to be substituted as a plaintiff in error. *Semble*, that the partner against whom no bankruptcy proceedings were instituted might have sued out the writ, using, if necessary, the names of all the parties against whom the judgment had been rendered. *Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895.

22. *Hill v. Harding*, 131 U. S. appx. cc. 26 L. Ed. 310.

Where the judgment in the cause is

who has received his discharge in bankruptcy pending the action has no further interest in the suit, and therefore cannot bring a writ of error to a judgment rendered against him before receiving such discharge. The assignee of the bankrupt is the proper party to bring error in such case.²³

f. *Parties to Consolidated Actions*.—One who is a party to each of the suits consolidated is also a party to the consolidated suit, and entitled to be heard upon the pleadings as they stood before the consolidation, where no change was ordered or deemed necessary by the court.²⁴

g. *Persons Holding Railroad Securities*.—The bond holders of a railroad which are secured by a mortgage, have a right under leave of court to oppose charges and allowances to trustees and receivers under the mortgage in a foreclosure proceeding, and to appeal from an order allowing them.²⁵

h. *Public Officers*.—Where a board of commissioners is appointed to make a contract which it does and is sued thereon, and subsequently the board is abolished by statute and the auditor of the state and the treasurer of the state, ex officio, is substituted in place of such board, with full power to settle up the unfinished business of said board, it was held, that an appeal might be taken by the treasurer and auditor, describing themselves by their individual names.²⁶

i. *Purchasers at Judicial Sales*.—**In General**.—If purchasers at judicial sales become, by purchase of the premises, subject to the jurisdiction of the court, in the subsequent proceedings they may appeal from orders adversely affecting their acquired rights in the subject matter.²⁷

rendered after the plaintiff in errors adjudication in bankruptcy, he may prosecute a writ of error in his own name. And this court will not undertake to decide on a motion by the defendants in error to dismiss, whether his discharge operates to release him from all liability growing out of the judgment. "But if the assignee shall be of the opinion that any of the questions involved are such as may affect the estate of the bankrupt, he will be heard on such questions by his counsel, in connection with the plaintiff in error, when the case comes up for argument, if he desires." *Hill v. Harding*, 131 U. S., appx. cc, 26 L. Ed. 310.

23. *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. Ed. 414.

24. *Parties to consolidated actions*.—*Ex parte The South, etc.*, R. Co., 95 U. S. 221, 24 L. Ed. 355.

25. *Persons holding railroad securities*.—*Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

26. *Public officers*.—*Hemingway v. Stansell*, 106 U. S. 399, 27 L. Ed. 245.

27. *Purchasers at judicial sales*.—*Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *Williams v. Morgan*, 111 U. S. 684, 699, 28 L. Ed. 559; *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 34 L. Ed. 379.

In *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 95, 34 L. Ed. 379, this court said that, "supported by sound reasons, are the following propositions: First, a party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction

of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree." *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 594, 38 L. Ed. 563.

A bidder at a marshal's sale made on foreclosure of a mortgage in a federal court below, may, by his bid, though no party to the suit originally, so far be made a party to the proceedings in that court as to be entitled to an appeal here. Whether or not, this court will not dismiss an appeal by such person, on mere motion of the other side; the decision involving the merits of the case, and such an examination of the whole record as can only be made on full hearing. *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673.

It was adjudged in *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673, that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings that for some purposes he has a right of appeal. It was said by Mr. Justice Miller, in the opinion of the court, that "it is certainly true that he cannot appeal from the original decree of foreclosure nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction

A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.²⁸

Purchasers under a railroad foreclosure, the sale containing a provision that the purchaser should pay all debts adjudged to be superior in equity to the deeds of trust foreclosed, are entitled to an appeal.²⁹

The right of appeal allowed purchasers at foreclosure sales must extend to all matters adjudicated after his bid, which affect the terms of that bid, or the burdens which he assumes thereby, and which are not withdrawn from his challenge by the terms of the decree under which he purchases. If by the decree the sale is to be made subject to certain conditions, the purchaser acquires no right to be heard as to those conditions, either in the trial or appellate courts.³⁰ Where not concluded by the terms of the decree, any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court.³¹

And purchasers at a sale of a railroad under foreclosure may appeal from an adverse decision of the court allowing compensation to the trustees and receivers under the mortgage.³²

A party bidding at a foreclosure sale may appeal from an order of confirmation. "Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers? If the sale be set aside, they lose the purchased premises and all the profits which might result from their purchase, and assume all the risks and delay in recovering that which they have paid into court."³³

Limitations of General Rule.—But purchasers at judicial sales cannot ap-

of the court and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect."

28. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 95, 34 L. Ed. 379.

Such was the ruling in *Swann v. Wright*, 110 U. S. 590, 28 L. Ed. 252, in which it was adjudged that, where a decree directed that a sale should be made subject to liens established or to be established, on references previously had or then pending before a master, a purchaser at such sale would not be heard either in the trial or appellate court to dispute the validity of the liens thus established. This ruling was placed distinctly on the ground that by the very terms of the decree the purchaser was to take the chances of the allowance of all the claims then pending, and, therefore, their validity and extent was a matter simply between the claimants and the parties to the mortgage; but the contingency now presented was foreshadowed in the opinion, for it says: "If the court had, in the decree of sale, reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and, therefore, not established by the court, an entirely different question would have been presented. But no

such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first mortgage bondholders." *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 94, 34 L. Ed. 379.

29. *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023, distinguishing *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97.

30. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 94, 34 L. Ed. 379, following *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 886.

31. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 95, 34 L. Ed. 379.

32. *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

The right of purchasers at a foreclosure sale to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, was affirmed in *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559, when, as in that case, by the terms of the decree, the amount of such compensation placed an additional burden upon the purchasers. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 94, 34 L. Ed. 379.

33. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 594, 38 L. Ed. 763.

peal from the original decree of foreclosure or order of sale made prior to their bids.³⁴ Nor can purchasers of property under foreclosure or sale by order of a court, appeal from decrees or orders distributing the proceeds of such sale among the various claimant creditors or lienors of the fund so realized.³⁵ A purchaser at a sale under a decree in equity, cannot appeal from a decree affecting his interests, until the proceedings for the sale under the original decree have become final.³⁶

j. *Receivers.—In General.*—A receiver may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as, for instance, to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial court. He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.³⁷ His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decree which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial court allowed the appeal must in the appellate court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property.³⁸

Removal of Receivers.—Where an appeal is taken to this court in the name of an old receiver as complainant, and a new receiver is appointed after the decree below was entered to come in as surety in the appeal bond, the appeal will not be dismissed, but the new receiver will on his motion be substituted as the complainant and appellant, without prejudice to the proceedings already had.³⁹ Though a receiver may not have been a party to the original suit, yet if he is the principal party to a side issue which has arisen in it, and which is appealable, he is a proper party to a final decree on such issue, and to an appeal therefrom.⁴⁰

Decree Directing Payment into Court.—Where a decree is rendered against a receiver, directing him to pay into court a certain sum of money being

34. *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673.

35. *Stuart v. Gay*, 127 U. S. 518, 32 L. Ed. 191; *Swann v. Wright*, 110 U. S. 590, 28 L. Ed. 252; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 222, 34 L. Ed. 97.

36. *Butterfield v. Usher*, 91 U. S. 246, 23 L. Ed. 318, citing and explaining *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673; *S. C.*, 3 Wall. 196, 18 L. Ed. 43.

37. *Receivers.*—*Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 189, 43 L. Ed. 941.

38. *Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 189, 43 L. Ed. 941.

39. *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, citing *Gates v. Goodloe*,

101 U. S. 612, 25 L. Ed. 895.

Where the defendant in error moved to dismiss a writ sued out by three partners, two of whom had previously received their discharges in bankruptcy, on the ground that the assignee alone could prosecute it, the court grants the application of the latter to be substituted as a plaintiff in error. *Semle*, that the partner against whom no bankruptcy proceedings were instituted might have sued out the writ, using, if necessary, the names of all the parties against whom the judgment had been rendered. *Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895.

40. *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888, following *Hinckley v. Gilman, etc., R. Co.*, 94 U. S. 467, 24 L. Ed. 160.

the balance found to be due from him on the settlement of his accounts, such receiver may appeal to this court from that decree.⁴¹

Leave of Court.—The allowance of an appeal by the circuit justice is equivalent to leave by the court to the receiver to take an appeal.⁴²

k. *States*—(1) *In General*.—Where the state is not a party to the record in the circuit court and does not become a party by intervention, pro inter esse suo or otherwise, but expressly refuses to submit its rights to the jurisdiction of the court, it cannot appeal from the decision of the circuit court because it is not concluded by it.⁴³ But where the state voluntarily appears in the cause and presents and prosecutes a claim to the fund in controversy, and it thereby makes itself a party to the litigation to the full extent required for its complete determination, it becomes an actor as well as defendant, and by its intervention this proceeding becomes one in the nature of an interpleader, in which it becomes necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claim title.⁴⁴

(2) *The State or United States in Criminal Cases*.—The law of England on this matter is not wholly free from doubt. But the theory that at common law the King could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming it; two attempts in the House of Lords, near the end of the seventeenth century, to reverse a reversal of an attainder; and an Irish case and two or three English cases, decided more than sixty years after the Declaration of Independence; in none of which does the question of the right of the Crown in this respect appear to have been suggested by counsel or considered by the court. And from the time of Lord Hale to that of

41. *Hinckley v. Gilman, etc.*, R. Co., 94 U. S. 467, 24 L. Ed. 166, approved in *Hovey v. McDonald*, 109 U. S. 150, 155, 27 L. Ed. 888.

Where, in the progress of a suit for the foreclosure of a mortgage, a receiver was appointed, against whom, after the foreclosure and sale of the mortgaged premises, a decree was rendered directing him to pay into court \$18,776.25, the balance found due from him on the settlement of his accounts. Held, that he had the right to appeal from that decree. *Hinckley v. Gilman, etc.*, R. Co., 94 U. S. 467, 24 L. Ed. 166, citing *Blossom v. Milwaukee, etc.*, R. Co., 1 Wall. 655, 17 L. Ed. 673.

42. *Farlow v. Kelley*, 131 U. S., appx. cci, 26 L. Ed. 427.

A motion to dismiss an appeal because it was taken by a receiver without first obtaining leave of the court will be denied, the allowance of the appeal is equivalent to leave by the court to the receiver to take an appeal. *Farlow v. Kelley*, 131 U. S., appx. cci, 26 L. Ed. 427.

43. *States in general*.—*United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216; *South Carolina v. Wesley*, 155 U. S. 542, 39 L. Ed. 254; *Tindal v. Wesley*, 167 U. S. 264, 212, 42 L. Ed. 137.

It appears from *South Carolina v. Wesley*, 155 U. S. 542, 545, 39 L. Ed. 254, 15 Sup. Ct. Rep. 230, that the state, by its attorney general, suggested to the court that these lands were held, occupied and possessed by the state through and by

its officer and agent, and were used for public purposes; and "without submitting the rights of the state to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy," it moved that the proceedings be dismissed. That motion was overruled and a writ of error sued out by the state was dismissed, the Chief Justice observing: "The state does not complain that it was refused leave to intervene, but that the circuit court, without the intervention of the state, refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The state was not a party to the record in the circuit court, and did not become a party by intervention, pro inter esse suo or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States v. Lee*, 106 U. S. 196, 197, 27 L. Ed. 171; *Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216." *Tindal v. Wesley*, 167 U. S. 264, 212, 42 L. Ed. 137.

44. *Clark v. Barnard*, 108 U. S. 436, 418, 27 L. Ed. 789, distinguishing *Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216, on the ground that in that case the state expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. And the circumstance that the appearance of the state was entered without prejudice to a demurrer does not affect the result.

Chadwick's Case, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive.⁴⁵

American Rule.—But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority, that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.⁴⁶

Reason of Rule.—In a few states, decisions denying a writ of error to the state after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it, would be to put him twice in jeopardy, in violation of a constitutional provision.⁴⁷ But the courts of many states, including some of the great authority, have denied, upon broader grounds, the right of the state to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.⁴⁸ In many of the states, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the state by positive statute. But the decisions conclusively show that under the common law, as generally understood and administered in the United States, and in absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.⁴⁹

States Allowing the Writ of Error.—In those states in which the government, in the absence of any statute expressly giving it the right, has been allowed to bring error, or appeal in the nature of error, after judgment for the defendant on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the question appears to have become settled by early practice before it was contested.⁵⁰

Act of February 6, 1889.—The first act of congress which authorized a criminal case to be brought from a circuit court of the United States to this court, except upon a certificate of division of opinion, was the act of February 6, 1889, c. 113, § 6, by which it was enacted that "in all cases of conviction" of a capital crime in any court of the United States, the final judgment "against the respondent" might, on his application, be re-examined, reversed or affirmed by this court on writ of error. 25 Stat. at L. 656. The writ of error given by that act was thus clearly limited to the defendant; and the terms and effect of the act of June 23, 1874, c. 469, § 3, concerning writs of error from this court to the supreme court of the territory of Utah, as well as those of the act of March 3,

45. *The state or United States in criminal cases.*—United States *v.* Sanges, 144 U. S. 310, 312, 36 L. Ed. 445, followed in *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114; *United States v. Rider*, 163 U. S. 136, 41 L. Ed. 103; *United States v. Ball*, 163 U. S. 670, 671, 41 L. Ed. 303; *United States v. Hewecker*, 164 U. S. 48, 41 L. Ed. 246; *Virginia v. Paul*, 148 U. S. 122, 37 L. Ed. 392; *Williams v. United States*, 168 U. S. 389, 42 L. Ed. 512.

46. *United States v. Sanges*, 144 U. S. 310, 312, 36 L. Ed. 445.

47. *United States v. Sanges*, 144 U. S. 310, 313, 36 L. Ed. 445.

48. *United States v. Sanges*, 144 U. S. 310, 313, 36 L. Ed. 445.

49. *United States v. Sanges*, 144 U. S. 310, 318, 36 L. Ed. 445.

50. *United States v. Sanges*, 144 U. S. 310, 316, 36 L. Ed. 445.

1879, c. 176, giving a writ of error from the circuit court of the United States to a district court, were equally restricted.⁵¹

The circuit court of appeals act of March 3, 1891, does not confer upon the United States the right to sue out a writ of error in any criminal case.⁵²

The provision of § 5, authorizing writs of error from this court in cases of capital or otherwise infamous crimes, is clearly limited in terms and effect (like the provision of the act of 1889, authorizing a writ of error in cases of capital crimes, and earlier acts, above cited) to convictions only.⁵³

The provision of § 6, giving the circuit courts of appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and cannot therefore be presumed to have been intended to confer upon the government the right to bring it.⁵⁴

In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the circuit court of appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of congress to make so serious and far reaching an innovation in the criminal jurisprudence of the United States.⁵⁵

Construction of Philippine Act.—The government no longer has a right of appeal in criminal cases in the Philippine Islands.⁵⁶

(3) *The United States in Civil Cases.*—Under an act of Congress approved March 3, 1887, 24 Stat. 505, c. 359, entitled an act to provide for the bringing of suits against the government of the United States, it was held, that as the right of appeal could be exercised by the United States before the enactment of this statute in the instance of any judgment of the court of claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district to circuit courts of the United States under this act.⁵⁷

1. **DEFENDANTS IN DEFAULT JUDGMENT.**—Persons who fail to appear and plead to the suit in the court below, whereby judgment was entered against them by default, are nevertheless entitled to sue out a writ of error, because they are parties to the suit and affected by judgment against them.⁵⁸

51. 18 Stat. 254; 20 Stat. 354; *United States v. Sanges*, 144 U. S. 310, 321, 322, 36 L. Ed. 445.

52. *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445.

53. In *United States v. Sanges*, 144 U. S. 310, 322, 36 L. Ed. 445, it was said: "Whether a writ of error by the defendant in a criminal case of lower grade would be included in the provisions of that section for bringing to this court cases in which the jurisdiction of the court below is in issue, or which involve the construction or application of the constitution of the United States, or the validity of a law of the United States, or the validity or construction of a treaty, or in which it is contended that the constitution or a law of a state contravenes the constitution of the United States, is not now before us for decision."

54. *United States v. Sanges*, 144 U. S. 310, 323, 36 L. Ed. 445.

55. *United States v. Sanges*, 144 U. S. 310, 323, 36 L. Ed. 445.

56. **Rule in Philippine Islands.**—*Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114, followed in *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128; *Mendezona v. United States*, 195 U. S. 158, 49 L. Ed.

136, citing *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445.

Military order, No. 58, as amended by act of the Philippine commissioner, No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, is repealed by the act of congress of July, 1902, providing immunity from second jeopardy for the same criminal offense. *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128; *Mendezona v. United States*, 195 U. S. 158, 49 L. Ed. 136.

57. **The United States in civil cases.**—*United States v. Davis*, 131 U. S. 36, 33 L. Ed. 93.

58. **Defendants in default judgment.**—In real actions, the death of the ancestor, without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant. If the heirs be made parties by order of the court in which the suit is brought, and judgment is entered against them by default for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment. "Being, then, parties to the suit,

m. *Mortgagor and Mortgagee*.—Not only is the purchaser at a foreclosure sale entitled to appeal from an order of confirmation, but also the mortgagor. "He may be satisfied with the sale which was made, may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the setting aside of one sale and the ordering of another may affect prejudicially or beneficially his interests, and because of that he has a right to be heard upon the question of setting it aside."⁵⁹ Where the mortgagor is interested in and affected by the decree of foreclosure and sale, he must be made a party to an appeal from such decree and be brought into this court, and a failure so to do, will result in a dismissal of the appeal.⁶⁰ The fact that a mortgagor, who is a party to a record in a suit to foreclose his mortgage, is interested in every order or decree in such a suit which gives the claim of an intervenor a priority over the mortgage, or a right to priority of payment out of the proceeds of the sale of the mortgaged property, seems obvious, because such an order or decree necessarily increases by the amount so paid the deficiency for which the mortgagor will remain personally liable after the sale of the property.⁶¹

B. Proper and Necessary Parties—1. **PLAINTIFFS IN ERROR**—a. *In General*.—All the parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will proceed to a decision upon the merits of the case.⁶² But parties having no legal interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal.⁶³

and affected by the judgment against them, they were clearly entitled to sue out a writ of error; and although the judgment was entered by default, for want of a plea, they may be injured not less by such judgment, than if it had been entered upon a verdict. If judgment in an action of trespass be rendered against one defendant by default, and in favor of the other defendant upon a plea, the former may alone bring a writ of error." *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515.

59. Mortgagor and mortgagee.—*Davis v. Mercantile Trust Co.*, 152 U. S. 590, 594, 38 L. Ed. 563.

In a decree for the foreclosure of a mortgage, the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 595, 38 L. Ed. 563.

60. Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563.

61. Davis v. Mercantile Trust Co., 152 U. S. 590, 595, 38 L. Ed. 563.

62. Plaintiffs in error in general.—*Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Hardee v. Wilson*, 146 U. S. 179, 181, 36 L. Ed. 933; *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 38 L. Ed. 563.

All the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule and the reasons therefor are fully stated in *Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953, and restated in *Hardee v. Wilson*, 146 U. S. 179, 181, 36 L. Ed. 933, and need not, therefore, be again repeated. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 593, 38 L. Ed. 563. See, also, *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. Ed. 76.

The reasons for the rule are stated in *Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953, and in *Hardee v. Wilson*, 146 U. S. 179, 181, 36 L. Ed. 933. Two of them are: (1) "That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed;" and (2) "that the appellate tribunal shall not be required to decide a second or third time the same question on the same record."

63. Basket v. Hassell, 107 N. S. 602, 27 L. Ed. 500; *Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 393; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Simpson v. Greeley*, 20 Wall. 152, 22 L. Ed. 338; *Cox*

b. *Real Parties in Interest*.—The real parties interested in the case must be made parties to the appeal.⁶⁴

c. *Parties to Joint Judgments and Decrees*.—(1) *In General*.—Where the interest is joint and the interest of all is affected by the judgment, the rule is universal, that all must join in the writ of error, else it is open to the other party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance, or by some equivalent action appearing in the record.⁶⁵ In equity causes, all parties against whom a joint decree is ren-

v. United States, 6 Pet. 181, 182, 8 L. Ed. 363; Amadeo v. Northern Assur. Co., 201 U. S. 194, 50 L. Ed. 722.

Intervenor.—Where the proceeds of an attachment sale are claimed by intervening parties who did not except to the action of the trial court in vacating the attachment and dismissing the action, and who were not made parties to the proceedings in error prosecuted from the judgment of the trial court to the supreme court of a territory, such intervenors are not essential parties to an appeal from the territorial supreme court to the United States supreme court. Central Loan & Trust Co. v. Campbell Commission Co., 173 U. S. 84, 90, 43 L. Ed. 623.

In accordance with the general rule that parties having no legal interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal, it was held, that an objection in an action on a policy of insurance that a writ of error sued out on behalf of a liquidating company to review a judgment for the defendant rendered in such action will not require a dismissal of the writ of error, where the defendants plead that the insured had no interest in the cause of action, because the policies and their proceeds had been duly sold and transferred to the liquidating company, and to sustain the plea a declaration is amended to show that the action was brought for the use of such company, and an allegation of the assignment of the policy to such liquidating company is asserted in the body of the declaration, and no objection in this regard was made below. Amadeo v. Northern Assur. Co., 201 U. S. 194, 50 L. Ed. 722.

64. Real parties in interest.—In Adams v. Law, 16 How. 144, 148, 14 L. Ed. 880, 882, a motion was made by defendant's counsel to dismiss the appeal on the ground "that there is no case, as entitled on the record; and that the real parties interested in the case, of which a record is filed, are not made parties to the appeal." After the decree was pronounced in the circuit court, the record states: "From which an appeal was prayed to the supreme court of the United States, on the 18th December, 1852, and to them it was granted." The word "defendants" is omitted in the prayer, but that must have been a clerical omission, as it appears the appeal was "granted to them," that is to the defendants. The title of the case, if incorrectly entered on the docket of this court, may

and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of them.

In a suit for the foreclosure of a mortgage given to secure a note, in which a personal judgment is asked against the maker, which trial results in a judgment against the maker for the payment of a debt, and in a decree for foreclosure against the other party defendant, it was held that the maker of the note could not appeal from the decree of foreclosure without joining his codefendant, and the appeal was dismissed. Nash v. Harshman, 149 U. S. 263, 37 L. Ed. 727, following Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 37 L. Ed. 443.

Where the proceedings instituted by an order requiring a receiver to file his account and a subsequent reference of that account to an auditor and the exceptions thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which he has placed in his hands, it was held that a motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit cannot prevail, because it was a side issue in the case, in which the complainants on the one side, and receiver on the other were real and interested parties. Hovey v. McDonald, 109 U. S. 150, 27 L. Ed. 888.

Where an alleged criminal is brought before a United States commissioner charged by a foreign consul with an extraditable crime, but is discharged by the United States district judge upon habeas corpus, the official character of this officer must be taken as sufficient evidence of his authority, and as the government he represents is the real party interested in resisting the discharge, the appeal is properly prosecuted by him on its behalf. Ornelas v. Ruiz, 161 U. S. 502, 40 L. Ed. 787, citing Wildenhus' Case, 120 U. S. 1, 30 L. Ed. 565.

65. Parties to joint judgments and decrees in general.—Smith v. Strader, 12 How. 327, 13 L. Ed. 1008; Davenport v. Fletcher, 16 How. 141, 142, 14 L. Ed. 879; Wilson v. Life Ins. Co., 12 Pet. 110, 9 L. Ed. 1032; O'Dowd v. Russell, 14 Wall. 992, 20 L. Ed. 837; Deneale v. Archer, 8 Pet. 526, 8 L. Ed. 1032; Williams v. Bank of United States, 11 Wheat. 414, 6 L. Ed. 508; Owens v. Kincannon, 7 Pet. 399, 8 L. Ed. 727; Todd v. Daniel, 16 Pet. 521, 10 L. Ed. 1054; Mussina v. Cavazos, 20

dered must join in an appeal, if any be taken; and when one of such joint defendants takes an appeal alone, and there is nothing in the record to show that his codefendants were applied to and refused to appeal, and no order is entered by the court, on notice, granting him a separate appeal in respect of his own interest, his appeal cannot be sustained.⁶⁶

How. 280, 289, 15 L. Ed. 878; Clifton v. Sheldon, 23 How. 481, 484, 16 L. Ed. 429; Masterson v. Howard, 10 Wall. 416, 19 L. Ed. 953; Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338; Feibelman v. Packard, 108 U. S. 14, 27 L. Ed. 634; Estis v. Trabue, 128 U. S. 225, 230, 32 L. Ed. 437; Beardsley v. Arkansas, etc., R. Co., 158 U. S. 123, 39 L. Ed. 919; Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563; Hardee v. Wilson, 146 U. S. 179, 36 L. Ed. 933; Mason v. United States, 136 U. S. 581, 34 L. Ed. 545; In re Humes, 149 U. S. 192, 193, 37 L. Ed. 698; Wilson v. Kiesel, 164 U. S. 248, 41 L. Ed. 422; Missouri, etc., R. Co. v. Evans, 175 U. S. 723, 44 L. Ed. 337; Fordyce v. Trigg, 175 U. S. 723, 44 L. Ed. 337; Sipperley v. Smith, 155 U. S. 86, 38 L. Ed. 79; Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76; Hanrick v. Patrick, 119 U. S. 156, 163, 30 L. Ed. 396; Mussina v. Cayazos, 6 Wall. 355, 18 L. Ed. 810; Downing v. McCartney, 131 U. S., appx. xcvi, 19 L. Ed. 757; Shannon v. Cayazos, 131 U. S., appx. lxxi, 15 L. Ed. 929.

Where a joint judgment is taken against several defendants in the court below, all such parties must be joined and their names set forth on a writ of error to this court. If one or less than all prosecute a writ of error, it will be dismissed for irregularity. *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032.

^{66.} *Beardsley v. Arkansas, etc., R. Co.*, 158 U. S. 123, 39 L. Ed. 919.

Suit by cestui que trust to set aside sales.—In the case of *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. Ed. 76, 14 Sup. Ct. 238, Stansbury, who was the cestui que trust under a deed of real estate, brought suit as complainant, against the trustee's heirs, and against certain others to whom a portion of the trust property had been set apart, and sold and conveyed, in certain partition proceedings, which were had before the complainant reached her majority. The result of the suit was that the conveyance and partition were decreed to be set aside. From this decree, appeal was taken by the trustee's heirs only. The complainant moved to dismiss. In opposition to the motion, affidavits of the other defendants were filed in the appellate court, to the effect that they had been advised by counsel that the appeal of the trustee's heirs was for the benefit of all defendants, and they said that the appeal was taken at the cost of the defendants. The court, in dismissing the appeal, said: "The real defendants, whose rights were affected by the decree appealed from,

were the parties claiming title under those proceedings, and they were necessary appellants from the decree setting aside those proceedings, and ordering the whole land to be conveyed to the plaintiff. * * *

It is quite clear that Inglehart's heirs could not appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them. This could only be shown by a summons and severance, or by some equivalent proceeding, such a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.

Codefendants in suit to set aside fraudulent conveyance.—In *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933, 13 Sup. Ct. 39, Wilson, the complainant, filed his bill against Minor and his wife and Hardee, alleging that a conveyance of land made by the said Minor to himself as trustee for his wife, and a certain other deed of the same lands subsequently made to Hardee, were without consideration, and that they were made with the intention of putting said lands beyond reach of creditors, of whom the complainant was one. A decree was entered holding that the decree in favor of Minor and his wife was void, and that the deed to Hardee was security only for a certain debt due him. Hardee appealed, but his codefendants did not join in the appeal, nor were they made parties thereto. It was held that Minor and his wife were necessary parties to the appeal, and the appeal was accordingly dismissed.

In *Sipperley v. Smith*, 155 U. S. 86, 38 L. Ed. 79, 15 Sup. Ct. 15, it appears that Sipperley & Co., consisting of A. F. Sipperley and H. S. Lee, made an assignment of partnership property to one Ross in trust to pay creditors in the order named: First, Grav and the Union Bank, in full; second, Mrs. Sipperley, Mrs. Walling, and H. A. Lee, in full; third, their remaining creditors. Suit was brought against Sipperley & Co. by Smith, Connor & Co., who were creditors, and an attachment was levied on the property upon the ground that it had been disposed of to defraud creditors. Thereupon the preferred creditors filed an intervening com-

There are two reasons for this. 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.⁶⁷

(2) *Principal and Surety*.—The sureties should be joined with the principal in a writ of error or an appeal sued out to the judgment entered against both the principal and surety. And the non-joinder of the sureties is ground for dismissing the writ of error. Though in such case the writ of error may be amended by inserting the names of the sureties therein under the authority conferred by § 1005 of the Revised Statutes, and the cause restored to the docket.⁶⁸ But it has been held that where the judgment is entered against the principal and sureties in a suit against a postmaster on his official bond, and the sureties sue out a writ of error

plaint, praying that they be paid as provided in the assignment. The assignment was decreed to be void, and the complaint of intervention was dismissed. An appeal was taken by Mrs. Sipperley, Mrs. Walling, H. A. Lee, and the Union Bank. No application for summons and severance as to M. J. Gray was found in the record, nor any order permitting severance; nor was any application made in the supreme court for a citation to H. S. Lee and Sipperley, nor did they or Gray make appearance in that court. On this state of the record, the appeal was dismissed.

Defendants in bill of peace.—In *Masterston v. Howard*, 10 Wall. 416, 19 L. Ed. 953, a bill of peace, and for the conveyance of a pretended title to a tract of land, was filed against one Maverick and one Herndon; and the decree was that complainant have and recover from the said Maverick and the said Herndon the said tract of land, and quieted the complainant's title to the same. From this decree Herndon appealed, and, in his petition for appeal, alleged that his codefendant refused to prosecute the appeal with him. In ordering the appeal dismissed in the supreme court, Mr. Justice Miller said: "In chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it renewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question, on the same record. * * *

Foreclosure of mortgages.—In *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 38 L. Ed. 563, 14 Sup. Ct. 695, the Mercantile Trust Company brought a foreclosure suit against the Kanawha & Ohio Railway Company, and a receiver was appointed, who took possession of the mortgaged property. An amended bill was filed, making two other railway companies additional parties defendant. Thereafter, Erwin Davis, the holder of certain of the bonds secured by the mort-

gage which was being foreclosed, intervened in the suit, and obtained an order that he be permitted to be heard upon any and all of the proceedings therein, for the protection of his interests as bondholder and stockholder of the Kanawha & Ohio Railway Company. A decree of foreclosure and sale was entered, and thereafter Davis took an appeal to the supreme court. The citation ran to the complainant and to each of the other defendants, and was served on the complainant and on all of the defendants except the Kanawha & Ohio Railway Company, the mortgagor. No supersedeas bond was filed. The property was sold, and the sale was confirmed, and from this order of confirmation Davis took a second appeal; but the bond and citation ran only to the Mercantile Trust Company. The appeal from the order of sale was dismissed because the mortgagor company was not made a party, nor were the purchasers at the foreclosure sale. The appeal from the decree of foreclosure was also dismissed. The court said: "The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary, in any given case, to determine that his interests would or would not be promoted by the setting aside of the decree. It is enough that in that matter he has a direct interest, and, because of this interest, common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense."

⁶⁷. *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508; *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Wilson v. Life Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032; *Masterston v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Hardee v. Wilson*, 146 U. S. 179, 181, 36 L. Ed. 933.

⁶⁸. **Principal and surety.**—*Inland, etc., Coasting Co. v. Tolson*, 136 U. S. 572, 34 L. Ed. 539; *In re Humes*, 149 U. S. 192, 37 L. Ed. 698.

to the judgment without joining the principal, the writ of error cannot be amended by adding the omitted parties as plaintiffs in error.⁶⁹

(3) *Summons and Severance or Equivalent Proceedings.*—As has been stated where a judgment or decree is joint, all the defendants must join in the appeal or writ of error or the one appealing must show a valid excuse for not joining them. This could only be shown by a summons and severance, or by some equivalent proceeding such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so; and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decrees against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.⁷⁰

69. *Mason v. United States*, 136 U. S. 581, 34 L. Ed. 545.

Mason v. United States, 136 U. S. 581, 34 L. Ed. 545, was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appeared and defended. The suit was abated as to two of the sureties, who had died, and the other sureties made default, and judgment by default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error, by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed.

Where the judgment is one against "the complainants and their sureties in their forthcoming bond," jointly for a definite sum of money, and there is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants, and execution is awarded against all of the parties jointly, the sureties should be joined in the writ of error; otherwise this defect cannot be reached by an amendment in or by this court under § 1005, and the court will of its own motion dismiss the case without awaiting the action of a party. *Estis v. Trabue*, 128 U. S. 225, 32 L. Ed. 437.

70. *Summons and severance or equivalent proceedings.*—*Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Todd v. Daniel*, 16 Pet. 521, 523, 10 L. Ed. 1054; *Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933; *Inglehart v. Stansbury*, 151 U. S. 68, 72, 38 L. Ed. 76; *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508.

The proper rule in cases of this sort,

where there are various defendants, seems to be that all the defendants affected by a joint decree (although it may be otherwise, where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all), should be joined in the appeal; and if any of them refuse or decline, upon notice and process (in the nature of a summons, and severance in a writ of error) to be issued in a court below, to become parties to the appeal, then that the other defendants should be at liberty to prosecute the appeal for themselves and upon their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed. *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054.

Less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below. "The regular mode of proceeding would have been to dismiss the appeal in this court below, and for a summons and severance, so that the defendant desirous of an appeal might take it, without the concurrence of those defendants who were opposed to it. Had the appeal been prayed in open court, and entered upon the record, the judge below might well have refused it, as the legal steps for its allowance were not taken. Under such circumstances, it was the duty of the judge to act in the presence of the opposing counsel. *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054." *Mussina v. Cavazos*, 20 How. 280, 15 L. Ed. 878.

It is equally well established, where some of the parties in interest refuse to join in the writ of error or appeal, that the others are entitled to resort to the process and proceeding of summons and severance to enable them effectually to remove the cause from the subordinate court into the appellate tribunal for re-examination. *Todd v. Daniel*, 16 Pet. 521, 523, 10 L. Ed. 1054; *Simpson v. Greeley*, 20 Wall. 152, 157, 22 L. Ed. 338.

The case of *Owings v. Kincannon* (7 Pet. 399, 8 L. Ed. 727) seems to have been misunderstood at the bar. The objection in that case was not that one or more of the defendants might not pursue

Summons and Severance.—In writs of error where one of the parties refused to join in the writ, the remedy was anciently by summons and severance, which barred such party from suing out the writ afterwards, and allowed the judgment to be enforced against him, while the other prosecuted the writ of error.⁷¹

Equivalent Proceeding.—But there is nothing technical about the summons and severance issued against the party to a joint judgment or decree refusing to join in the writ of error or appeal. It is probable that the appeal or writ of error would be good if it appears in any way by the record that the party refusing to join has been notified in writing to appear, and that he has failed to appear, or, if appearing, has refused to join. But the mere allegation of his refusal, in the petition of the appellant, does not prove this. There should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter.⁷²

The same effect will be given by this court to the allowance of a writ

an appeal for their own interest, if the others refused to join in it upon due notice, and process for that purpose from the circuit court; but that it did not appear that all the defendants were not ready and willing to join in the appeal, and that the appeal was brought by some of the appellants without giving the others an opportunity of joining in it, for the protection of their own interest, not only against the appellee, but against the appellants, as their own interests might be distinct from, or even adverse to, that of the appellants; and it was right and proper that all the parties should have an opportunity of appearing before the court, so that one final decree, binding upon all the parties having a common interest, might be pronounced. *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054, 1055.

71. Summons and severance.—*Master-son v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508; *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054.

72. Masterson v. Howard, 10 Wall. 416, 19 L. Ed. 953.

In the case of *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the

legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. *Hardee v. Wilson*, 146 U. S. 179, 181, 36 L. Ed. 933.

We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that *Maverick* had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join,

of error or an appeal, when one of the parties has been notified or requested in writing to join in the writ of error or appeal, and refuses to do so.⁷³

Refusal to Join after Notice Equivalent to Summons and Severance.—A notice by one of three defendants to his codefendants of his intention to prosecute a writ of error, and a refusal by them to co-operate, is equivalent to the old proceeding of summons and severance, and the one defendant can take his writ accordingly.⁷⁴

Nature and Scope of Remedy.—This remedy was allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error as in an appeal.⁷⁵

(4) *Limitations of General Rule.*—Whenever several parties are made defendants to a suit, and the judgment or decree as to any one of them is severable, or so separate and distinct as not to affect the rights of the other parties to the suit, such party may prosecute his appeal without joining others whose rights are not so affected.⁷⁶ Likewise a party to a joint decree or order who has parted

and it would estop that party from bringing another appeal for the same matter. *Hardee v. Wilson*, 146 U. S. 179, 182, 36 L. Ed. 933.

A statute of Washington Territory enacts that "a part of several coparties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other parties." One of two defendants in a cause served upon the other written notice, entitled in the cause, that he would, on a day therein named, "file a notice of appeal and stay-bond, and appeal said cause," and added, "You are herewith requested to join in said appeal." The other defendant answered in writing, "I hereby accept service of the above notice," and decline to join in an appeal in said cause. Held, that this was an exact and effectual compliance with the provision of the statute. *Ex parte Parker*, 120 U. S. 737, 30 L. Ed. 818.

73. *Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953.

74. **Refusal to join after notice equivalent to summons and severance.**—*O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857, citing *Masterson v. Howard*, 10 Wall. 416, 418, 19 L. Ed. 953. This was left a *quære* in *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508.

75. **Nature and scope of remedy.**—*Masterson v. Howard*, 10 Wall. 416, 417, 19 L. Ed. 953.

76. **Limitations of general rule.**—*Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 392; *Brewster v. Wakefield*, 22 How. 118,

16 L. Ed. 301; *City Nat. Bank v. Hunter*, 129 U. S. 557, 559, 32 L. Ed. 752; *Gulfillan v. McKee*, 159 U. S. 303, 40 L. Ed. 161; *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359; *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404.

"Cases arise beyond all doubt where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error may carry up the case without joining the others in the appeal or writ of error. *Forgay v. Conrad*, 6 How. 201, 203, 12 L. Ed. 404; *Germain v. Mason*, 12 Wall. 259, 261, 20 L. Ed. 392; *Cox v. United States*, 6 Pet. 172, 182, 8 L. Ed. 359." *Simpson v. Greeley*, 20 Wall. 152, 157, 22 L. Ed. 338.

Though several defendants may be affected by a judgment or decree, there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants. *Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 392, citing *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

Undoubtedly, the general rule is that all parties named as defendant, where the decree is a joint one in favor of the complainant, must join in the appeal. *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Masterson v. Howard*, 10

with all his interest in the subject matter thereof, and cannot be injured by such de-

Wall. 416, 19 L. Ed. 953; *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933, 13 Sup. Ct. Rep. 39. But this rule is not inexorable. In *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, a bill was filed by an assignee of a bankrupt against the bankrupt and three other defendants to set aside three several deeds to each as fraudulent. The deeds were set aside by decree of the court below, and one of the alleged fraudulent grantees took an appeal. A motion to dismiss was made on the ground that the other three defendants below were not joined. The motion to dismiss was overruled. The supreme court, speaking by Chief Justice Taney, said: "The appeal is taken by Samuel A. Forgay and Ann Fogarty, otherwise called Ann Wells, and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to them at different times and by separate conveyances, as mentioned in the proceedings, and it was not, therefore, necessary that they should join in this appeal." *Merchantile Trust Co. v. Kanawha, etc.*, R. Co., 58 Fed. Rep. 6, 12.

Illustrative Cases.—The United States instituted a suit in the district court of the United States for the eastern district of Louisiana, according to the practice of that state, upon a joint and several bond given by a navy agent and his sureties, and a verdict and judgment were entered in favor of the plaintiffs against three defendants; which entry stated the sums for which the defendants were jointly and severally liable to the United States, according to the judgment. On the trial one of the defendants took a separate defense; and he afterwards prosecuted a writ of error to this court, without joining the other two defendants in the writ. The other defendants also issued a separate writ of error; and the plaintiffs in error in each writ gave several appeal bonds. The court overruled a motion to dismiss the cause, the ground of the motion being, that but one writ of error could be sued out; and that all the defendants should have united in the same. *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359.

In the case of *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359, no doubt was entertained by this court that a writ of error might be entertained by the defendants severally, where the judgment operated under the laws of Louisiana as a several as well as joint judgment, although they might have united in the writ of error; and if any one chose not to prosecute it, the others might, upon a summons and severance, proceed alone. *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054, 1055.

Where the defendants claimed separate pieces of property, conveyed at different times by separate conveyances, and the decree against them was several, it was not necessary for all to enjoin in an appeal. *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, citing *Todd v. Daniel*, 16 Pet. 521, 523, 10 L. Ed. 1054.

In *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301, the bill was to foreclose a mortgage, and subsequent lienholders were made parties. A decree of foreclosure was entered. The mortgagor alone appealed from the amount of the judgment rendered against him on the mortgage debt. It was held, that it was not necessary to make the lien claimants parties to the appeal. Chief Justice Taney said: "Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were not necessary parties to a proceeding in equity to foreclose the mortgage, and none of them have appeared to the suit to contest the claim of Wakefield. And if it had been otherwise, yet the question in controversy here is the amount of the debt due from the appellant; and in the case of *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, this court decided that a defendant in equity, whose interest is separate from the other defendants, may appeal without them." And yet it is very evident that the other lienholders were very substantially interested with the mortgagor in reducing the amount due from the mortgagor to the mortgagee, because such a reduction would necessarily give them a better chance of collecting their claims out of the mortgaged property.

In *Danrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396, 7 Sup. Ct. Rep. 147, a plaintiff brought trespass to try title against one defendant. The other defendants were made parties on their own motion, according to the Texas practice, and claimed title to the land through the plaintiff, and adverse to both the plaintiff and the defendant. It was held that it was not necessary for the three defendants to join in a writ of error, because their interests were distinct. Mr. Justice Matthews says (page 164, 119 U. S., and page 151, 7 Sup. Ct. Rep.): "In equity, where interventions pro interesse suo have been permitted to those affected by the proceedings, but not parties to the original controversy, or where the original parties have distinct and separable interests, the same general rule applies to appeals as to joint decrees; but it has always been held that, where the decree is final and separate or separable, those not affected by it are not necessary parties to the appeal. *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404."

In *Germain v. Mason*, 12 Wall. 259, 20

cree, is not a necessary party to the appeal.⁷⁷ Where the decree determined the amount and priority of the respective liens, an appeal therefrom will not be dismissed on the ground that it was taken by one lien creditor, if it brings up so much of the case and such of the parties as are necessary for the determination of his rights.⁷⁸

(5) *Reversal*.—Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he cannot ask its reversal here on any matter which will injuriously affect their interests.⁷⁹

(6) *Dismissal*.—Where there is a joint judgment or decree in the court below against several defendants, and there is nothing in the record showing that the other complainants had notice of the appeal, or that they refused to join in it, the appeal will be dismissed,⁸⁰ unless upon notice the court grants a separate appeal to a single party.⁸¹ Subsequently the same rule was applied in cases where the cause was removed into this court by appeal, as appeals are subject to the same rules, regulations, and restrictions as are prescribed by law in case of writs of error.⁸²

L. Ed. 392, suit was brought by Mason and others to recover judgment for work and material furnished, and for the establishment of a mechanic's lien prior to those of a number of other lien claimants, made parties defendant. Judgment was rendered against Germain for the amount claimed, and it was decreed to be a lien prior to all the rest. It was held, that Germain might appeal alone from this decree without bringing in the other lien claimants, although it established the debt of Mason as a paramount lien on the real estate as to all the other defendants. It is very clear in this case that the interest of the other lien claimants to have the judgment in favor of Mason against Germain set aside was substantial, and that it affected the security of the other liens.

In *Railroads v. Johnson*, 15 Wall. 8, 21 L. Ed. 118, a mortgagee filed a bill for foreclosure against his mortgagor, and against certain trustees who held shares of stock as collateral security for the same debt, praying for the foreclosure of the land mortgaged, and the sale of it and the stock. The decree was against the mortgagor for foreclosure, and against the trustees for sale of the collateral. The mortgagor sued out a writ of error. It was held that the trustees were not necessary parties to the writ.

The appellants were the original defendants. After the decree of the circuit court, an appeal was claimed by all the defendants, and allowed by the court. A part of the defendants, who had originally claimed the appeal, before any further proceedings, abandoned it; and the residue of them, excepting Todd, have, since the appeal was filed, abandoned it, and Todd only has entered his appearance in the supreme court. The record stood in the names of all the appellants. A motion was made to dismiss the appeal, for irregularity and want of jurisdiction; on the ground that it cannot be maintained in behalf of Todd alone. The court refused to dismiss the

appeal. *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054, citing *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359, and explaining *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727.

77. *Mercantile Trust Co. v. Kanawha, etc.*, R. Co., 58 Fed. 6; *Aiken v. Smith*, 54 Fed. 894, both distinguishing *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933.

78. *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444.

In *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444, an assignee in bankruptcy brought suit in equity to sell land of the bankrupt, and to secure an adjustment of the liens upon the land against all the lien claimants and the general creditors. The decree determined the amount and priority of the several liens. It was held that one lien claimant who was defeated might appeal without making the other lien claimants parties to the appeal.

79. *Reversal*.—*Terry v. Abraham*, 93 U. S. 38, 23 L. Ed. 794.

80. *Dismissal*.—*Downing v. McCartney*, 131 U. S., appx. xcvi, 19 L. Ed. 757; *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933; *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054.

81. *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933; *Beardsley v. Arkansas, etc.*, R. Co., 158 U. S. 123, 39 L. Ed. 919.

82. *Owings v. Kincannon*, 7 Pet. 399, 402, 8 L. Ed. 727 (so held as to decrees in chancery); *Simpson v. Greeley*, 20 Wall. 152, 157, 22 L. Ed. 338; *Downing v. McCartney*, 131 U. S., appx. xcvi, 19 L. Ed. 757; *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508 (so held as to judgments at law); *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Wilson v. Life, etc.*, Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Shannon v. Cavazos*, 20 How. 343, 15 L. Ed. 929; *Hardee v. Wilson*, 146 U. S. 179, 36 L. Ed. 933.

"A motion is now made to dismiss this appeal, because the decree being joint,

2. DEFENDANTS IN ERROR—*a. In General.*—In the same way that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he is a party to the judgment in the court below, no one can be made a defendant in the writ of error, who is not a party to the judgment in the inferior court.⁸³

b. Husband and Wife.—Where the husband was not a party to the judgment in the court below, he is not a necessary party to the writ of error in this court.⁸⁴

c. Municipal Corporations.—Where both parties severally claim compensation for land taken by a city for public use, the city, the only adverse party to them in the proceedings below, is an indispensable party to the writ of error.⁸⁵

C. Intervention—1. WHO MAY INTERVENE.—The general rule is that persons interested who are not parties to the record may apply to the court for leave to intervene for the protection of their own interests.⁸⁶ Persons incidentally interested in some branch of a case will be allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below.⁸⁷ Though it has been held by this court that a person cannot intervene

all the parties ought to join in the appeal. Upon principle it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal. We have, however, found precedent in chancery proceedings, for our government in this case. But in the case of *Williams v. Bank of United States*, 11 Wheat. 414, 6 L. Ed. 508, which was a writ of error, sued out by one defendant to a joint judgment against three, the writ was dismissed, the court being of opinion that it had issued irregularly, and that all the defendants ought to have joined in it." *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727, 728.

The supreme court has announced and reiterated several times the rule that separate appeals to that court, by several parties asserting interests in common affected by a single decree, cannot be permitted, and has enforced the rule by dismissing appeals when necessary parties were not joined, nor barred of their right to appeal by refusing to join after due notice. *Owings v. Kincannon*, 7 Pet. 399, 402, 8 L. Ed. 727; *Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Hampton v. Rouse*, 13 Wall. 187, 20 L. Ed. 593; *Simpson v. Greeley*, 20 Wall. 152, 22 L. Ed. 338; *Sipperley v. Smith*, 155 U. S. 86, 39 L. Ed. 79, 15 Sup. Ct. 15.

Where all the parties defendant who are interested in the decree of the lower court do not join in the appeal, and there is no summons and severance in order to allow a prosecution of the appeal by any less than the whole number of the defendants against whom the decree was rendered, the appeal will be dismissed. *Estes v. Trabue*, 128 U. S. 225, 32 L. Ed. 437, 9 Sup. Ct. Rep. 58.

83. Defendants in error in general.—*Payne v. Niles*, 20 How. 219, 15 L. Ed. 895.

Where there was a judgment in the court below, and certain persons inter-

vened, whose petition for intervention was dismissed, they have no right to sue out a writ of error from the judgment to which they were not parties; nor was any process, upon their intervention, served upon the original defendant. *Payne v. Niles*, 20 How. 219, 15 L. Ed. 895.

84. Husband and wife.—Where a motion is made to dismiss a cause because the husband of the defendant in error is not named in the writ of error as a party to the proceeding, and it appears that the judgment was in favor of the wife and that the husband was a party authorizing her in the suit below, according to the forms of the Louisiana law, which require that the husband must be joined with the wife when she sues whether he has any interest or not, a motion to dismiss was denied because the plaintiff in error had served a citation from the husband although he was not named in the writ of error. *Marchand v. Livandais*, 127 U. S. 775, 32 L. Ed. 324, 8 Sup. Ct. Rep. 1389.

85. Municipal corporations.—*Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436.

86. Who may intervene.—*Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

87. Blossom v. Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673. (A purchaser at foreclosure sale admitted to appeal); *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *Hinckley v. Gilman, etc., R. Co.*, 94 U. S. 467, 24 L. Ed. 166 (where a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed receiver); *Sage v. Central R. Co.*, 96 U. S. 712, 24 L. Ed. 641 (where parties interested were allowed to appeal from an order confirming the sale); *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157 (where an appeal from an order for allowance of costs and expense to a complainant suing on behalf of a trust fund, was sustained); *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888 (where an appeal was allowed to be brought against

here who was no party to the suit below.⁸⁸

Joint Parties.—In equity, where interventions pro interesse suo have been permitted to those affected by the proceeding, but not parties to the original con-

a receiver from an order made in his favor).

It seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receivers under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances. So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court; these are at liberty to come before the master after the decree, and establish their claims to share in the distribution. *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673.

Subsequently to a decree pro confesso, additional parties were, by leave of the court, permitted to intervene as defendants, in the same manner and with like effect as if named in the original and supplemental bills. The case was then referred to a master, who computed, ascertained, and reported the amount of indebtedness, etc.; whereupon the court, after finding certain facts and overruling the exceptions of such intervening parties to his report, passed a final decree, but denied their right to an appeal therefrom. Held, that they had that right. *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123.

A holder of railroad bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation which entitles him to intervene, and to contest it, and to appeal from the adverse decision. *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

In a foreclosure suit, in which a municipal corporation within the corporate limits of which the mortgaged property is situate is allowed to intervene to put in a claim for taxes, may appeal to this court from a decision of the circuit court respecting this claim for taxes. *Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276.

When purchasers at a sale of a railroad under foreclosure purchase under an agreement, recognized by the court and referred to in the decree that a new mortgage shall be issued after the sale, a part of which is to be applied to the payment

of the foreclosure debt and a part to the payment of expenses, which expenses include the compensation of the trustees under the mortgage foreclosed, the purchasing committee named in that agreement have an interest in fixing that compensation which entitles them to intervene, and to be heard, and to appeal from an adverse decision. *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

The successful bidder at a foreclosure sale, although he is not a party to the record, either plaintiff or defendant, is never substituted for either; filed no bill or cross bill, or answer, but is simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder, yet this gives him a right of appeal from any decision of the circuit court in the foreclosure proceeding affecting his interests. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 38 L. Ed. 563, citing *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

88. *United States v. Patterson*, 15 How. 10, 14 L. Ed. 578, cited in *United States v. Innerarity*, 19 Wall. 595, 597, 22 L. Ed. 202.

A person cannot intervene here who was no party to the suit in the district court. And even if the practice of this court sanctioned such intervention, there is nothing to show his right to do so in this case. *United States v. Patterson*, 15 How. 10, 14 L. Ed. 578.

In proceedings in prize, parties who were not in any way parties to the litigation in the district court and are neither appellants nor appellees cannot come into this court and be heard as "interveners." *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583.

Where there was a judgment in the court below, and certain persons intervened, whose petition for intervention was dismissed, they have no right to sue out a writ of error from the judgment to which they were not parties; nor was any process, upon their intervention, served upon the original defendant. *Payne v. Niles*, 20 How. 219, 15 L. Ed. 895.

A respondent to a bill in equity in a state court, who allows a decree pro confesso to be taken against him in the lower state court, and is not a party to the appeal to the supreme court of the state, nor to the petition for a writ of error to this court, cannot make himself a party here against the objections of other respondents, who appeared and contested the cause in the state courts, and sued out the writ of error to this court. *Marsh v. Nichols*, 120 U. S. 598, 30 L. Ed. 796.

troversy, or where the original parties have distinct and separable interests, the same general rule as to appeals applies to joint decrees; but it has always been held that, where the decree is final and separate or separable, those not affected by it are not necessary parties to the appeal.⁸⁹ The same principle must govern judgments at law rendered in actions according to the forms of procedure prescribed by the statutes of the states in which they are tried where interventions are permitted, and the same rule must be adopted in reference to them.⁹⁰ When the statutes of the state in which an action at law in a federal court is tried permit a third party to intervene *pro interesse suo*, as in equity, and on the trial a general verdict is rendered and a general judgment entered against both the intervenor and the losing party, the intervenor is not a necessary party to the writ of error to this court, if his interest is clearly separable and distinct.⁹¹

2. CALIFORNIA LAND CASES.—The motives which may actuate parties intervening in a California land case to appeal, or the fact that an inconsiderable interest in the grant is represented by them, can have no influence upon the decision of the matter presented. The holder of the slightest interest, if properly before the court, has the right to insist upon a fair location of the quantity granted, however much location may clash with the wishes of his co-owners.⁹²

3. FROM FINAL JUDGMENTS AND DECREES.—The rule in equity is that an intervenor has the right to appeal from the final decree of the court.⁹³

4. PETITION.—If one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party.⁹⁴

5. RIGHTS OF INTERVENERS.—Where the appellants have intervened and become parties to the suit for the purposes of an appeal, and their separate appeal has been properly allowed and perfected, the case is here to the extent necessary for the protection of their interests. It is their separate appeal within the rule as to the form in which a severance may be obtained.⁹⁵ But where certain persons are permitted to intervene as parties, to prosecute an appeal for the protection of their several interests, they cannot object to orders made prior to the time they came into the proceedings, when they were not parties to the suit. For example, where persons did not intervene and become parties until after a decree rendered Oct. 22, they cannot object to an order made prior to that time.⁹⁶

D. Designation and Description of Parties—1. **NECESSITY FOR.**—**Writs of Error.**—Where the unsuccessful party brings a writ of error, all the parties to it must be named in the writ.⁹⁷ If a writ of error does not set out the

^{89.} *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404.

^{90.} *Hanrick v. Patrick*, 119 U. S. 156, 164, 30 L. Ed. 396.

^{91.} *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396.

^{92.} **California land cases.**—*United States v. Armijo*, 5 Wall. 444, 18 L. Ed. 492.

^{93.} **From final judgments and decrees.**—*Ex parte Jordon*, 94 U. S. 248, 24 L. Ed. 123; *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559.

^{94.} **Petition.**—*Ex parte Cutting*, 94 U. S. 14, 21, 24 L. Ed. 49.

^{95.} **Rights of interveners.**—*Masterson v. Howard*, 10 Wall. 416, 19 L. Ed. 953; *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

^{96.} *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

Where some of a number of first mort-

gage bondholders were permitted to intervene as parties to prosecute, for the protection of their several interests, an appeal from the decree for a sale of the property, and the appeal not having been made a supersedeas, the decree was executed, they cannot object to orders made prior to the decree, nor assign for error any part of it which is not injurious to their interests. *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

^{97.} **Designation and description of parties.**—*Smith v. Clark*, 12 How. 21, 22, 13 L. Ed. 875.

Where the order allows the claim, specifying the persons to whom allowed and the amounts, and the body of the order states that the plaintiffs in the cross suit pray an appeal to this court; and a subsequent decree orders the payment of the claims allowed by the aforesaid order, and contains the prayer by the plaintiffs

names of all the parties to the judgment of the circuit court, the case will be dismissed.⁹⁸

Appeals.—And the reason for requiring all the parties, whose interests are to be affected by the judgment, to be named in the writ of error, applies with equal force to the case of an appeal from a decree.⁹⁹

Motion to Docket Causes.—And the same principle was applied to a writ of error docketed under the 43d rule.¹

Amendment—Where a writ of error is defective in the statement of the parties thereto, the right to amend is not absolute, under § 1005, Rev. Stat.; but the court, in its discretion, may allow the requisite amendment to be made upon such terms as it may deem just.²

2. **SUFFICIENCY**—a. *In General.*—It is not a fatal defect in a writ of error that it describes the parties as plaintiffs and defendants in error, as they appear in this court, instead of describing them as plaintiffs and defendants, as they stood in the court below, if the names of all the parties are given correctly.³

b. *Christian Names of Parties.*—The omission of the Christian name of one of the plaintiffs below is not error. At any rate such an objection cannot be taken advantage of after judgment.⁴

in the cross suit for an appeal from said decree, it was held that the order and decree appealed from sufficiently designates all the appellees by name. *Miltenberger v. Logansport, etc., R. Co.*, 106 U. S. 286, 27 L. Ed. 117.

Omission to name plaintiffs in error in writ.—In certain proceedings for the sale of property mortgaged, the widow and children of the deceased owner of the property were made defendants. The district court of Louisiana gave a judgment in favor of the plaintiffs. The widow was entitled to her community in the property mortgaged, and had taken the property at the appraisal and estimation. The writ of error to the district court of Louisiana was issued in the name of "The heirs of Nicholas Wilson," without naming any person as plaintiff. The widow of Nicholas Wilson did not join in the writ of error. The writ of error was dismissed on the two grounds—that no person was named in it, and that the widow of Nicholas Wilson had not joined in it. *Wilson v. Life, etc., Ins. Co.*, 12 Pet. 1440, 9 L. Ed. 1032, citing *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032.

Where it appears by the writ of error that there are parties to the judgments below not personally named in the writ, it must be dismissed. Thus a writ in the name of the "heirs of Nicholas Wilson," must be dismissed. So also a writ describing the plaintiffs in error as "Mary and others," because the name should be set forth that this court may render the proper judgment in the case, and this is not done by naming some of them merely "others." *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Wilson v. Life, etc., Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032; *Mussina v. Cavazos*, 6 Wall. 355, 362, 18 L. Ed. 810.

98. *Smith v. Strader*, 12 How. 327, 13 L. Ed. 1008.

99. *Smith v. Clark*, 12 How. 21, 22, 13 L. Ed. 875.

Where the title of an appeal is "*William A. Freeborn & Co. v. The Ship Protector and owners*," a motion to dismiss the case from the docket for want of jurisdiction, upon the ground of a defect of the title of the parties in the appeal as allowed, will be granted; because no difference exists between writs of error and appeals as to the manner in which the names of the parties should be set forth. And this rule applies to appeals in admiralty. *The Protector*, 11 Wall. 82, 20 L. Ed. 47, citing *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032, *Wilson v. Life, etc., Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032; *Smith v. Strader*, 12 How. 327, 13 L. Ed. 1008; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879.

1. *Smith v. Clark*, 12 How. 21, 22, 13 L. Ed. 875.

Where a motion is made to docket and dismiss a case under the 43d rule of this court, the certificate of the clerk of the court below, upon which the motion is founded, must state the names of the parties to the suit. It is not enough to say, *Joseph W. Clark and others*. The names of the "others" ought to be set forth. *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875.

2. *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 3.

In *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436, the court declined to allow an amendment to a writ of error so as to cure a defect in the parties, inasmuch as the question made by the assignment of error had been settled by repeated decisions, and therefore was no longer open to discussion here.

3. **Sufficiency in general.**—*Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

4. **Christian names of parties.**—The plaintiff Sigg was denominated in the petition and writ "*J. J. Sigg*." The omission of his Christian name at full length was alleged as error. By the court: He

c. *Must Be Described by Individual Names.*—It is also well settled that the writ of error or appeal must describe the parties by their individual names, and in no other way.⁵

"And Others."—For example the name of one or more of them "and others" is not a sufficient description to bring those not named before the court.⁶ And the same principle was applied to a writ of error docketed under the 43d rule.⁷

d. *Partnerships.*—**In General.**—Where a writ of error describes the judgment as rendered in favor of a firm, without naming the persons who compose the firm, such a writ is irregular, and this court will not undertake to review a judgment thus described, and a motion to dismiss the writ of error will be allowed.⁸

"And Co."—Where a writ of error is taken out in the name of the firm, but it merely describes the parties by the name of the firm, and designates some of the parties by the expression "& Co." without naming in the writ of error the individuals who compose the firm, it will be dismissed.⁹

Amendments.—Prior to the enactment of § 1005 of the Revised Statutes allowing amendments of writs of error in certain cases, it was held that where an appeal is taken in the names of the individual members of a firm instead of in the name of the firm, the appeal would be dismissed on account of such irregularity.¹⁰ But now where the record shows who are the members of a partnership, in the name of which an appeal has been taken, the defect may, under § 1005, Rev. Stat., be cured by an amendment substituting their names.¹¹

may have had no Christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the name of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made; was not the partner of Theodore Nicolet & Co.; advantage should have been taken of it sooner. It is too late to allege it as error in this court. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

5. **Must be described by individual names.**—It is well settled that this court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the expression "& Co." or the expression "and others," or in any other way than by their individual names. *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Wilson v. Life, etc., Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879; *Mussina v. Cavazos*, 6 Wall. 355, 361, 362, 18 L. Ed. 810; *Miller v. McKenzie*, 10 Wall. 582, 19 L. Ed. 1043; *The Protector*, 11 Wall. 82, 2 L. Ed. 47; *Estes v. Trabue*, 128 U. S. 225, 228, 32 L. Ed. 437.

6. *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875.

This court has undoubtedly, from the case of *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032, to that of *The Protector* 11 Wall. 82, 20 L. Ed. 47, held that all the parties to the judgment must be named in the writ of error, and that the use of the name of one of the parties, with the addition of the words, "and others," as "Joseph W. Clark and others," does not satisfy the requirement, but on the contrary shows that there were parties to the judg-

ment or decree in the inferior court who are not named in the writ. It is upon this ground that the judgment in the case of *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875, is distinctly placed by Chief Justice Taney in the opinion. *Gumbel v. Pitkin*, 113 U. S. 515, 518, 28 L. Ed. 1128.

A writ of error brought in the name of "Mary Deneale and others," dismissed for irregularity. A new one in due form may be brought. *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032.

A writ of error dismissed as defective in respect to parties, where the suit was against four persons by name, and the writ recited that it was against two which it named, "and others." *Miller v. McKenzie*, 10 Wall. 582, 19 L. Ed. 1043.

7. *Smith v. Clark*, 12 How. 21, 22, 13 L. Ed. 875.

Where a motion is made to docket and dismiss a case under the 43d rule of this court, the certificate of the clerk of the court below, upon which the motion is founded, must state the names of the parties to the suit. It is not enough to say "Joseph W. Clark and others." The names of the "others" ought to be set forth. *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875.

8. **Partnerships in general.**—*Godbe v. Tootle*, 154 U. S. appx., 376, 19 L. Ed. 831, citing *Mussina v. Cavazos*, 6 Wall. 355, 362, 18 L. Ed. 810.

9. *Estes v. Trabue*, 128 U. S. 225, 229, 32 L. Ed. 437, citing *Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 599.

10. *The Protector*, 11 Wall. 82, 20 L. Ed. 47.

11. *Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 590, explaining *The Protector*, 11 Wall. 82, 20 L. Ed. 47.

In *Moore v. Simonds*, 100 U. S. 145, 25

3. **PRESUMPTIONS ON APPEAL.**—Where the writ gives all the names of the parties as they are found in the record of the case in the circuit court, and where there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and would lead to a manifest injustice. Accordingly a writ of error which describes the defendants in error by their firm names, is sufficient.¹²

4. **VARIANCE.**—Where there is a variance between the writ of error and proof or between the citation and writ of error, the case will be dismissed.¹³

5. **EXCEPTIONS AND OBJECTIONS.**—Objections to the erroneous designation or description of the parties cannot be taken advantage of after judgment.¹⁴

E. Death of Party.—1. **IN GENERAL.**—When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.¹⁵ This section is applicable to writs of error.¹⁶

2. **OF PLAINTIFF IN ERROR.**—**Survivability of Action in General.**—In writs

L. Ed. 590, an appeal was taken in the name of a firm, but it was taken when § 1005 was in force, and the bond showed the names of the individual members who composed the firm. This court said: "We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for that reason we will not dismiss the appeal." *Estes v. Trabue*, 128 U. S. 225, 229, 32 L. Ed. 437.

12. **Presumptions on appeal.**—*Gumbel v. Pitkin*, 113 U. S. 545, 549, 28 L. Ed. 1128, distinguishing *The Protector*, 11 Wall. 82, 20 L. Ed. 47.

Although the writ of error does not set forth the names of the members of the several firms mentioned in the writ as defendants, yet "where the writ gives all the names of the parties as they are found in the record of the case in the circuit court, and where there is nothing to show that any other person was a party than such as are so named," this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and would lead to a manifest injustice." *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. Ed. 1128, reviewing and distinguishing *The Protector*, 11 Wall. 82, 20 L. Ed. 47.

13. **Variance.**—Writs of error dismissed in two cases: in one of which were but three plaintiffs in error, while the citation presented four; and in the other where the names in the citation were different

from those in the writ of error; bonds, moreover, in both cases reciting but one person as plaintiff in error, when there were in fact three. *Kail v. Whitmore*, 6 Wall. 451, 18 L. Ed. 862.

A writ of error dismissed as defective in respect to parties, where the suit was against four persons by name, and the writ recited that it was against two which it named, "and others." *Miller v. McKenzie*, 10 Wall. 582, 19 L. Ed. 1043.

14. **Exceptions and objections.**—*Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

15. **Death of party in general.**—Rev. Stat., § 955; *Dolan v. Jennings*, 139 U. S. 385, 35 L. Ed. 217.

16. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

Where deceased has assigned his interest.—Where in an action on a policy of insurance, in which the insured was originally named as sole plaintiff, the insured dies after judgment in favor of the defendant, this court will not dismiss a writ of error sued out to review the judgment, because the action had not been revived below; the death of the insured was not suggested on the record, and no notice of intention to take out the writs was given to his succession, where the plaintiff pleads and proves that the insured had no interest in the cause of action, because the policies and their proceeds had been duly transferred and sold to another. *Amadeo v. Northern Assur. Co.*, 201 U. S. 194, 50 L. Ed. 722.

of error upon judgments already rendered, in personal actions, if the plaintiff in error dies before assignment of errors, the writ abates at common law; but if, after assignment of errors, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous, and may then revive it against the representatives of the plaintiff.¹⁷

Where, pending a writ of error in an action which does not survive by law, the plaintiff dies, the writ of error will be abated.¹⁸

Damages for Personal Injuries.—Where the original plaintiff in an action to recover damages for personal injuries dies after verdict and judgment for the defendant in the court below, and pending a writ of error in this court upon the plaintiff's exception to the rulings and instructions at the trial, the writ of error will be dismissed.¹⁹

Real Actions.—And this court, following the rule laid down in personal actions, decided that in real actions, the death of neither party pendente lite operates to abate the writ of error. "There seems no good reason why, in case of the death of his ancestor, pending proceedings, he (the heir) may not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions."²⁰

Effect of Failure to Make Substitution.—Where upon the suggestion of the death of plaintiff in error, leave is granted by this court to make the representatives of deceased parties at a prior term of this court parties, but the proper parties have not been made at a subsequent term, the writ of error will be abated, and the cause remanded to the circuit court to be proceeded in according to law and justice.²¹

Death of Accused in Criminal Cases.—The death of the accused in a criminal case brought by writ of error abates the suit.²²

3. OF DEFENDANT IN ERROR.—But a writ of error, in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a scire facias may issue to compel them.²³

Application for New Writ.—Where, pending a writ of error to this court, subsequently dismissed, the defendant in error dies and the other side wishes to take a new writ, application should be made to the court below for the purpose of reviving the suit in the name of the representatives of the deceased. A writ of error can then regularly issue. A motion in this court to revive the writ by suggesting the death and substituting the representatives as parties to the record is not

17. In case of death of plaintiff in error. —Green v. Watkins, 6 Wheat. 260, 5 L. Ed. 256.

18. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Mills v. Green, 159 U. S. 651, 654, 40 L. Ed. 293.

19. Damages for personal injuries. —Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

"In Green v. Watkins, 6 Wheat. 260, 262, 5 L. Ed. 256, it was said by Mr. Justice Story, following Tidd's Practice, 1096, that a writ of error in a personal action would not abate if the plaintiff in error died after assignment of errors. But the case before the court was a real action, in which, as he observed, the right descended to the heir. And there is nothing in Tidd's Practice, or in the authorities there cited, which countenances the theory that a writ of error in an action, the cause of which would not survive, either to heirs or to personal representatives, would not be abated by the death of the only person who could maintain the ac-

tion." Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 702, 38 L. Ed. 311.

20. A motion by the defendant in error to dismiss the writ of error in a real action, upon a suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court, will be overruled. Green v. Watkins, 6 Wheat. 260, 261, 5 L. Ed. 256; Macker v. Thomas, 7 Wheat. 530, 5 L. Ed. 515.

21. Phillips v. Preston, 11 How. 294, 13 L. Ed. 702; Barribeau v. Brant, 17 How. 43, 15 L. Ed. 31.

22. Death of accused in criminal cases. —List v. Pennsylvania, 131 U. S. 396; Menken v. Atlanta, 131 U. S. 405.

Where the death of the plaintiff in error in the cause is suggested by counsel for the plaintiff in error, and it appears to the court that it was a criminal case, such death abates the case, and therefore the writ of error will be dismissed. Menkin v. Atlanta, 131 U. S. 405.

23. Of defendant in error. —Green v. Watkins, 6 Wheat. 260, 5 L. Ed. 256.

regular. If the court below should refuse an application such as that above contemplated, in the circumstances mentioned, then the writ may, from necessity, issue in the name of the representative in the usual way, serving on them the citation to appear at the next term.²⁴

Failure of Appellant to Appear.—Where the death of the appellee is suggested, and the counsel for his executor offer to enter his appearance for the executor, the appeal will be dismissed if no person appears to prosecute the suit for the appellants.²⁵

Decree against Persons Substituted.—Where the cause has been heard in this court and has proceeded to final hearing, the decree will be absolute against the heirs and representatives of the deceased appellee, where the counsel for the appellee had undertaken to appear for the heirs and representatives of the original appellee, deceased, and has filed in the office of the clerk of this court a waiver of publication, and has failed to appear.²⁶

4. OF ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS.—**In General.**—"The judiciary act of 1789, 1 Stat. 90, ch. 20, § 31, provided that 'if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.' This was re-enacted in the Revised Statutes as § 956, and is substantially a copy of the act of 8 and 9 W. III., c. 11, § 7, which it was held, in *Clarke v. Rippon*, 1 B. & Ald. 586, was applicable to writs of error."²⁷

Thus, where one of three parties, plaintiffs in a writ of error, dies after the writ of error is issued, it is not necessary to make the heirs and representatives of the deceased parties to the writ of error, as the cause of action survives to

24. **Application for new writ.**—*McClane v. Boon*, 6 Wall. 244, 18 L. Ed. 835, citing *Kellogg v. Forsyth*, 24 How. 186, 16 L. Ed. 654.

25. **Failure of appellant to appear.**—*Hook v. Linton*, 10 Pet. 107, 9 L. Ed. 363.

26. **Decree against persons substituted.**—*Hunt v. Blackburn*, 131 U. S. 403.

27. **Of one of several plaintiffs or defendants in general.**—"Lord Ellenborough, in giving that judgment, said: 'The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action.' * * * This court gave the same effect to our statute in *McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002." *Moses v. Wooster*, 115 U. S. 285, 287, 29 L. Ed. 391. See *United States v. Sampson*, 187 U. S. 436, 47 L. Ed. 248.

"Section 956 of the Revised Statutes, like the statute of 8 & 9 Will. 3, ch. 11, § 7, by which the death of one of several plaintiffs or defendants does not abate an action which survives to or against the survivor of them, has been held to extend to writs of error, because, as said by Lord Ellenborough, and repeated by Chief Justice Waite: 'The proceeding is an action which is commenced by a writ, and the cause of the action is the damage

sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action.' *Clarke v. Rippon*, 1 B. & Ald. 586; *Moses v. Wooster*, 115 U. S. 285, 29 L. Ed. 391; *McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002." *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 702, 38 L. Ed. 311.

Where one of the complainants in the court below has died after the decree and before appeal is taken, and so far as disclosed by the record, the cause of action did not on the death of one of the complainants survive to the other, nor could there have been, nor was there any severance between the surviving party and the legal representatives of the deceased plaintiff; nor was his death suggested on the record by the appellants, except as the titles to the petitions for appeal, and the directions of the citations, might be considered as such; no order was procured directed to the proper representatives of the deceased's estate or notifying them of the appeal, nor have they voluntarily appeared, and more than four years have elapsed since the final decree was entered, the objection is fatal to our jurisdiction, and the appeal must be dismissed. *Dolan v. Jennings*, 139 U. S. 385, 35 L. Ed. 217, distinguishing *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 432.

the two other plaintiffs in error.²⁸ Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the due prosecution of an appeal, notwithstanding the survivorship of others. If that should be so, the court can, with propriety, direct that the appeal be dismissed, unless it be properly revived within a limited time.²⁹

Where both parties to the cause die pending the appeal in this court and before the case is docketed here, this court will declare the suit abated by the death of the parties, and have the representatives of those in interest to proceed.³⁰

5. **PLACE OF REVIVAL.**—Where a party dies before the appeal is allowed and prosecuted, the suit should be revived in the subordinate court.³¹

6. **PERSONS TO BE SUBSTITUTED.—By Rules of Court.**—Whenever, pending a writ of error, or appeal, in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon, the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the same reversed, if it be erroneous. Provided, however, that a copy of every such order shall be printed in some newspaper, at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the supreme court then next ensuing.³²

“By the judiciary act of September 24, 1789, ch. 20, § 31 (1 Stat. 90), following the statute of 8 & 9 Will. 3, ch. 11, §§ 6, 7, and since embodied as follows in the Revised Statutes, ‘when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment.’” This section is applicable to writs of error.³³

Statement of General Rule.—Where the plaintiff in error dies pending the appeal, the only persons who, upon principle and the rules of this court, can be permitted to appear in his stead, are those who, upon his death, succeed to the interest he then had and upon whom the estate then devolves.³⁴

A foreign administrator should not properly be substituted as appellee in a suit upon the death of his decedent, because he has no standing in another state in the absence of statute.³⁵

28. *McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002.

29. *Moses v. Wooster*, 115 U. S. 285, 287, 29 L. Ed. 391.

30. **Death of both parties.**—*State v. Demarest*, 110 U. S. 400, 28 L. Ed. 191.

31. **Place of revival.**—*Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260.

32. **Persons to be substituted.**—Rule 31, 6 Wheat. XIII.

By the rules of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule. *Green v. Watkins*, 6 Wheat. 260, 5 L. Ed. 256.

33. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 691, 38 L. Ed. 311.

34. Where, soon after the action was commenced, a plaintiff conveyed his interest to a trustee, and died after appeal to this court, held, the trustee acquired no new interest by his death, and could not be substituted as his representative, on the appeal. The only persons who can appear, in his stead, are those, who, upon his death, succeed to the interest he then had. Where the death of a party was suggested at December term, 1851, and his legal representatives did not appear by December 10, term, 1854, held, that under Rule 61, the bill must as to him be entered abated. *Barribeau v. Brant*, 17 How. 43, 15 L. Ed. 34.

35. The court—admitting that an administrator of a decedent appointed in one state (that of his decedent's residence), cannot, in the absence of statute,

VII. WAIVER OF RIGHT.

A. By Release of Errors—1. IN GENERAL.—A release of errors may be filed as a bar to the writ.³⁶

Under the law of Virginia, a confession of judgment, by the plaintiff in error, in the original suit, is a release of errors.³⁷

2. CONSENT DECREES.—When a decree is rendered by consent, no errors can be considered here on an appeal which were in law waived by such a consent.³⁹ In other words, if, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing.⁴⁰

3. WHO MAY RELEASE ERRORS.—The trustee in a mortgage executed to secure railroad bonds represents the bondholders in a suit to foreclose the mortgage, and he may bind them by his release of errors, where his relation to them is not changed between the time of the entry of the decree and the time of the execution of the release.⁴¹ The trustee in a mortgage executed by a railroad company to secure its bonds, may execute a release of his right to appeal, and his waiver binds all who act in his name as trustee.⁴² And a stranger who has been allowed to intervene in a suit and to appeal in the name of the trustee is likewise bound.⁴³

4. HEARING AND DETERMINATION.—A release of errors, although not found in the transcript of the record, may be properly brought before this court. The reason for this rule is stated as follows by Mr. Justice Miller: "But this court is compelled, as all courts are, to receive evidence dehors the record, affecting their proceedings in a case before them on error or appeal. The death of one of the parties after a writ of error or appeal requires a new proceeding to supply its place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced."⁴⁴

B. Implied Waiver or Release of Errors—1. IN GENERAL.—No waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel.⁴⁵

maintain an action in another state, to enforce an obligation there, given to his decedent—yet refused to set aside a decree given by it nine terms ago in favor of such an administrator, who, after an appeal taken and perfected to this court by his decedent, in a suit by him to enforce an obligation in a state where he was not domiciled, had been substituted by order of court as appellee in the suit; the decedent dying and the substitution having been made in the absence of all ancillary administration, and without opposition by the debtor or by any one. *Noonan v. Bradley*, 12 Wall. 121, 20 L. Ed. 279.

36. By release of errors in general.—*Dakota County v. Glidden*, 113 U. S. 222, 225, 28 L. Ed. 981.

37. *Mandeville v. Holey*, 1 Pet. 136, 137, 7 L. Ed. 85.

39. Consent decrees.—*United States v.*

Babbitt, 104 U. S. 767, 26 L. Ed. 921, citing *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932.

40. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 295, 25 L. Ed. 932.

41. Who may release errors.—*Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998, citing *Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605, 611, 612, 25 L. Ed. 757; *First Nat. Bank v. Shedd*, 121 U. S. 74, 86, 30 L. Ed. 877; *Barnes v. Chicago, etc., R. Co.*, 122 U. S. 1, 30 L. Ed. 1128.

42. *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998.

43. *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998.

44. Hearing and determination.—*Elwell v. Fosdick*, 134 U. S. 500, 513, 33 L. Ed. 998, citing *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981.

45. Implied waiver or release of errors in general.—*Embry v. Palmer*, 107

Estoppel.—When an appellant seeks to reverse a decree because too large an allowance was made to the appellees out of a fund in which he and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time here.^{45a}

2. ACCEPTANCE OF BENEFITS—*a. In General.*—The acceptance by the appellants of what is confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from the appellees anything, on the reversal of the decree, to which they would otherwise be entitled.⁴⁶

b. Payments on Judgment.—(1) *In General.*—The mere fact that the amount of money ordered by the decree below to be paid to the plaintiff in error as a condition to granting the relief, has been accepted by him, is not a release of errors especially where the amount awarded paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him.⁴⁷

(2) *Partial Satisfaction.*—Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was, a bar to a writ of error.

U. S. 3, 8, 27 L. Ed. 346; *Gilfillan v. McKee*, 159 U. S. 303, 312, 40 L. Ed. 161.

45a. **Estoppel.**—*Terry v. Abraham*, 93 U. S. 38, 23 L. Ed. 794.

46. **Acceptance of benefit in general.**—*Embry v. Palmer*, 107 U. S. 3, 8, 27 L. Ed. 346; *Reynes v. Dumont*, 130 U. S. 354, 394, 32 L. Ed. 934.

47. **Payments on judgment in general.**—*Embry v. Palmer*, 107 U. S. 3, 27 L. Ed. 346; *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268; *Reynes v. Dumont*, 130 U. S. 394, 32 L. Ed. 934.

Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error. "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655.

"In no instance within our knowledge," says the court, in *Erwin v. Lowry*, 7 How. 172, 184, 12 L. Ed. 655, "has an appeal or writ of error been dismissed on the assumption that a release of errors

was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the court to restore the parties to their rights." That was a case where the appellant received the money which by the decree he recovered of the appellee, and is, therefore, a stronger case than the present, as his action would seem to ratify the decree. *O'Hara v. McConnell*, 93 U. S. 159, 174, 23 L. Ed. 840.

A writ of error lies only on a final judgment, and therefore the plaintiff, when he accepts full satisfaction for his judgment, removes the only foundation on which the writ of error can be allowed. *United States v. Dashiell*, 3 Wall. 288, 18 L. Ed. 268, 270.

"While the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal, there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever. Clearly his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund. There is nothing inconsistent in his action in accepting the amount awarded to him from the special fund, and appealing from the refusal of the court to award him the general fund." *Gilfillan v. McKee*, 159 U. S. 303, 311, 40 L. Ed. 161.

where it appeared that the levy was made, or the payment was received prior to the service of the writ, and there is no well considered case which affords the slightest support to any such proposition. Subsequent payment, unless in full, would have no greater effect. Where the alleged satisfaction is not in full, and was obtained prior to the allowance of the writ of error, the authorities are unanimous that it does not impair the right of the plaintiff to prosecute the writ.⁴⁸

3. ENFORCEMENT OF JUDGMENT BY EXECUTION.—Where the execution is issued before the writ of error is sued out, if the sheriff has commenced to levy under the execution, he must proceed to complete what he has begun; but if, when notified of the writ of error, he has not commenced to levy, he cannot obey the command of the execution. Even the levy of the execution after the supersedeas has commenced to operate is no bar to the writ of error; but the court, on due application, will enjoin the proceedings and set the execution aside and it has been held that the sheriff and all the parties acting in the matter, are liable in trespass. Neither the decisions of the courts, therefore, nor text writers afford any countenance to the theory that partial satisfaction of the execution operates as an extinguishment of the judgment, or a release of errors, or that it takes away or impairs the jurisdiction of this court.⁴⁹

4. PERFORMANCE OF JUDGMENT OR DECREE.—In General.—The performance of a decree does not deprive the party so performing of a right of appeal. In other words, an appeal or writ of error will not be dismissed on the assumption that a release of errors is implied from the fact that money or property has changed hands by force of a judgment or decree. If the judgment is reversed, it is the duty of the court to restore the parties to their rights.⁵⁰

Hence a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. The defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.⁵¹

Nor does the making of a conveyance, under order of the court deprive the defendant of the right of appeal.⁵²

Payment of Judgment by Appellant.—In General.—There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. The defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.⁵³

The payment of taxes, whether voluntary or compulsory, after the dismissal of a suit to enjoin its collection, constitutes a waiver of the right to appeal.⁵⁴

48. Partial satisfaction.—1 Chit. Archb. Pr. 558 (Ed. 1862); *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, 270, Mr. Justice Grier, Mr. Justice Nelson, and Mr. Justice Swayne dissenting.

Where a writ of error is taken to this court by a plaintiff below, who previously to taking the writ issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ will not, in consequence of such execution merely, be dismissed. *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, justices dissenting.

49. Enforcement of judgment by execution.—*United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, 270.

A motion to dismiss an appeal in a decree of foreclosure in chancery, refused, though the complainant below, appellant

here, had, after his appeal made, issued execution and got the amount for which the decree he appealed from, was given. *Merriam v. Haas*, 3 Wall. 687, 18 L. Ed. 29.

50. Performance of judgment or decree.—*O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840, following *Erwin v. Lowry*, 7 How. 172, 184, 12 L. Ed. 655.

51. Dakota County v. Glidden. 113 U. S. 222, 224, 28 L. Ed. 981; *Gregg v. Forsyth*, 2 Wall. 56, 17 L. Ed. 782.

52. O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840.

53. Dakota County v. Glidden, 113 U. S. 222, 224, 28 L. Ed. 981.

54. Singer Mfg. Co. v. Wright, 141 U. S. 696, 35 L. Ed. 906, following *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016.

5. **MOTION FOR NEW TRIAL.**—A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits, the right should be waived upon the record, before the motion for a new trial is heard. "The motion for a new trial was not a waiver of a writ of error. In some of the circuits there is a rule of court to this effect. But effect could be given to that rule only by requiring a party to waive on the record of error, before his motion for a new trial is heard. In the greater part of the circuits no such rule exists. It does not appear to have been adopted in Louisiana."⁵⁵

6. **OBTAINING LEAVE TO AMEND.**—The obtaining leave to amend a bill, after a decree dismissing the bill is entered, is not the waiver of a right to appeal from the decree of the court dismissing the bill, where it appears from the record that the decree to dismiss the bill is regularly stricken out before the leave to amend was granted, and afterwards when the complainant elected not to amend, the bill was ordered to be dismissed by reason of the demurrer.⁵⁶

Withdrawal of Demurrer.—But where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder. "If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand."⁵⁷

7. **SEEKING OTHER MODES OF RELIEF.**—Neither a subsequent petition in the nature of a bill of review, nor anything in answer to such petition on which no action was had by the court, can prevent a party from appealing from the original decree.⁵⁸

VIII. Exceptions and Objections.

A. General Principles—1. **OBJECT OF OBJECTIONS.**—One object of an objection is to call the attention of the trial judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if, in his judgment, it should be proper to do so.⁵⁹

2. **NECESSITY FOR OBJECTIONS**—a. *In General.*—To be available here an objection must have been taken in the court below. Unless so taken, it will not be heard here. It is not competent to a party to assent to a proceeding in the court below, take his chances of success and, upon failure, come here and object that the court below had no authority to take the proceeding.⁶⁰ And where it does

55. **Motion for new trial.**—United States v. Hodge, 6 How. 279, 12 L. Ed. 437.

56. **Obtaining leave to amend.**—McCormick v. Gray, 13 How. 26, 14 L. Ed. 36.

57. **United States v. Boyd**, 5 How. 29, 51, 12 L. Ed. 36.

58. **Seeking other modes of relief.**—O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840.

59. **Object of objections.**—Beaver v. Taylor, 93 U. S. 16, 55, 23 L. Ed. 797.

60. **Necessity for objections in general.**—Brown v. Clarke, 4 How. 4, 11 L. Ed. 850; Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643; Turner v. Yates, 16 How. 14, 14 L. Ed. 824; Camden v. Doremus, 3 How. 515, 11 L. Ed. 705; National Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 551; Reed v. Gardner, 17 Wall. 409, 21 L. Ed. 665; Ray v. Smith, 17 Wall. 411, 412, 21 L. Ed. 666; Insurance

Co. v. Folsom, 18 Wall. 237, 21 L. Ed. 827; Town of Ohio v. Marcy, 18 Wall. 552, 21 L. Ed. 813; Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Shutte v. Thompson, 15 Wall. 151, 21 L. Ed. 123; Prout v. Roby, 15 Wall. 472, 21 L. Ed. 58; Mays v. Fritton, 20 Wall. 414, 22 L. Ed. 389, 390; Tome v. Dubois, 6 Wall. 548, 555, 18 L. Ed. 943; Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. Ed. 329; National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701; Wheeler v. Sedgwick, 94 U. S. 1, 24 L. Ed. 31; Wilson v. McNamee, 102 U. S. 572, 26 U. S. 234; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Clark v. Fredericks, 105 U. S. 4, 26 L. Ed. 938; Robinson & Co. v. Belt, 187 U. S. 41, 50, 47 L. Ed. 65, reaffirmed in Hegeman v. Springer, 189 U. S. 505, 47 L. Ed. 921; Chesapeake Beach R. Co. v. Washington R. Co., 199 U. S. 247, 252, 50 L. Ed. 175; Lloyd v. Preston, 146 U. S. 630, 36 L. Ed. 1111; Bell v. Bruen, 1 How. 169, 11 L.

not appear from the record that an objection was taken in the court below, it will not be noticed when insisted on in the first place in this court.⁶¹ Parties should present their objections at the stage of the litigation when the errors, if any, may be corrected without inconvenience and unnecessary expense; and if they fail to do so without just excuse, they must be understood as having acquiesced in the decision of the court.⁶²

In the language of Mr. Justice Brown: "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases de novo."⁶³

Effect of State Statutes and Practice.—The rule that exceptions not taken

Ed. 89; *Barrow v. Reab*, 9 How. 366, 13 L. Ed. 177; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. Ed. 296; *Lathrop v. Judson*, 19 How. 66, 15 L. Ed. 553; *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91; *Rodriguez v. Vivoni*, 201 U. S. 371, 50 L. Ed. 792; *Wood v. Weimar*, 164 U. S. 786, 795, 26 L. Ed. 779; *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 29 L. Ed. 226; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. Ed. 825, citing *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Badger v. Ramlett*, 106 U. S. 255, 27 L. Ed. 194; *Flourney v. Lastrapes*, 131 U. S. appx. cixi, 25 L. Ed. 406; *United States v. Morgan*, 131 U. S. 164, 25 L. Ed. 519; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *Doe v. Watson*, 8 How. 263, 12 L. Ed. 1072; *Newell v. Nixon*, 4 Wall. 572, 18 L. Ed. 305; *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328; *The Lady Pike*, 96 U. S. 461, 465, 24 L. Ed. 673; *Board of Supervisors v. Lackawanna, etc., Co.*, 93 U. S. 619, 23 L. Ed. 989; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Western Pac. R. Co. v. United States*, 108 U. S. 510, 27 L. Ed. 806; *Schuchardt v. Allens*, 1 Wall. 359, 17 L. Ed. 642; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. Ed. 641.

To entitle objections to consideration here, they must be presented to the court below in the first instance—at least, if they are of a kind which might have been there obviated. *Houghton v. Jones*, 1 Wall. 702, 705, 17 L. Ed. 503.

It is a general rule of practice, that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court. *Brockett v. Brockett*, 3 How. 691, 692, 11 L. Ed. 786.

We wish it to be distinctly understood, as a matter of practice in like cases, that this court cannot express any opinion on matters ruled in any other court, or side of the court, than that appealed from; and if it be necessary to go into other courts to get verdicts or decisions on any portion of the case in its progress below,

any objections to rulings on the points arising in those trials or decisions must be presented for revision to the court which orders the issue, and be acted upon there, if we are expected to take cognizance of them here. *Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786; *Van Ness v. Van Ness*, 6 How. 62, 12 L. Ed. 344; *Mayhew v. Soper*, 10 Gill & J. (Md.) 372. Such, too, is substantially the doctrine in England. 2 Dan., Ch. Pr., 746; *Bootle v. Blundell*, 19 Ves. 500. *McLaughlin v. Bank of Potomac*, 7 How. 220, 227, 12 L. Ed. 675.

Time of submitting cause.—An assignment of error for the first time in this court that the circuit court erred in submitting the case to the jury before a demurrer to the answer was disposed of, cannot be considered if it was not formally raised in the circuit court. *Coffey v. United States*, 116 U. S. 427, 29 L. Ed. 681, 684.

Damages.—Where in an action to recover on a building contract, there is no evidence of the amount of damage caused by each particular breach, but only of the total amount sustained, and the plaintiff in error desires to avail himself of the objection to a recovery for the particular damage permitted, counsel should call the attention of the court to the point, and request a direction of a verdict for the defendant on that ground. At any rate he cannot argue the objection here which was never taken in the trial court. *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. Ed. 811.

Accounts and accounting.—Where no exception is taken in the court below to the mode in which the account is stated, no exception can be taken here. *Roach v. Summers*, 20 Wall. 165, 169, 22 L. Ed. 252.

^{61.} *Rogers v. Ritter*, 12 Wall. 317, 20 L. Ed. 417.

^{62.} *The Vanderbilt*, 6 Wall. 225, 230, 18 L. Ed. 823.

^{63.} *Robinson & Co. v. Belt*, 187 U. S. 41, 50, 47 L. Ed. 65, reaffirmed in *Hegeman v. Springer*, 189 U. S. 505, 47 L. Ed. 921.

in the court below are not subject to review here, is not affected by the statutes and practice of the state in which the trial takes place.⁶⁴

b. *Limitations of and Exceptions to General Rule*—(1) *In General*.—The rule that this court will not review a judgment on a ground which was not presented to the court below, should not be applied when the effect would be to make the rights of the parties depend upon a statute which this court is bound to know judicially is not the statute that governs the case.⁶⁵ Thus, where a plain error is committed in a matter so vital to the defendants as a denial of a motion or request to the jury being instructed to find for defendants, this court will correct it, although the question was not properly raised.⁶⁶ And the principle that objections not taken in the court below will not be allowed to be taken in this court, can have no application where there is a combination of errors, and errors of so grave a character; as for example, the rendition of a decree on a petition by way of cross bill, which makes nobody defendant, which prays for no process and under which no process is issued.⁶⁷

(2) *Errors Apparent on the Record*.—An exception to the opinion of the court is only necessary when the alleged error could not otherwise appear upon the record.⁶⁸ Therefore, errors apparent on the record may be considered by this court, though not objected to in the court below.⁶⁹

64. *St. Clair v. United States*, 154 U. S. 134, 38 L. Ed. 936.

65. *Limitations of and exceptions to general rule in general*.—Fourth Nat. Bank *v. Francklyn*, 120 U. S. 747, 30 L. Ed. 825.

66. *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

In a criminal case, the supreme court may examine the case to see that all the elements of the crime are proved, or at least that testimony is offered which justifies a jury in finding those elements, although no motion or request was made that the jury be instructed to find for the defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict. *Clyatt v. United States*, 197 U. S. 207, 49 L. Ed. 726, citing *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

67. *Washington Railroad v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894.

68. *Errors apparent on the record*.—*Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515, 516.

69. *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Baltimore, etc., R. Co. v. Trustees of Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260; *New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358; *Suydam v. Williamson*, 20 How. 427, 433, 15 L. Ed. 978; *Cohens v. Virginia*, 6 Wheat. 270, 410, 5 L. Ed. 259; *New Orleans, etc., R. Co. v. Morgan*, 10 Wall. 261, 19 L. Ed. 892.

Where the error is apparent both in the verdict and in the judgment, it may be examined in this court on a writ of er-

ror. *New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

Whenever the error is apparent in the record the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment, or execution of a suit in a court of record. *Suydam v. Williamson*, 20 How. 427, 433, 437, 15 L. Ed. 978; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205, *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Cohens v. Virginia*, 6 Wheat. 270, 410, 5 L. Ed. 259; *Insurance Co. Piaggio*, 16 Wall. 378, 386, 21 L. Ed. 358.

It is not too late to allege, as error, in the appellate court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below. *Woodward v. Brown*, 13 Pet. 1, 5, 10 L. Ed. 31; *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205.

No exception is necessary to the action of the court in ordering a suit to be revived, because this sufficiently appears upon the face of the record. An exception to the opinion of the court is only necessary, when the alleged error could not otherwise appear upon the record. *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515.

A brought suit on a policy on vessel and freight, for a total loss. The jury found the whole amount insured with interest and \$5,000 besides for damages, and judgment was entered accordingly. Held, that the party could not recover damages beyond legal interest, and that there was error on the face of the record. *New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

(3) *Illegal Contracts and Transactions*.—An objection may be taken for the first time in this court, that the contract in suit is illegal and void, as being contrary to public policy.⁷⁰

Cases before Land Department.—While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the land department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding.⁷¹

3. **NECESSITY FOR EXCEPTIONS.—In General.**—The fact that objections are made and overruled is not sufficient, in the absence of exceptions, to bring them before the court.⁷² And the record must show that an exception was taken at the time when the ruling objected to was given, or it will not be considered.⁷³ Where it does not appear from the record that any exceptions were taken in the progress of the trial to what was done by the court below, no case is presented for review here of the rulings at the trial.⁷⁴

70. Illegal contracts and transactions.—*Oscanyan v. Winchester, etc., Arms Co.*, 103 U. S. 261, 269, 26 L. Ed. 539; *Coppell v. Hall*, 7 Wall. 542, 19 L. Ed. 244.

71. *Lee v. Johnson*, 116 U. S. 48, 52, 29 L. Ed. 570.

An illustration of this rule is found in *Oscanyan v. Winchester, etc., Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. There a large sum was claimed from the vendor of firearms as commissions on sales that, through the influence of the plaintiff, had been made to the Turkish government, of which he was then an officer. The defendant pleaded the general issue; and it was contended that the illegality of the contract could not be noticed, because not affirmatively pleaded. But the court held that, assuming the contract to be a corrupt one, forbidden by morality and public policy, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties; that it was one which the court itself was bound to raise in the interest of the due administration of justice. *Lee v. Johnson*, 116 U. S. 48, 52, 29 L. Ed. 570.

72. Necessity for exceptions.—*Newport News, etc., Co. v. Pace*, 158 U. S. 36, 37, 39 L. Ed. 887, citing *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Bradstreet v. Potter*, 16 Pet. 317, 10 L. Ed. 978.

A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. *Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91.

The fact that a party made the point at the trial, and the court decided it against him, is not sufficient to bring the

question before this court. He must show that he excepted to the decision. *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900.

73. *Brown v. Clarke*, 4 How. 4, 11 L. Ed. 850; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *Turner v. Yates*, 16 How. 14, 14 L. Ed. 824; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485; *Hanna v. Maas*, 122 U. S. 24, 30 L. Ed. 1117; *Lees v. United States*, 150 U. S. 476, 483, 37 L. Ed. 1150; *Mad-dock v. Magone*, 152 U. S. 368, 38 L. Ed. 482; *Bank v. Caldwell*, 154 U. S., appx., 592, 21 L. Ed. 305; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

74. *Pittsburg, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58, citing *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182; *Morrill v. Jones*, 106 U. S. 466, 27 L. Ed. 267; *Garland v. Davies*, 4 How. 131, 143, 11 L. Ed. 907; *Barrow v. Reab*, 9 How. 366, 13 L. Ed. 177; *Lathrop v. Judson*, 19 How. 66, 15 L. Ed. 553; *Stoddard v. Chambers*, 2 How. 284, 285, 11 L. Ed. 269; *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287; *De Sobry v. Nicholson*, 3 Wall. 420, 423, 18 L. Ed. 263.

If the court, upon a writ of error to the circuit court, on looking into the record of the cause, finds no exception to any ruling of the court upon the trial, nor to the report of the assessors of damages, nor to any ruling of the court in relation to it, there is nothing in the record which can be reviewed here upon error, and the judgment of the circuit court must be affirmed. *Weed v. Crane*, 154 U. S., appx., 570, 19 L. Ed. 712.

The court cannot give any opinion upon points not properly before it, those points not being in the bill of exceptions filed in the record to the ruling of the circuit court; the proper functions of a court on a writ of error is to pass a judgment

Affirmance.—Where on looking into the record of the case, there is found no exception to the ruling of the court upon the trial, the judgment will be affirmed.⁷⁵

Error to State Courts.—A case coming into this court from the circuit court on a writ of error, issued under the 22d section of the judiciary act, when the record shows that no exception was taken below, is not to be treated like a case with a similar record which comes up from a state court under the 25th section.⁷⁶

Exceptions to General Rule.—Though there can be no doubt that exceptions to the opinions given by the courts below must all be taken at the time the opinions are pronounced, yet it is equally clear that when the whole record is before the court above, any exceptions appearing on it can be taken by counsel which could have been taken below.⁷⁷ Where it appears from the whole record that the exceptions were not saved, but enough appears to enable us to pass upon the question presented, this is sufficient though there may be some obscurity in the record upon this subject.⁷⁸

4. **TIME FOR PERFECTING EXCEPTIONS.**—By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term.⁷⁹ The rule is well established, and of long standing, that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise.⁸⁰ Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial.⁸¹

5. **FORM AND SUFFICIENCY.—Particularity Required.**—Exceptions, to be of any avail, must present distinctly and specifically the ruling objected to.⁸²

upon the points excepted to in the opinion of the court below; and not to decide the law of the case, in anticipation of its trial in the circuit court. *Bradstreet v. Potter*, 16 Pet. 317, 10 L. Ed. 978.

75. *Weed v. Crane*, 131 U. S., appx., 570, 19 L. Ed. 712.

76. *Taylor v. Morton*, 2 Black 481, 17 L. Ed. 277.

77. *Roach v. Hulings*, 16 Pet. 319, 10 L. Ed. 979; *Garland v. Davis*, 4 How. 143, 11 L. Ed. 907.

78. *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 32 L. Ed. 1058.

79. **Time for perfecting exceptions.**—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 298, 36 L. Ed. 162.

Where bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time. *Insurance Co. v. Boon*, 95 U. S. 117, 127, 24 L. Ed. 395.

"It may be further remarked that the alleged bills of exception do not show that the exceptions were taken on the trial. While exceptions may be reduced to form and signed after the trial, they

must appear affirmatively to have been taken before the jury withdrew from the bar. *United States v. Carey*, 110 U. S. 51, 28 L. Ed. 67, and cases cited. Here it is expressly stated that the exceptions were taken on the 8th day of October, two days after the return of the verdict. This was too late." *Pacific Express Co. v. Malin*, 132 U. S. 531, 538, 33 L. Ed. 450.

80. *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *United States v. Carey*, 110 U. S. 51, 52, 28 L. Ed. 67; *Turner v. Yates*, 16 How. 14, 28, 11 L. Ed. 824; *Pacific Express Co. v. Malin*, 132 U. S. 531, 33 L. Ed. 450.

81. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182; *Pittsburg, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58.

82. **Form and sufficiency.**—*Young v. Martin*, 8 Wall. 354, 19 L. Ed. 418; *Springfield, etc., Ins. Co. v. Sea*, 21 Wall. 158, 22 L. Ed. 511.

When there is nothing in the record to show specifically what was excepted to, but where all is general—as, for ex-

"A case ought not to be left in such a condition after a trial that the defeated party may hunt through the record, and if he finds an unsuspected error, attach it to a general exception and thus obtain a reversal of the judgment upon a point that may never have been brought to the attention of the court below."⁸³

Grounds of Objection.—The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way.⁸⁴ Parties excepting to an answer put in to an admiralty claim, should state with reasonable precision the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is.⁸⁵

Prayer for and Signature of Judge.—Although counsel objects and says that he excepts to the opinion of the court, yet if no exception is actually prayed by the party and signed by the judge, this court cannot consider the exception as actually taken, and must suppose it was abandoned.⁸⁶

Ruling of Court Must Be Stated.—Where an objection is to the ruling of the court, it is indispensable that the ruling should be stated, and that it should also be alleged that the party then and there excepted.⁸⁷

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them. Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.⁸⁸

B. Applications of Rules to Particular Instances—1. **FORM OF ACTION, MODE OF PROCEDURE AND IRREGULARITIES AT THE TRIAL.**—It is too late to object for the first time on appeal to the particular form of the action.⁸⁹ Likewise, objections in matters of form to modes of procedure in the court below cannot be urged here for the first time.⁹⁰ Thus, an objection cannot be taken after a

ample when at the end of the bill of exceptions and immediately preceding the signature of the judge, are the words "exceptions allowed," and nothing to indicate the application of the exceptions—so that the exception, if it amounts to anything, covers the whole record—this court will not regard the exception. It should have presented specifically and distinctly the ruling objected to. *Springfield, etc., Ins. Co. v. Sea*, 21 Wall. 158, 22 L. Ed. 511.

^{83.} *Springfield, etc., Ins. Co. v. Sea*, 21 Wall. 158, 162, 22 L. Ed. 511.

^{84.} *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 400, 30 L. Ed. 1061; *Young v. Martin*, 8 Wall. 357, 19 L. Ed. 418.

^{85.} *Schooner Commander-in-Chief*, 1 Wall. 43, 17 L. Ed. 609.

^{86.} *Scott v. Lloyd*, 9 Pet. 418, 419, 9 L. Ed. 178.

^{87.} *Pomery v. State Bank*, 1 Wall. 592, 17 L. Ed. 638.

^{88.} *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 152.

^{89.} **Form of action, mode of procedure and irregularities at the trial.**—*Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 548, 49 L. Ed. 591.

In a case where the trial has proceeded on merits, and the error has not been

pointed out below, judgment will not be reversed, even though the form of action has been wholly misconceived, and to the case made by it a defense plainly exists. *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785.

^{90.} *National Bank v. Colby*, 21 Wall. 609, 614, 22 L. Ed. 687.

It is too late for counsel to question in this court the right of the receiver to appear in the state court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceeding, it was waived by the silence of the parties. *National Bank v. Colby*, 21 Wall. 609, 614, 22 L. Ed. 687.

Although the statute gives the commissioner of internal revenue a choice as to how reimbursement for the loss of unused revenue stamps shall be made; whether by delivering other stamps or by payment of the face value thereof in money, the objection cannot be made by the government for the first time in this court to the action of the commissioner in compelling the plaintiff to resort to the courts in order to obtain its legal rights under the statute. The objection does not go to the merits of the claim, but is one of procedure only; "hence, if

decision rendered, and for the first time on appeal, that the decrees were rendered in a proceeding by petition, instead of by a supplemental or cross bill.⁹¹

Irregularities at the Trial.—It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception.⁹²

Foreclosure Proceedings.—Although the proceedings in the court below to foreclose a mortgage may have been somewhat irregular, yet in the absence of an objection, such irregularity will not be reviewed by this court.⁹³

Joinder and Consolidation.—It is too late to raise the objection for the first time in this court that separate matters cannot be combined in one suit.⁹⁴

2. **ARBITRATION AND AWARD.**—Where no objection is taken to an award by arbitrators in the court below, the judgment will be affirmed in this court, unless some substantial objection appears on the face of the proceedings or in the award itself.⁹⁵

3. **ARGUMENTS OF COUNSEL.**—Where no objection is made at the time to objectionable argument on the part of counsel, nor is the court requested to interrupt it, or caution the jury against its force, and no exception appears to have been taken, no assignment of error in regard thereto can be sustained. "It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception."⁹⁶

4. **ASSIGNMENTS FOR BENEFIT OF CREDITORS.**—An objection that an assignment for the benefit of creditors was invalid for want of acceptance cannot be raised for the first time on appeal.⁹⁷

5. **QUESTIONS RELATING TO CORPORATIONS.—Powers of Foreign Corporations.**—Where no question is set up in the pleadings in the court below as to the incompetency of a corporation to do business within the territory for want of compliance with the provisions of the territorial law, the objection cannot be urged for the first time in this court.⁹⁸

it would have been valid if taken in time, it may be and was waived by the failure of the government, so far as the record shows, to take the objection until the argument of the case in this court." *United States v. American Tobacco Co.*, 166 U. S. 468, 480, 41 L. Ed. 1081.

91. *Colburn v. Cedar Valley Land, etc.*, Co., 138 U. S. 196, 34 L. Ed. 876, citing *Kelsey v. Hobby*, 16 Pet. 269, 277, 10 L. Ed. 961.

92. *Stoddard v. Chambers*, 2 How. 284, 11 L. Ed. 269; *De Sobry v. Nicholson*, 3 Wall. 420, 18 L. Ed. 263; *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 29 L. Ed. 226; *Thompson on Trials*, §§ 699, 693, 700; *Alexander v. United States*, 138 U. S. 353, 355, 34 L. Ed. 954.

93. *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501.

94. *Illinois, etc., R. Co. v. Wade*, 140 U. S. 65, 35 L. Ed. 342.

95. **Arbitration and award.**—*Alexandria Canal Co. v. Swan*, 5 How. 83, 12 L. Ed. 60.

Where a writ of error is brought to remove the proceedings of arbitrators, on the ground of the illegality and invalidity of the award, the exception to the award must be taken in the court below, and cannot be made for the first time on appeal, except where the error is appar-

ent on the face of the record. *Alexandria Canal Co. v. Swan*, 5 How. 83, 12 L. Ed. 60.

The fact that an award was signed by only two of three referees was not called to the attention of the court when their report was confirmed and judgment rendered thereon. Held, that it furnishes no ground for reversing the judgment. "It would be fair neither to the court nor the other party to permit the objection to be raised here for the first time. Under the circumstances, it must be held to have been conclusively waived, and the plaintiff in error cannot be heard now to insist upon it. *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Wheeler v. Sedgwick*, 94 U. S. 1, 24 L. Ed. 31." *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085.

96. **Arguments of counsel.**—*Crumpton v. United States*, 138 U. S. 361, 364, 34 L. Ed. 959, citing *Thomp. on Trials*, § 962.

97. **Assignments for benefit of creditors.**—*Robinson & Co. v. Belt*, 187 U. S. 41, 47 L. Ed. 65.

98. **Questions relating to corporations.**—*Dahl v. Montana Copper Co.*, 132 U.

Where the objection that the contract is *ultra vires* was not in any way brought to the notice of the court below, the defendant is not entitled to avail himself of it in this court.⁹⁹

6. **MATTERS OF DEFENSE.—In General.**—The court will not express an opinion upon a matter of defense which was not brought to the consideration of the court below.¹

Usury.—If a defendant wishes to rely at any time on usury as a defense, he should raise the question in some form in the court below. If this is not done, the defense cannot be made here.²

When there is any just suspicion of fraud or forgery, the defense should be made below, and the evidence to support the charge should appear on the record.³

Where in a suit for the reformation of a deed on the ground of fraud, accident or mistake, an objection is raised for the first time in this court that the court erred in holding that the misconduct was due to mistake or inadvertence rather than to intentional fraud, it comes too late.⁴

The defense of the statute of limitations barring the right of recovery cannot be relied on in the appellate court, where it is not relied on in any way in the trial court.⁵

7. **DEPOSITIONS.**⁶—Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error.⁷

An objection that depositions in the record should be stricken out, or disregarded by the court on the appeal, for the reason that it does not appear that any order had been granted on behalf of either party to take further proofs,

S. 264, 32 L. Ed. 325, affirming *Dahl v. Raunheim*, 132 U. S. 260, 33 L. Ed. 324.

99. *Pullman's Car Co. v. Central Transp. Co.*, 139 U. S. 62, 35 L. Ed. 69, citing *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Badger v. Randlett*, 106 U. S. 255, 27 L. Ed. 194; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 465, 29 L. Ed. 963.

1. **Matters of defense.**—*Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Newcomb v. Wood*, 97 U. S. 581, 583, 24 L. Ed. 1085.

Foreclosure of mortgages.—Where a mortgage is executed by one partner on behalf of the firm, to secure a firm debt, and subsequently the mortgage is foreclosed for the payment of such debt, in a suit in equity by the mortgagee to enforce his rights in the premises, it was held that the defense that the withholding of the mortgage from the record invalidated it as against the creditors of the firm could not be made in the first instance on appeal, where no such defense to the mortgage was set up in the answer, and there was no issue thereon below.

McGahan v. National Bank, 156 U. S. 218, 39 L. Ed. 403.

2. *Ewing v. Howard*, 7 Wall. 499, 19 L. Ed. 293.

Where usury is not set up in some way as a defense below, it cannot be urged here. "Parties might lawfully agree that the rate of interest should be eight per cent., and inasmuch as that rate was demanded in the petition and was allowed by the court, and no objection was taken to the ruling of the court, it must be presumed in this court, under the state of the pleadings exhibited in the record, that the court decided correctly." *Newell v. Nixon*, 4 Wall. 572, 18 L. Ed. 305.

3. *United States v. Johnson*, 1 Wall. 326, 17 L. Ed. 597, followed in *United States v. Auguisola*, 1 Wall. 352, 17 L. Ed. 613.

4. *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 37 L. Ed. 454.

5. *Bardon v. Land, etc., Co.*, 157 U. S. 327, 39 L. Ed. 719.

6. See the title **DEPOSITIONS**.

7. *Suydam v. Williamson*, 20 How. 427, 433, 15 L. Ed. 978; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260.

comes too late if made for the first time in this court. It should be made in the court below.⁸

Where a deposition is taken upon a commission, the general rule is that all objections to it of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. It is too late to raise such objections for the first time at the trial. Thus, where a copy of a bill of lading was annexed to the answer of a witness examined on a commission, and no objection to the copy was taken at the examination or by motion to suppress afterwards, it was held that the objection that the original was not produced or its loss shown came too late at the trial.⁹

Suppression of Depositions.—Though a party may have taken exception before a trial to the refusal of a court then to suppress a deposition, yet if he allow the deposition to be read on the trial without opposition, he cannot avail himself, in this court, of his previous exception.¹⁰ Where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or at all.¹¹

8. DISMISSAL AND NONSUIT.—The ruling on a motion to dismiss a nonsuit to the plaintiff must be excepted to in order to authorize a review of the order.¹²

9. DUTIES, IMPORTS AND INTERNAL REVENUE.—Where the question as to whether imported goods are subject to some other rate of duty than that exacted is not raised in the court below, it cannot be raised here.¹³ It is a sufficient answer to an objection that the importation was not from "beyond the seas," that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated in some form into the record, "an authenticated transcript" of which is returned with our writ of error.¹⁴ Where no objection is taken in the court below to the sufficiency of an information in rem for a violation of the internal laws, it cannot be raised in this court.¹⁵ An assignment of error in this court that upon the trial in the circuit court upon an information in rem for a violation of the internal revenue laws,

8. *The Georgia*, 7 Wall. 32, 19 L. Ed. 122.

9. *York Mfg. Co. v. Illinois Central R. Co.*, 3 Wall. 107, 18 L. Ed. 170, reaffirmed in *Blackburn v. Crawford*, 3 Wall. 175, 18 L. Ed. 186.

10. *Ray v. Smith*, 17 Wall. 411, 21 L. Ed. 666.

Where an objection is made by the defendant to the admission of a deposition on the ground of an informality, that ground, to avail here, should appear in the bill of exceptions with a sufficient statement to enable this court to see that the ground was a valid one; "and the informality on which the deposition was ruled out should, to avail him, be stated in the bill of exceptions, with sufficient other matter to enable this court to say that the identical informality on which the ruling of the court proceeded existed, and was good ground for the ruling. As the defendant made the objection to the admissibility of the deposition, and it was excluded, it was incumbent on him to make it appear, by the bill of exceptions, what the ground of objection was, and that it was a valid ground." *Spaids v.*

Cooley, 113 U. S. 278, 286, 28 L. Ed. 984.

11. *Brown v. Tarkington*, 3 Wall. 377, 378, 18 L. Ed. 255.

12. **Dismissal and nonsuit.**—*Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713.

No exception having been taken to the opinion of the court overruling the motion for a nonsuit, the question whether, as matter of law, there was any evidence to be submitted to the jury, going to establish an intermarriage at or before the time of the demise laid in the declaration, was not before this court. *Garrard v. Reynolds*, 4 How. 123, 11 L. Ed. 903.

Where the action of the court below in granting a motion to set aside a nonsuit more than two years after the judgment had been rendered, is not excepted to, this court will not interfere. *Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713.

13. **Duties, imports and internal revenue.**—*Badger v. Ranlett & Co.*, 106 U. S. 255, 27 L. Ed. 194.

14. *Morrill v. Jones*, 106 U. S. 466, 467, 27 L. Ed. 267.

15. *Coffey v. United States*, 116 U. S. 436, 29 L. Ed. 684.

there was no sufficient monition, attachment or seizure of the property, and no legal publication and notice of the seizure, and no valuation of the goods as required by law, cannot be considered here if it was not formally raised in the circuit court.¹⁶

10. **EVIDENCE**—a. *Necessity for Objections and Exceptions.*—If a party does not object to testimony, he cannot afterwards be heard to say that there was error in receiving it.¹⁷

If parol evidence be received without objection, to prove the contents of a record, it is sufficient for that purpose.¹⁸

Necessity for Exceptions.—The settled rule is that the fact that objections to the admission or exclusion of evidence are made and overruled is not sufficient, in the absence of exceptions, to bring them before the court.¹⁹ No ruling upon evidence is open to revision where none appears to have been excepted to.²⁰

Errors in the admission of testimony which do not appear to have been excepted to upon the trial, will not be considered.²¹

To authorize any objection to the admission or exclusion of evidence, to be heard in this court, the record must disclose the fact that the parties excepted at the time to the action of the court thereon.²² And where no exception appears in the record to the admission of testimony, the court will refuse to consider the propriety of the court's action.²³ In the ordinary course of things, on the trial of a cause before a jury, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient, if it be taken, and the right reserved to put it in form, within the time prescribed by the practice or the rules of the court.²⁴

The admission of evidence which was irrelevant, but which was not objected to, will not authorize the admission of other irrelevant evidence offered to rebut the same, when the same is objected to.²⁵

16. Coffey v. United States, 116 U. S. 436, 29 L. Ed. 684.

17. **Necessity for objections and exceptions.**—Benson v. United States, 146 U. S. 325, 332, 36 L. Ed. 991; Pennoek v. Dialogue, 2 Pet. 1, 7 L. Ed. 327.

18. Roberts v. Graham, 6 Wall. 578, 581, 18 L. Ed. 791.

19. Newport News, etc., Co. v. Pace, 158 U. S. 36, 39 L. Ed. 887; United States v. Breitling, 20 How. 252, 15 L. Ed. 900; Kelsey v. Hobby, 16 Pet. 269, 10 L. Ed. 961.

Where errors are assigned to the admission of evidence "against defendant's objection," and "notwithstanding objections by the defendant" but the bill of exception does not show any exception taken to the overruling of this objection, and it is also claimed in a particular instance evidence offered by the defendant was improperly excluded "on plaintiff's objection," but no exception to the action of the court appears to have been preserved, the questions sought to be raised cannot be considered. Newport News, etc., Co. v. Pace, 158 U. S. 36, 39 L. Ed. 887.

Where a release is admitted in evidence without exception, no objection can afterwards be made to the manner in which it was introduced. Kelsey v. Hobby, 16 Pet. 269, 10 L. Ed. 961.

20. Scott v. Lloyd, 9 Pet. 418, 9 L. Ed.

178; Hanna v. Maas, 122 U. S. 24, 30 L. Ed. 1117.

Where no exception is taken to the ruling of the court in permitting the translation of a cipher telegram to be received in evidence and read to the jury, such ruling cannot be reviewed by this court. Allis v. United States, 155 U. S. 117, 39 L. Ed. 91.

21. Bannen v. United States, 156 U. S. 464, 39 L. Ed. 494.

22. Hitchens v. King, 1 Wall. 53, 60, 17 L. Ed. 544; Scott v. Lloyd, 9 Pet. 418, 9 L. Ed. 178; Hanna v. Maas, 122 U. S. 24, 30 L. Ed. 1117.

The fact, that testimony was objected to and received, does not oblige this court to consider it; the record not showing that the objection was overruled, and exception taken. Laber v. Cooper, 7 Wall. 565, 19 L. Ed. 151.

23. Cavazos v. Trevino, 6 Wall. 773, 18 L. Ed. 813.

The exception brings up the charge of the court to the jury, but not the admission of evidence which was objected to on the trial, but to the admission of which no exception was noted. United States v. Breitling, 20 How. 252, 15 L. Ed. 900.

24. Poole v. Fleeger, 11 Pet. 185, 9 L. Ed. 680.

25. Stringer v. Young, 3 Pet. 320, 7 L. Ed. 693.

Where no exception is taken to the competency of evidence, either generally or for any particular purpose, it is not before this court for consideration.²⁶

b. Objections Must Be Taken Below—(1) *In General*.—To authorize any objection to the admission or exclusion of evidence, to be heard in this court, the record must disclose the fact that the objection was taken in the court below.²⁷ Where no objection is taken in the court below to the admission of testimony, it will be considered as waived.²⁸ An objection cannot be taken for the first time in this court to the admission of irrelevant evidence.²⁹

Likewise, upon a writ of error to a state court, objections to the admission of evidence must be made on the trial in the court below.³⁰

(2) *Illustrative Cases*.—These rules have been applied to the introduction in evidence of deeds,³¹ of tax deeds,³² of letters,³³ to documentary evidence of title produced on the trial in an action of ejectment,³⁴ to the introduction of a release,³⁵ to the admission of secondary evidence,³⁶ to the authentication and proof of documents,³⁷ to the weight and sufficiency of evidence,³⁸ and to many other

26. *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327.

27. *Objections must be taken below in general*.—*Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197, citing *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797; *Wheeler v. Sedgwick*, 94 U. S. 1, 24 L. Ed. 31; *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328; *Warner v. Norton*, 20 How. 448, 15 L. Ed. 950.

Where the record fails to show that any exception was taken at the trial based upon the lack of any evidence, it is not properly presented to this court for consideration. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 31 L. Ed. 485.

28. *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

29. *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 37 L. Ed. 454.

30. *Spies v. Illinois*, 123 U. S. 131, 31 L. Ed. 80.

31. *Deeds*.—An objection not made in the court below to the introduction in evidence of the deed, comes too late in this court. *Wood v. Weimar*, 104 U. S. 786, 795, 26 L. Ed. 779.

32. Where no objection is taken in the court below to the admission of a tax deed, the objection cannot be made in this court for the first time. *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253.

33. Where a letter is found in the record as part of the evidence taken before the master, and is certified by the clerk to have been filed on the same day as other exhibits specifically referred to in a deposition, and the record does not show that any objection was taken to its admission at the hearing before the court. It must, therefore, under rule 13 of this court, be deemed to have been admitted by consent. *Hoyt v. Hambury*, 128 U. S. 584, 585, 32 L. Ed. 565.

34. *Documentary evidence of title*.—This court will refuse to consider objec-

tions to the documentary evidence of title produced on the trial of an action of ejectment, unless they are presented in the first instance to the court below, if they are of a kind which might have been there obviated. *Houghton v. Jones*, 1 Wall. 702, 17 L. Ed. 503.

35. *Release*.—Where no objection was taken in the court below to the introduction of a release, it cannot be taken on appeal. *Kelsey v. Hobby*, 10 Pet. 269, 10 L. Ed. 961.

36. *Secondary evidence*.—Where it does not appear that an objection was made in the court below to the admission of secondary evidence, a court of errors will not for that reason reverse the judgment. *United States v. Moreno*, 1 Wall. 400, 17 L. Ed. 633.

37. *Execution and proof of document*.—An objection that a contract cannot be proved by one witness according to the law of Louisiana cannot be made for the first time here; the objection should be made in the court below. *Cucullu v. Emerling*, 22 How. 83, 16 L. Ed. 300.

A deed of land in Missouri, in 1804, attested by two witnesses, purporting to have been executed in the presence of a syndic, presented to the commissioners of United States in 1811, and again brought forward as the foundation of a claim before the commissioners in 1835, must be considered as evidence for a jury. If it was not objected to in the court below, it cannot be in this court. *Stoddard v. Chambers*, 2 How. 284, 11 L. Ed. 269.

38. *Weight and sufficiency*.—An objection of the defendant that the evidence admitted in the court below tended to prove that he was not solely liable to the plaintiff for one of the items of the account sued upon, cannot be made for the first time in this court. *Wheeler v. Sedgwick*, 94 U. S. 1, 24 L. Ed. 31.

Where in an action for death by wrongful act, the defendant deems that the court below erroneously made no reference in its charge to the jury to the lack of any

matters of evidence, instances of which are to be found in the footnotes.³⁹

c. *Form and Sufficiency of Exceptions and Objections.*—The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule. It has, therefore, been often held, that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if in any possible circumstances it could be deemed or could be made relevant, material, or competent.⁴⁰

Grounds of Objection.—Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.⁴¹ It is perfectly well settled

evidence in record to show that the deceased left any one dependent upon him for support, it should call that matter to the attention of the court at that time, and insist upon a ruling as to that point. Failing to do that, and failing also to save any exception on that point, it must be held to have waived any right it may have had in that particular. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485.

An objection as to the sufficiency of a certificate of a register of deeds to an instrument offered in evidence which was not made at the trial cannot be taken here. *Culbertson v. The H. Witbeck Co.*, 127 U. S. 326, 32 L. Ed. 134.

Where an objection to the want of proof of the fact, if taken below, might have been met at once, the rule is general, that such objection will be considered as waived, except as to matters going to the jurisdiction of the court. At any rate the objection cannot be taken in this court for the first time. *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669.

39. Wills.—Where no objection was made in the court below to the admission of an authenticated copy of a will, it cannot avail the appellant in this court. *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161.

When the objection to treasury transcripts offered in evidence under the act of March 3d, 1797, in a suit against the collector of customs to recover a balance claimed in the settlement of the accounts, that some of the items included contain a charge against the defendant in gross, is not specially pointed out at the trial in the court below, this affords a full answer to the objection. *Hoyt v. United States*, 10 How. 109, 13 L. Ed. 348.

Production of documents.—An objection that a bond described in the complaint was not produced at the trial, and that no copy of it was ever filed in the case, must be made in the court below to be available for the defendant. *Storm v. United States*, 94 U. S. 76, 81, 24 L. Ed. 42.

Findings in suit for foreclosure.—Upon an appeal from a final decree in a suit to foreclose a mortgage, an assign-

ment of error that the amounts found due the respective bond holders were not supported by sufficient evidence, cannot be reviewed by this court where the objection was not taken in the court below. *Indiana Southern R. Co. v. Liverpool, etc., Ins. Co.*, 109 U. S. 168, 27 L. Ed. 895.

Reason for objection.—After a case has gone to a hearing, testimony submitted to the jury and a verdict rendered, a party cannot state for the first time in this court a reason for his objection to that evidence which would make the objection good. *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460.

40. Form and sufficiency of exceptions and objections.—*Sparf v. United States*, 156 U. S. 51, 56, 38 L. Ed. 343.

But an objection to a question put to a witness to repeat the conversation referred to on the ground that it was "irrelevant, immaterial, and incompetent" is sufficiently specific. *Sparf v. United States*, 156 U. S. 51, 38 L. Ed. 343.

41. United States v. McMasters, 4 Wall. 680, 18 L. Ed. 311; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Wood v. Weimar*, 104 U. S. 786, 795, 26 L. Ed. 779; *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 400, 30 L. Ed. 1061; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 69, 48 L. Ed. 96; *District of Columbia v. Woodbury*, 136 U. S. 450, 462, 34 L. Ed. 472.

The objection to the introduction of the articles of incorporation at the trial was that they were "immaterial, irrelevant, and incompetent" evidence. Held, the objection is too general. *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 400, 30 L. Ed. 1061.

Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to be tolerated in the court below. *Camden v. Doremus*, 3 How. 515, 11 L. Ed. 705.

Where, in an action of ejectment, a letter of the plaintiff's grantor, written to the ancestor of the defendant, is introduced to show that the ancestor entered into possession under the license of the plaintiff's grantor, a general objection that such letter is a declaration

in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state, for the first time, a reason for that objection which would make it good.⁴² General objections to the admission of evidence are calculated to embarrass the court, and put it at a disadvantage in its conduct of the trial. They lose much of their force because they do not indicate with distinctness the precise grounds upon which they are intended to rest. The court below is entitled to know the grounds of the objection, so that the jury can be put in possession of the real case to be tried.⁴³ This rule is especially applicable in actions for personal injuries, in which no fixed rule can be prescribed for measuring the amount of damages and in which the result must, of necessity, depend upon the good sense and sound discretion of the jury, as controlled by the special circumstances of the case.⁴⁴

An exception to the refusal to admit evidence should show what the excluded testimony was, in order that it may appear whether the evidence was material or not.⁴⁵

Specifying Part Objected to.—When an exception is taken on a trial to evidence, after it has been given, without objection to the whole matter stated in the exception, if any part of it was admissible, the objection may be properly overruled. It is the duty of a party taking exceptions to evidence to point out the part excepted to, where the evidence consisted of a number of particulars, so that the attention of the court may be drawn to the particular objections.⁴⁶ Hence,

of the grantor of his own rights is sufficient. *Smiths v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717.

An assignment of error that a copy of a paper was read in evidence without any proof that it was a copy, where the objection that there was no proof that the copy was a copy was not taken in the bill of exceptions, is of no avail. In other words, if the copy is treated by both sides as a copy, and the bill of exceptions merely states that when the defendants offered the copy in evidence, the plaintiffs objected; but no ground of objection is set forth, the exception is unavailing. *Toplitz v. Hedden*, 146 U. S. 252, 36 L. Ed. 961, citing *Camden v. Doremus*, 3 How. 515, 11 L. Ed. 705; *United States v. McMasters*, 4 Wall. 680, 18 L. Ed. 311; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306.

42. *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791; *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 335, 39 L. Ed. 1006.

Where in an action to recover damages for personal injuries received while riding as a passenger on one of its trains, objection was made to the admission of evidence to show the profits of the plaintiff's business, on the ground that it went to show special damages against the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration, it was held that this objection was not good on appeal where it did not appear that objection was specifically made to the evidence on the

ground that the declaration contained no allegations of the special damage sought to be shown. *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. Ed. 1006.

43. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472; *Camden v. Doremus*, 3 How. 515, 11 L. Ed. 705; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460.

44. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472.

45. *Hornbuckle v. Stafford*, 111 U. S. 389, 393, 28 L. Ed. 468, citing *Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Reed v. Gardner*, 17 Wall. 409, 21 L. Ed. 665.

46. *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172; *United States v. McMasters*, 4 Wall. 680, 18 L. Ed. 311; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299.

Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, but it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is

objections of a very general and indefinite nature to testimony taken under a commission, with interrogatories, and which do not point out except in gross the portions of the answers objected to, and which embrace matters clearly competent, will not be sustained. If the exception covers any admissible testimony, it is rightly overruled.⁴⁷

Confined to Objections Taken.—It is a rule of law that where a party objects to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assigns no ground of exception the mere objection cannot avail him.⁴⁸ A party specifying his objection to the admission of evidence must be considered as waiving all others, or as conceding that there is no ground upon which they can be maintained.⁴⁹ But it is clear that where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time, does not authorize the use of it for other purposes for which it was not, nor could have been, legally introduced. The right of the defendant below to object to the perversion and misuse of the evidence depends upon whether objection was duly reserved thereto and not upon whether exception was taken to the admissibility of the evidence which, it is asserted, was misused.⁵⁰

Severance.—This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency, is said to be not only unusual, but to confound propositions distinct in themselves, and to be calculated to embarrass the court, and the questions to be decided. It is undoubtedly true, that questions respecting the admissibility of evidence, are entirely distinct from

enough to authorize their rejection. *El-liott v. Peirsol*, 1 Pet. 328, 7 L. Ed. 164.

47. *United States v. McMasters*, 4 Wall. 680, 18 L. Ed. 311, citing *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172.

48. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Camden v. Doremus*, 3 How. 515, 530, 11 L. Ed. 705; *Harvey v. Tyler*, 2 Wall. 328, 339, 17 L. Ed. 871; *Beckwith v. Bean*, 98 U. S. 266, 284, 25 L. Ed. 124; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. Ed. 641; *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 337, 28 L. Ed. 447; *Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406; *Block v. Darling*, 140 U. S. 334, 35 L. Ed. 476; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. Ed. 1006; *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454; *Stoddard v. Chambers*, 2 How. 284, 11 L. Ed. 269; *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172.

In examining the admissibility of testimony in the court above, the party objecting is to be confined to the specific objection taken at the trial. *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454.

Where the objection made below was to the introduction in evidence of a deed on the ground that it is incompetent, immaterial, and irrelevant, an objection comes too late here as to the form of the authentication of the copy. *Wood v. Weimar*, 104 U. S. 786, 26 L. Ed. 779.

Hence, where an original deposition, regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its

place, an objection to the copy "on the ground that it was not the original" is too indefinite to let in argument that the witness was alive, and that the lost deposition could only be supplied by another one by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition. If the objection had been made in a form as specific as by the argument above mentioned it was sought to be made, it would be insufficient, it appearing that the witness lived in another state, and more than a hundred miles from the place of trial. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299.

Where a deed was objected to in the circuit court on the ground of fraud, but no specific grounds of objection were made, this court cannot inquire into the correctness or incorrectness of the objection. *Thomas v. Lawson*, 21 How. 331, 16 L. Ed. 82.

49. *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306.

When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. "Consequently, when the specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded." *Belk v. Meagher*, 104 U. S. 279, 289, 26 L. Ed. 735.

50. *Waldron v. Waldron*, 156 U. S. 361, 381, 39 L. Ed. 453.

those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time.⁵¹

d. *Time to Take and Perfect Exceptions.*—Exceptions to evidence must be taken as soon as the court decides to admit or reject it; a note of the exception is then made, and it is usually reduced to form afterwards.⁵² Where none of the evidence offered by a plaintiff is objected to below, and no exception taken to the findings of the court there, objection cannot be made in this court.⁵³ The exception to the admission of evidence need not be put in form, or written out at large and signed; but it is sufficient if it is taken, and the right reserved to put it in form, within the time prescribed by the practice or the rules of the court.⁵⁴ Where it appears that an exception to the rejection of evidence was taken after the trial was over, it does not constitute a proper subject for assignment of error.⁵⁵

11. *FINDINGS OF COURT.*—Prior to the Act of March 3rd 1865.—Where the court decided both the law and fact without the intervention of a jury, no exception need be taken in the court below as a condition precedent to prosecuting error.⁵⁶ But where the parties have waived the intervention of a jury under the act of March 3rd and submitted the cause to the court, if no exception is taken to the findings of the court below, objection cannot be made in this court.⁵⁷ Thus an objection that the court did not separate its findings of fact from its conclusions at law comes too late in this court for first time.⁵⁸

Where, according to the practice in Louisiana, the facts of the case are stated by the court below in the nature of a special verdict, an objection that the contract sued upon could not be proved by one witness only, comes too late when made for the first time in this court.⁵⁹

12. *PUBLIC LANDS AND SPANISH AND MEXICAN GRANTS.*—An objection that a grant is fictitious,⁶⁰ or that the receiver took part with the register on the hearing and decision in the land office,⁶¹ cannot be taken for the first time in this court.

Execution and Proof of Document.—And where no suspicion, from the absence of the usual preliminary documentary evidence in the archives of the former government, arises as to the genuineness of a Mexican grant produced, the general rule is, that objections to the sufficiency of proof of its execution must be taken in the court below. They cannot be taken in this court for the first time.⁶²

51. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 44, 7 L. Ed. 335.

52. *Time to take and perfect exceptions.*—*Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643.

53. *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328.

54. *Poole v. Fleegeer*, 11 Pet. 185, 9 L. Ed. 680.

55. This clearly is where "there is nothing whatever to indicate that any exception was taken to the rejection of the evidence complained of until the next term after the trial was over and the judgment rendered, though not signed. Even the liberal extension of the rule granted in *Simpson v. Dall*, 3 Wall. 460, 18 L. Ed. 265, is not enough to reach this defect. The language here implies an exception only at the time of tendering the bill of exceptions to be signed, which was not only long after the trial, but at a subsequent term of the court." *United States v. Carey*, 110 U. S. 51, 52, 28 L. Ed. 67.

56. *Findings of court.*—*United States*

v. King, 7 How. 833, 12 L. Ed. 934; *Craig v. Missouri*, 4 Pet. 410, 427, 7 L. Ed. 903.

57. *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328.

58. *Clark v. Fredericks*, 105 U. S. 4, 26 L. Ed. 938.

59. *Cucullu v. Emmerling*, 22 How. 83, 16 L. Ed. 300.

60. *Public lands and Spanish and Mexican grants.*—*United States v. Larkin*, 18 How. 557, 15 L. Ed. 485.

The objection, that a Mexican grant is a fictitious one, cannot be taken in this court for the first time. *United States v. Larkin*, 18 How. 557, 15 L. Ed. 485.

61. *Carr v. Fife*, 156 U. S. 494, 39 L. Ed. 508.

62. *Objection to sufficiency of proof.*—*United States v. Auguisola*, 1 Wall. 352, 17 L. Ed. 613.

Where the usual preliminary proceedings to the issue of a Mexican grant in colonization are preserved in the archives of the former government, the proof of the signatures of the grantor and attest-

Objections to Mexican grants ought not to be taken as if the case was pending on a writ of error, with a bill of exceptions to the admission of every item of testimony offered and received below.⁶³

13. **INSTRUCTIONS**—a. *Right to Except*.—That a party has a right to except to a misdirection of the jury contained in the charge of the judge who tries the cause is settled.⁶⁴

b. *Objections Must Be Made Below*.—To authorize any objection to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose the fact that the objection was taken in the court below.⁶⁵ Hence, an objection that the court erred in giving an instruction because it assumed a material fact in dispute, cannot be availed of here, where the record does not show that this objection to the instruction was taken in the court below.⁶⁶

c. *Necessity for Excepting*.—**In General**.—Nor are instructions which were given, but not excepted to, subject to review.⁶⁷ This court can only review so much of the instructions of the court below as were made the subject of an exception.⁶⁸ In short, to authorize any objection to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose the fact that the parties excepted at the time to the action of the court thereon.⁶⁹

Cautionary Instructions.—An objection to language used by the court in cautioning the jury in respect to the testimony bearing on the defense of an

ing secretary will be deemed by the supreme court sufficient to establish the genuineness and due execution of the grant, unless objection is taken to its sufficiency before one of the inferior tribunals. *United States v. Yorba*, 1 Wall. 412, 17 L. Ed. 635, approving *United States v. Auguisola*, 1 Wall. 352, 17 L. Ed. 613.

63. *United States v. Johnson*, 1 Wall. 326, 17 L. Ed. 597, followed in *United States v. Auguisola*, 1 Wall. 352, 17 L. Ed. 613.

64. **Right to except**.—*Church v. Hubbard*, 2 Cranch 187, 239, 2 L. Ed. 249; *Smith v. Carrington*, 4 Cranch 62, 72, 2 L. Ed. 550.

65. **Objections must be made below**.—*Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544; *Doe v. Watson*, 8 How. 263, 12 L. Ed. 1072; *Cunningham v. Springer*, 204 U. S. 647, 51 L. Ed. 662; *Barrow v. Read*, 9 How. 366, 13 L. Ed. 177.

An assignment of error that the trial court refused to give the instruction asked by the accused upon the subject of manslaughter, and said to the jury that if a felonious homicide has been committed, of which they were to be the judges from the proof, there is nothing in the case to reduce it below murder, is not subject to review where there was no exception taken to the action of the court in these particulars. *St. Clair v. United States*, 154 U. S. 134, 135, 38 L. Ed. 936, citing *Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112.

66. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979.

67. **Necessity for excepting**.—*Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112; *St. Clair v. United States*, 154 U. S. 134, 153, 38 L. Ed. 936; *Humes v. United*

States, 170 U. S. 210, 212, 42 L. Ed. 1011; *Rankin v. Chase Nat. Bank*, 188 U. S. 557, 565, 47 L. Ed. 594; *Pittsburgh, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 32 L. Ed. 1058; *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 44 L. Ed. 1127; *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 464, 45 L. Ed. 948.

68. *Mutual Life Ins. Co. v. Snyder*, 93 U. S. 393, 23 L. Ed. 887; *Hanna v. Maas*, 122 U. S. 24, 30 L. Ed. 1117; *Lindsay v. Burgess*, 156 U. S. 208, 39 L. Ed. 399; *Clune v. United States*, 159 U. S. 590, 40 L. Ed. 269; *Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91; *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892; *Andrews v. United States*, 162 U. S. 420, 421, 40 L. Ed. 1023; *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101.

Errors in the charge of the court which do not appear to have been excepted to upon the trial, will not be considered. *Bannon v. United States*, 156 U. S. 464, 39 L. Ed. 494.

69. *Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544; *Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112, citing *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900.

Where a party moving for a new trial assigns as reasons therefor that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions and refusing others, held, that, as he did not at the time except to the ruling of the court, although they are incorporated in the bill of exceptions allowed on the refusal of the court of original jurisdiction to grant a new trial. *Railway Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550.

alibi, will not be considered by this court if no due exception is taken at the trial and no opportunity is given the court to modify the charge.⁷⁰

d. *Form and Sufficiency of Exceptions and Objections.*—Rule 4 of this court provides: "The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."⁷¹

Repeated decisions have emphasized the necessity of a strict adherence to this rule: "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."⁷²

An objection to language used in an instruction, urged on a motion for a new trial cannot be regarded as equivalent to an exception at the trial.⁷³

A general exception to the whole of the charge cannot be regarded, as it is a violation of Rule 4 of this court.⁷⁴ Exceptions to the charge of the court

70. *Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011.

71. *Form and sufficiency of exceptions and objections.*—*Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91; *District of Columbia v. Robinson*, 180 U. S. 92, 103, 45 L. Ed. 440.

"If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed." *Moulton v. American Life Ins. Co.*, 111 U. S. 335, 337, 28 L. Ed. 447; *Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91.

72. *Harvey v. Tyler*, 2 Wall. 328, 339, 17 L. Ed. 871; *Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91.

The court expresses its dissatisfaction at the manner in which a plaintiff in error sends a case here, without argument, either oral or printed, thus leaving the court to search the entire record to find out whether error had been committed; increasing the trouble moreover by a general exception to the charge instead of specific exceptions to parts complained of; this, in violation of the rules of court. *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769.

73. *Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011.

74. *White v. Barber*, 123 U. S. 392, 419, 31 L. Ed. 243; *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 29 L. Ed. 215; *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 135, 35 L. Ed. 961; *Hicks v. United States*, 150 U. S. 442, 37 L. Ed. 1137, Mr. Justice Brewer, dissenting; *Railroad Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *Lees v. United States*, 150 U. S. 476, 483, 37 L. Ed. 1150; *Insurance Co. v. Boykin*, 12 Wall. 436, 20 L. Ed. 442.

Where an exception to the giving of an

instruction is too general, it will not be considered. *Newport News, etc., Co. v. Pace*, 158 U. S. 36, 39 L. Ed. 887.

"It is justly said that the exception ought to be so precise and pointed as to call the attention of the judge to the particular error complained of, so as to afford him an opportunity to correct any inadvertence, in form or substance, into which he may have fallen. * * * To enable us to form a just view of the error complained of, it was necessary, or at least useful, to cite the entire passage of the charge that covered it. To have selected certain obnoxious sentences as the subject of special exceptions might have justified the very opposite criticism, that the omitted context would have explained or nullified the error." *Hicks v. United States*, 150 U. S. 442, 453, 37 L. Ed. 1137.

"There is no pretense that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part, and no exception to any particular part is shown. The rule is that a general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 29 L. Ed. 215; *Chataugay Ore, etc., Co. v. Blake*, 144 U. S. 476, 488, 36 L. Ed. 510; *Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011." *Holder v. United States*, 150 U. S. 91, 92, 37 L. Ed. 1010.

Where eighteen special instructions were asked, and in respect to them the bill of exception states: "The court did not charge either of said requests except as he had charged. For the refusal of the court to charge in the specific language of said hereinbefore recited requests, the defendant's counsel then and there duly excepted." The exception is not sufficient. *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S.

which are in general terms, and do not clearly and specifically point out the objectionable part of it, cannot be sustained as a ground for reversing the judgment.⁷⁵ The party should, by his exception, direct the attention of the court to the specific propositions on which he relies, and separate it or them from the rest.⁷⁶ When an exception is taken to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection.⁷⁷

A general exception "to all and each part of the foregoing charge and instructions" suggests nothing for our consideration. It is no more than a general exception to the whole charge. The court below is entitled to a distinct specification of the matter, whether of fact or of law, to which objection is made.⁷⁸

250, 28 L. Ed. 708; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 29 L. Ed. 215; *Chateaugay Ore, etc., Co. v. Blake*, 144 U. S. 476, 488, 36 L. Ed. 510.

75. *Railroad Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233.

The practice of excepting, generally, to a charge of the court to the jury, without setting out specifically the points excepted to, censured. The writ of error not dismissed, only on account of the peculiar circumstances of the case. *Stimpson v. Westchester R. Co.*, 3 How 553, 11 L. Ed. 722.

76. *Boogher v. New York Life Ins. Co.*, 103 U. S. 90, 98, 26 L. Ed. 310; *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 261, 28 L. Ed. 708; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 476, 29 L. Ed. 215.

Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law. *Railroad Co. v. Varnell*, 98 U. S. 479, 485, 25 L. Ed. 233.

A general exception to the "answers" of the court to the application to charge the jury is too vague and indefinite. If it is intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court must be directed to the specific points concerning which it was supposed error had been committed. This court cannot under a general exception taken to the refusal of the court to grant a series of instructions, reverse the judgment merely because in the series presented as one request, there were some which ought to have been given. *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447, citing *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 295, 23 L. Ed. 898; *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Johnson v. Jones*, 1 Black 209, 17 L. Ed. 117; *Beaver v. Taylor*, 93 U. S. 46, 23 L.

Ed. 797; *Beckwith v. Bean*, 98 U. S. 266, 25 L. Ed. 124.

The court reprehends severely the practice of counsel in excepting to instructions as a whole, instead of excepting as they ought, if they except at all, to each instruction specifically. Referring to *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714, etc., it calls attention anew to the penalty which may attend this unprofessional and slatternly mode of bringing instructions below before this court; the penalty, to wit, that the exception to the whole series of propositions may be overruled, no matter how wrong some may be, if any one of them all be correct; and when, if counsel had excepted specifically, a different result might have followed. *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871.

Distinction between sole and proximate cause.—"If the defendant had desired to obtain a more specific charge in relation to the distinction between 'sole' and 'proximate' cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word 'sole,' and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question." *Spring Co. v. Edgar*, 99 U. S. 645, 659, 25 L. Ed. 487; *Gila Valley, etc., R. Co. v. Lyon*, 203 U. S. 465, 474, 51 L. Ed. 276.

77. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 596, 28 L. Ed. 527, citing *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106.

78. *Block v. Darling*, 140 U. S. 234, 35 L. Ed. 476, citing *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Beckwith v. Bean*, 98 U. S. 266, 25 L. Ed. 124; *Moulor v. American Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447.

"An exception 'to all and each part' of and charge gives no information whatever as to what is in the mind of the excepting party, and, therefore, gives no opportunity to the trial court to correct any error committed by it." *Block v.*

Improper Modification.—Where an instruction is excepted to on the ground that there has been an improper modification of the same, the attention of the court should be called to the particular point by something more definite than a general exception.⁷⁹

Variances from Instructions Requested.—An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained.⁸⁰

Where Series of Propositions Embodied in Instructions.—Parties, in excepting to instructions, must state distinctly the several matters to which they except. If a series of propositions are embodied in instructions and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled.⁸¹ We have uniformly held that "if a series of

Darling, 140 U. S. 234, 238, 35 L. Ed. 476. See, also, *Phoenix Life Ins. Co. v. Rad-din*, 120 U. S. 183, 30 L. Ed. 644, and cases cited in the opinion; *New York, etc., Co. v. Frazer*, 130 U. S. 611, 32 L. Ed. 1031; *Anthony v. Louisville, etc., R. Co.*, 132 U. S. 172, 33 L. Ed. 301; *Allis v. United States*, 155 U. S. 117, 122, 39 L. Ed. 91.

79. *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708, citing *Beckwith v. Bean*, 98 U. S. 266, 284, 25 L. Ed. 124; *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106; *McNitt v. Turner*, 16 Wall. 352, 362, 21 L. Ed. 341; *Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797.

80. *Beaver v. Taylor*, 93 U. S. 46, 55, 23 L. Ed. 797.

81. *Relfe v. Wilson*, 131 U. S., appx. clxxxix, 26 L. Ed. 212, citing *Johnston v. Jones*, 1 Black 209, 220, 17 L. Ed. 117; *Beaver v. Taylor*, 93 U. S. 46, 54, 23 L. Ed. 797; *Bogk v. Gas-sert*, 149 U. S. 17, 26, 37 L. Ed. 631; *Newport News, etc., Co. v. Pace*, 158 U. S. 36, 38, 39 L. Ed. 887; *Hickory v. United States*, 151 U. S. 303, 316, 38 L. Ed. 170; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 295, 23 L. Ed. 898; *Block v. Dar-ling*, 140 U. S. 234, 35 L. Ed. 476; *Holder v. United States*, 150 U. S. 91, 37 L. Ed. 1010; *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91; *Thiede v. Utah*, 159 U. S. 510, 40 L. Ed. 237; *Worthington v. Ma-son*, 101 U. S. 149, 25 L. Ed. 848; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 29 L. Ed. 215; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624; *White v. Van Horn*, 159 U. S. 3, 40 L. Ed. 55; *McDermott v. Severe*, 202 U. S. 600, 50 L. Ed. 1162; *Rogers v. The Mar-shal*, 1 Wall. 644, 17 L. Ed. 714; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Mou-lor v. American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447; *Lincoln v. Claflin*, 7 Wall. 132, 139, 19 L. Ed. 106; *Cooper v. Schlesinger*, 111 U. S. 148, 152, 28 L. Ed. 382; *United States v. Hough*, 103 U. S. 71, 26 L. Ed. 305; *Union Ins. Co. v. Smith*, 124 U. S. 405, 424, 31 L. Ed. 497.

It was long ago determined that it is the duty of counsel excepting to proposi-tions submitted to a jury to except to them distinctly and severally, and that

where they are excepted to in mass the ex-ception will be overruled, provided any of the propositions be correct. *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Block v. Darling*, 140 U. S. 234, 238, 35 L. Ed. 476; *Jones v. East Tennessee, etc., R. Co.*, 157 U. S. 682, 684, 39 L. Ed. 856; *Newport News, etc., Co. v. Pace*, 158 U. S. 36, 37, 39 L. Ed. 887.

If the entire charge of the court is ex-cepted to, or a series of propositions con-tained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained. *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Beaver v. Taylor*, 93 U. S. 46, 54, 23 L. Ed. 797.

The record shows that plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three except as covered by the general charge. The whole charge is contained in the bill of exceptions, which thus concludes: "To which refusal and charge of the court and the exclusion of evidence offered, and to the action of the court in refusing a new trial, plaintiff ex-cepted and tendered this bill of excep-tions, which was signed and sealed by the court and ordered to be made a part of the record in this cause." This exception was insufficient. Rule 4; *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Har-vey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Insurance Co. v. Sea*, 21 Wall. 158, 22 L. Ed. 511; *Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797; *Block v. Darling*, 140 U. S. 234, 238, 35 L. Ed. 476; *Jones v. East Ten-nessee, etc., R. Co.*, 157 U. S. 682, 39 L. Ed. 856.

Beaver v. Taylor, 93 U. S. 46, 55, 23 L. Ed. 797, in which this court observes: "It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge, to discover what are the portions thus ex-cepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is sup-posed he has erred, that he may then and there consider it, and give new and dif-ferent instructions to the jury, if in his

propositions is embodied in instructions (to the jury), and the instructions are excepted to in a mass, if any one of the propositions is correct the exception must be overruled."⁸² The whole charge must be substantially wrong before such a general exception will avail for any purpose.⁸³

Rule in Montana.—This is not only the rule in this court but also in the courts of Montana.⁸⁴ Although since this case was decided, and at a session of the legislature in 1887, the law was changed so that the giving or refusal to give instructions are deemed excepted to, and no exception need be taken.⁸⁵

Setting Out Evidence.—In drawing up exceptions to instructions given by the court, the preliminary evidence on which the points of law arose must be set out before the instructions are inserted, in order that this court may see if the points arose on which they are given, and to which exception is taken.⁸⁶

e. Time for Excepting.—In General.—The record must show that exceptions to the instructions were duly taken.⁸⁷ The rule in relation to exceptions to

judgment it should be proper to do so." *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91; *Newport News, etc., Co. v. Pace*, 158 U. S. 36, 39 L. Ed. 887; *Thiede v. Utah*, 159 U. S. 510, 521, 523, 40 L. Ed. 237.

Where the only exception to the refusal of the court to give a series of instructions is in this language, "the defendant excepts to the refusal of the court to give the instructions requested by the defendant, being numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, and 21," such an exception is insufficient to compel an examination of each separate instruction. *Thiede v. Utah*, 159 U. S. 510, 40 L. Ed. 237.

Should one general exception to thirteen different instructions be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct? We think not. The wholesale manner of taking exceptions is unfair, both to the judge and the opposite party. After a judge has given a long charge to the jury, consisting of many different propositions of law and fact involved in the trial, a general exception noted at the end of the charge to each proposition separately of law or fact announced therein is not sufficient if a proposition of law contained in the charge is correct. Those propositions in regard to the correctness of which there is a real controversy should be at least called to the attention of the judge, so that if he thought it proper he might correct, modify or explain them. *Holloway v. Dunham*, 170 U. S. 615, 620, 42 L. Ed. 1165.

Charge as to element of damages.—Where the court's attention is not called to any particular in which a charge which covers a number of elements of damages is alleged to be wrong, but only a general exception is taken to the charge as given, it has been frequently held that an exception of this general character will not cover the specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify

them. *McDermott v. Severe*, 202 U. S. 600, 50 L. Ed. 1162, citing *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 73, 39 L. Ed. 624.

82. *Johnston v. Jones*, 1 Black 209, 17 L. Ed. 117; *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106; *Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797; *Boogher v. New York Life Ins. Co.*, 103 U. S. 90, 98, 26 L. Ed. 310.

It is firmly established that where propositions submitted to a jury are excepted to, in mass, the exception will be overruled provided any of the propositions be correct, and where a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound. *Newport News, etc., Co. v. Pace*, 158 U. S. 36, 39 L. Ed. 887; *Union Pac. R. Co. v. Callaghan*, 161 U. S. 91, 95, 40 L. Ed. 628.

83. *Lincoln v. Claffin*, 7 Wall. 132, 139, 19 L. Ed. 106; *Cooper v. Schlesinger*, 111 U. S. 148, 151, 28 L. Ed. 382; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 596, 28 L. Ed. 527; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 476, 29 L. Ed. 215; *Anthony v. Louisville, etc., R. Co.*, 132 U. S. 172, 173, 33 L. Ed. 301.

84. *Woods v. Berry*, 7 Montana 195; *Bogk v. Gassert*, 149 U. S. 17, 26, 37 L. Ed. 631.

85. *Bogk v. Gassert*, 149 U. S. 17, 26, 37 L. Ed. 631.

86. *United States v. Morgan*, 11 How. 154, 13 L. Ed. 643, citing *Zeller v. Echert*, 4 How. 289, 297, 11 L. Ed. 979; *Vasse v. Smith*, 6 Cranch 226, 233, 3 L. Ed. 207; *Stimpson v. Westchester R. Co.*, 3 How. 553, 555, 11 L. Ed. 722.

87. **Time for excepting.**—*New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 35 L. Ed. 919.

A bill of exceptions showed that certain instructions, numbered 1 and 2, were requested by the plaintiff, and refused, and that certain others, numbered 3 and 4, adverse to him, were given; and the court stated that "plaintiff's counsel presented his requests in writing before the

instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it.⁸⁸ Exceptions to the charge of the court, taken after the verdict is returned, come too late.⁸⁹ Exceptions to instructions not taken until after the trial are too late. The exceptions must be taken at the trial and while the jury are at the bar.⁹⁰ Where the record shows that two days after the verdict, and in their motion for a new trial, the defendants protested and excepted to the giving of certain instructions, the objection comes too late. Because in the federal courts a motion for a new trial is a mere application to the discretion of the trial court, and it is too late then to tender

charge of the court began. The court instructed the jury to find for the defendant, without notice to plaintiff's counsel that the requests would not be given, and there was no opportunity for counsel to except to the failure of the court to charge as requested until the instructions were given to the jury. The exceptions, therefore, contained in Nos. 1, 2, 3, and 4, were not taken or noted during the trial." The bill also stated that "the court instructed the jury to return a verdict for defendant. The jury returned a verdict in accordance with said instructions, and judgment was thereupon entered, * * * and to said instructions, verdict, and judgment the plaintiff, by his counsel, excepted, and now excepts," etc. Held, that it sufficiently appeared that the general instruction to find for defendant was excepted to at the proper time. *Dunlap v. North-eastern R. Co.*, 130 U. S. 649, 32 L. Ed. 1058.

88. *Hickory v. United States*, 151 U. S. 303, 316, 38 L. Ed. 170; *Dredge v. Forsyth*, 2 Black 563, 568, 17 L. Ed. 253, citing *United States v. Breitling*, 20 How. 252, 254, 15 L. Ed. 900; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *Turner v. Yates*, 16 How. 14, 28, 14 L. Ed. 824.

Must be taken while jury is at bar.—In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them, excepted to them while the jury were at the bar. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court and must appear by the certificate of the judge who authenticates it, to have been so taken. Hence, when the verdict was rendered on the 13th of December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the circuit court must be affirmed, with costs. *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643, followed in *United States v. Breitling*, 20 How. 252, 254, 15 L. Ed. 900, citing *Shepard v. Wilson*, 6 How. 260, 275, 12 L. Ed. 430.

It has been repeatedly ruled by this court that no instruction to the jury, given or refused by the court below, can be brought here for revision by writ of error, unless the record shows that the exception to it was taken or reserved while the jury were at the bar. *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *United States v. Breitling*, 20 How. 252, 254, 15 L. Ed. 900.

Where exceptions are not taken at the time to instructions to the jury, they will be considered as waived. *Poole v. Flee-ger*, 11 Pet. 185, 9 L. Ed. 680; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643.

It is a conclusive answer to an objection to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict, that no exception is taken to this instruction at the time it is given, or before the verdict was returned. And the fact that neither of the counsel was then present affords no excuse. "The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record." *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 390, 32 L. Ed. 439.

89. *Pacific Express Co. v. Malin*, 132 U. S. 531, 33 L. Ed. 450.

Theide v. Utah, 159 U. S. 510, 40 L. Ed. 237 (in this case the verdict was returned on October 21, and on November 2, the counsel came into court, and sought to save other exceptions to the charge), citing *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

90. *New Orleans, etc., R. Co. v. Jones*, 142 U. S. 18, 35 L. Ed. 919, citing *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *Brown v. Clark*, 4 How. 4, 11 L. Ed. 850.

for the first time exceptions to rulings made at the trial.⁹¹ The charge of the court below, if no exception is taken thereto before the final submission of the case to the jury, cannot be reviewed here.⁹²

"Then and There Excepted."—It has been held repeatedly that the statement at the close of the bill of exceptions, and immediately following the instructions given, that the "defendants then and there excepted" to the instructions, rulings, and decisions of the court, sufficiently shows that the rulings of the court in refusing to instruct the jury as requested, and in respect to the instructions given, were properly excepted to at the time the rulings were made.⁹³ Although the bill of exceptions does not use the words "then and there excepted" neither is it said that the court, "then and there instructed," yet if the bill purports to be a recital of what took place on the trial, it will be assumed that the instructions were given and the exceptions taken during and as a part of the trial.⁹⁴

14. **INTEREST.**—Where no question as to allowance of interest is called to the attention of the court below, its ruling in that respect will not be disturbed in this court.⁹⁵

15. **ISSUES TO THE JURY.**—According to approved chancery practice, exceptions taken or objections made to the verdict or proceedings on the trial at law of issues from chancery must be brought to the notice of the court of chancery, else they cannot be urged in an appellate court.⁹⁶

91. *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892, citing *Pacific Express Co. v. Malin*, 132 U. S. 531, 33 L. Ed. 450.

92. *Pittsburg, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58.

"The trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge is wrong even though its attention was not called to the error complained of before the case was finally submitted to the jury. But not so with us. Our power is confined to exceptions taken at the trial. And unless objection is made and exceptions taken before the verdict, no case is presented for review here of the rulings at the trial." *Pittsburg, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58, citing *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

93. **"Then and there excepted."**—*Dredge v. Forsyth*, 2 Black 563, 568, 17 L. Ed. 253; *Kellogg v. Forsyth*, 2 Black 571, 17 L. Ed. 256; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900.

94. *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 35 L. Ed. 919, citing *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Dredge v. Forsyth*, 2 Black 563, 568, 17 L. Ed. 253. Compare *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012.

In the case of *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012, it appeared that after the verdict and judgment the defendant filed a motion, supported by affidavit, which was overruled. Following the recital of this fact, the record added, "to all which decisions, rulings and instructions defendant then and there excepted;" and it was held that such recital showed that the exceptions were taken at the time of the overruling of the motion. *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 22, 35 L. Ed. 919.

95. **Interest.**—*Lloyd v. Preston*, 146 U. S. 630, 36 L. Ed. 1111.

96. **Issues to the jury.**—*Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786; *Watt v. Starke*, 101 U. S. 247, 253, 25 L. Ed. 826.

Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up for appeal. *McLaughlin v. Bank of Potomac*, 7 How. 220, 12 L. Ed. 675.

Where an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue. If this is not done, the objections cannot be taken in an appellate court of chancery. *Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786.

Where a court of equity has submitted certain issues to the jury for the information of the conscience of the chancellor, and it is evident, from the terms of the decree, that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding "upon the proof submitted;" under such circumstances, it is not the practice of an appellate court to consider formal exceptions to rulings in the courts of the trial of the issues before the jury. *Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826; *Wilson v. Riddle*, 123 U. S. 608, 615, 31 L. Ed. 280.

16. JUDGMENTS AND DECREES.—**In General.**—An objection to the form of the judgment cannot be raised for the first time on appeal,⁹⁷ nor an objection that the judgment was obtained after the death of the defendant,⁹⁸ nor an objection that too large an amount of interest has been included in a judgment.⁹⁹ An objection to a judgment that it was rendered against persons not parties cannot be raised for the first time on appeal.¹

Overruling Motion in Arrest of Judgment.—Where the record does not show any exceptions to have been taken to the overruling of a motion in arrest of judgment in the court below, the defendant must be held to have acquiesced in it, and to have waived the objection.²

17. JURISDICTION AND VENUE—*a. In General.*—The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not.³ Accordingly, the question of jurisdiction, although not raised by either party in the court below or in this court, will be taken notice of by this court of its own motion.⁴ Whether the circuit

97. **Judgments and decrees.**—*Robinson & Co. v. Belt*, 187 U. S. 41, 47 L. Ed. 65.

Objection that personal judgment improper.—*Robinson & Co. v. Belt*, 187 U. S. 41, 47 L. Ed. 65.

98. *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102.

99. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184.

1. *Robinson & Co. v. Belt*, 187 U. S. 41, 47 L. Ed. 65.

2. *Rodriguez v. United States*, 198 U. S. 156, 161, 49 L. Ed. 994.

3. **Jurisdiction and venue in general.**—*Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119; *Definance Water Co. v. Definance*, 191 U. S. 184, 194, 48 L. Ed. 140; *Kimball v. Chicago Press Brick Co.*, 194 U. S. 631, 48 L. Ed. 1158; *Warder v. Loomis*, 197 U. S. 619, 49 L. Ed. 909; *Russell v. Russell*, 200 U. S. 613, 614, 50 L. Ed. 620; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 690, 38 L. Ed. 311; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92, 98, 42 L. Ed. 673; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 44 L. Ed. 842.

4. *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Coffey v. United States*, 116 U. S. 427, 29 L. Ed. 681; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Morris v. Gilmer*, 129 U. S. 315, 327, 32 L. Ed. 690.

Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet if the record fails to affirmatively show jurisdiction, this court must take notice of the defect. *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Denny v. Pironi*, 141 U. S. 421, 35 L. Ed. 657; *Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579; *Northwestern Pac. R. Co. v. Walker*, 148 U. S. 391,

37 L. Ed. 391; *Maulsby v. Northwestern, etc., R. Co.*, 158 U. S. 53, 39 L. Ed. 894.

If the record discloses a controversy of which the circuit court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, "which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it." To the same effect are *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. Ed. 70; *Morris v. Gilmer*, 129 U. S. 315, 325, 32 L. Ed. 690. See, also, *Hancock v. Holbrook*, 112 U. S. 229, 231, 28 L. Ed. 714.

Where the case is submitted to us on printed argument, the court has been in the habit of examining the record to see if it has jurisdiction, whether the question is raised by counsel or not. *Bartemeyer v. Iowa*, 14 Wall. 26, 20 L. Ed. 792.

This court cannot overlook the fact on which its jurisdiction depends, by any action in the case in the circuit court

court had or had not jurisdiction, is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits.⁵ In the language of Mr. Chief Justice Waite: "No

upon an irregular appeal. All that this court can do is to reverse the judgment of the circuit court, and send the case back to the circuit court, that the appeal may be dismissed in it for want of its jurisdiction, that the parties may carry out the case in the district court to a final decree. *Mordecai v. Lindsay*, 19 How. 109, 15 L. Ed. 624.

Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees were willing to submit, upon argument, the whole case to the final decision of the court; but it appeared that the circuit court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the court; the counsel were directed by this court to argue the point of jurisdiction only. *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287, cited in *DeSobry v. Nicholson*, 3 Wall. 420, 423, 18 L. Ed. 263.

"In *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719, it was held to be the duty of the circuit court to execute the provisions of the 5th section of the act of March 3d, 1875, c. 137, 18 Stat. pt. 3, p. 470, by dismissing a suit of its own motion, whenever it appeared that it did not really and substantially involve a dispute or controversy properly within its jurisdiction, and equally so of this court, when, on error or appeal, it appeared that the circuit court had failed to do so, in a proper case, to reverse its judgment or decree for that reason, and to remand the cause with direction to dismiss the suit." *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 386, 28 L. Ed. 462.

In *Jackson v. Ashton*, 8 Pet. 148, 8 L. Ed. 898, the court itself raised and insisted on the point of jurisdiction in the circuit court; and in that case, it was expressly ruled, that because it did not appear that the circuit court had jurisdiction, this court on appeal, had no jurisdiction except for the purpose of reversing the decree appealed from, on that ground.

In *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932, it is true that this court passed upon all the questions in the case affecting its merits, although it reversed the judgment because the jurisdiction of the circuit court was not apparent; but it was thought convenient and proper to do so, in that case, because the record itself made it probable that its omission of the statements necessary to show jurisdiction was inadvertent, and might be supplied for a future trial in the same court. Cited in

Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 386, 28 L. Ed. 462.

Foreign consuls.—This court must, from its own inspection of the record, determine whether a suit against a person holding the position of counsel of a foreign government is excluded from the jurisdiction of the circuit courts even in the absence of any objection by the parties. *Bors v. Preston*, 111 U. S. 252, 255, 28 L. Ed. 419.

Where a libel was filed against a foreign ship, in an admiralty case, in an admiralty court of the United States, the libellant and claimant both being foreigners, the place of shipping and the place of consignment being foreign ports, and the whole ground of libel a matter which occurred abroad, this court considered the question of jurisdiction open for argument here, though it was not raised by the pleadings, and had not been suggested by any one in the court below. *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772.

5. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Blacklock v. Snail*, 127 U. S. 96, 105, 32 L. Ed. 70; *Cameron v. Hodges*, 127 U. S. 322, 326, 32 L. Ed. 132; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. Ed. 543.

The failure of parties to urge objections to the jurisdiction of the circuit court cannot relieve the supreme court from the duty of ascertaining from the record whether the circuit court could properly take jurisdiction of the suit. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 44 L. Ed. 842.

In *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, the court said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229." And was approved by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Great*

doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."⁶

And this is the case, not only when it appears on the record by a plea to the jurisdiction that jurisdiction does not exist, but even where it does not appear affirmatively that it does exist.⁷

In a very late case it was said that where the jurisdiction fails, the objection can be raised in this court; if not by the parties, then by the court itself.⁸

Reversal and Remand.—If there is nothing in the record to show that the circuit court had jurisdiction of the case, this court of its own motion will reverse the judgment and remand the cause for further proceedings.⁹

b. Equity Jurisdiction.—(1) *In General.*—If a cause is one not properly cognizable by a court of equity under any circumstances, the objection may be raised at any time; want of jurisdiction of the subject matter is always fatal at any stage of the proceeding.¹⁰ "Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, but if a plain defect of jurisdiction appears at the hearing, or on appeal, a court of equity will not make a decree."¹¹

Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. Ed. 842. See, also, the following cases recognizing this rule: *Hancock v. Holbrook*, 112 U. S. 229, 231, 28 L. Ed. 714; *Thayer v. Life Ass'n*, 112 U. S. 717, 720, 28 L. Ed. 864; *Ayres v. Watson*, 113 U. S. 594, 598, 28 L. Ed. 1093; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 226, 30 L. Ed. 623; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. Ed. 543; *Morris v. Gilmer*, 129 U. S. 315, 325, 32 L. Ed. 690; *Chapman v. Barney*, 129 U. S. 677, 681, 32 L. Ed. 800; *Stevens v. Nichols*, 130 U. S. 230, 32 L. Ed. 914; *Graves v. Corbin*, 132 U. S. 571, 590, 32 L. Ed. 462; *Parker v. Ormsby*, 141 U. S. 81, 83, 35 L. Ed. 654; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 689, 38 L. Ed. 311; *Mattingly v. Northwestern, etc., R. Co.*, 158 U. S. 53, 57, 39 L. Ed. 894; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92, 98, 42 L. Ed. 673.

6. *Hartog v. Memory*, 116 U. S. 588, 591, 29 L. Ed. 725.

7. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462.

"When there was a plea to the jurisdiction of the circuit court in a case brought here by a writ of error, the first duty of this court is, sua sponte, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the circuit court nor this court shall use the judicial power of the United States in a case to which the constitution and laws of the United States have not extended that power." The doctrine applies equally in every case where the jurisdiction does not appear from the record. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 384, 28 L. Ed. 462.

8. *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Mansfield, etc., R. Co. v.*

Swan, 111 U. S. 379, 28 L. Ed. 462; *Thompson v. Central, etc., R. Co.*, 6 Wall. 134, 18 L. Ed. 765." *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

9. *Hegler v. Faulkner*, 127 U. S. 482, 32 L. Ed. 210; *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800.

It is the duty of this court to reverse any judgment given below, and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the circuit court. *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the circuit court, although the point has not been formally raised in that court or in this court, in *Turner v. Farmers' Loan, etc., Co.*, 106 U. S. 552, 555, 27 L. Ed. 273; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 386, 28 L. Ed. 462; *Farmington Village v. Pillsbury*, 114 U. S. 138, 144, 29 L. Ed. 114; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226, 30 L. Ed. 623. *Graves v. Corbin*, 132 U. S. 571, 590, 32 L. Ed. 462.

10. **Equity jurisdiction in general.**—*New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484.

An objection to the jurisdiction of the court to entertain a bill for injunction urged apparently for the first time in this court, where the entire record fails to show complainant entitled to an injunction within the rule announced, will be recognized. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, 35 L. Ed. 303, distinguishing *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273; *Thompson v. Central, etc., R. Co.*, 6 Wall. 134, 18 L. Ed. 765.

11. *Thompson v. Central, etc., R. Co.*, 6 Wall. 134, 137, 18 L. Ed. 765.

(2) *Adequate Remedy at Law*.—And it has been held, that in the courts of the United States, an objection that a party who brings a bill in equity has a plain, complete and adequate remedy at law, goes to the jurisdiction of the forum, and may, therefore, be enforced by the judges sua sponte, though not raised by the pleadings or suggested by the counsel.¹² But though the doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal that the latter can exercise no discretion in the disposition of such objection.¹³ An objection to the jurisdiction in equity must be raised in the court below, by answer or otherwise, unless the case shows a plain defect

12. *Adequate remedy at law*.—*Parker v. Winnipiseogee, etc., Co.*, 2 Black 545, 17 L. Ed. 333, citing *Fowle v. Lawrason*, 5 Pet. 495, 496, 8 L. Ed. 204; *Dade v. Irwin*, 2 How. 383, 11 L. Ed. 308, 309.

13. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934, citing *Wylie v. Cox*, 15 How. 415, 420, 14 L. Ed. 753; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 554, 39 L. Ed. 759.

"In recent cases in this court the subject of the raising for the first time in this court of the question of want of jurisdiction in equity has been considered. In *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934, it was said that the court, for its own protection, might prevent matters properly cognizable at law from being drawn into chancery at the pleasure of the parties interested, but that it by no means followed, where the subject matter belonged to that class over which a court of equity had jurisdiction, and the objection that the complainant had an adequate remedy at law was not made until the hearing in the appellate tribunal, that the latter could exercise no discretion in the disposition of such objection; and reference was made to 1 *Daniell's Chancery Practice*, 555, 4th Am. Ed.; *Wylie v. Cox*, 15 How. 415, 420, 14 L. Ed. 753; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; and *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70. To the same effect are *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 555, 536, 33 L. Ed. 1021; and *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, 35 L. Ed. 303." *Tyler v. Savage*, 143 U. S. 79, 97, 36 L. Ed. 82.

"Even an objection that an action should have been brought at law instead of in equity may be waived by failure to take advantage of it at the proper time." *Wylie v. Cox*, 15 How. 415, 420, 14 L. Ed. 753; *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934; *Clark v. Flint*, 22 Pick. 231; *Ludlow v. Simond*, 2 *Caines' Cas.* 1, 40, 56; *Insley v. United States*, 150 U. S. 512, 515, 37 L. Ed. 1163.

An objection of want of jurisdiction on the ground of an adequate remedy at law must be alleged in the court below, either by plea or answer, if the defendant intended to avail himself of it. It is too late to urge it in an appellate court, unless it appears on the face of the proceedings. *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753.

Ordinarily, where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, the objection of the adequacy of the remedy at law should be taken at the earliest opportunity and before the defendant enters upon a full defense. *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 23 L. Ed. 1021; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, 35 L. Ed. 303.

This court will not recognize on appeal, in an action to restrain the enforcement of ordinances making a reduction in street car fares, the defense that the complainant has a plain and adequate remedy at law, where it appears on the face of the bill that the execution of the ordinances may result in a multiplicity of suits, or harassing or expensive litigation, and might impair the ability of the complainant to renew or extend its mortgage indebtedness, or result in such a decrease of income as to seriously imperil the solvency of complainant; especially where the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject matter, and does not insist that there is an adequate and plain remedy at law, and no such objection has been taken at any time and has not been insisted upon before us. *Detroit v. Detroit, Citizens' St. R. Co.*, 184 U. S. 368, 381, 46 L. Ed. 592, citing *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021.

But in *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70, it was held, that if the court, in looking at the proofs, found none of the matters which would make a

of equity jurisdiction.¹⁴ Accordingly, where it is competent for a court of equity to grant the relief asked for, and it has jurisdiction of the subject matter, the objection that the complainant has an adequate remedy at law should be taken at the earliest opportunity, and before the defendants enter upon a full defense.¹⁵

The rule as stated in 1 *Daniell's Chancery Practice*, 555, 4th Am. Ed., is, that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that "if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification, that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter."¹⁶

Mr. Justice Brewer states the rule as follows: The objection that there exists a plain and adequate remedy at law need not always be raised by some pleading, but may be presented on the hearing even in the appellate court, and if not suggested by counsel, may be enforced by the court on its own motion.¹⁷ But on the other hand it is equally true that where the objection that the plaintiff

proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. *Parker v. Winnipiseogee, etc., Co.*, 2 Black 545, 17 L. Ed. 333; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, 35 L. Ed. 303.

14. *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82, citing *Thompson v. Central, etc., R. Co.*, 6 Wall. 134, 18 L. Ed. 765.

15. *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005, following *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934.

Where no objection was raised in the court below at any stage of the proceeding in an action at law that the matter of complainant's demand is one of equitable cognizance in the Federal courts, he cannot be permitted to go to trial before a jury on the facts of the case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court. *Burbank v. Bigelow*, 154 U. S., appx., 558, 19 L. Ed. 51.

The supreme court of the state of Missouri, on appeal, dismissed a petition which sought to have the title to lands held by the defendant, under a patent from the United States, divested, and vested in the complainant. From this decree of dismissal a writ of error brought up the case under the twenty-fifth section of the judiciary act, the complainant claiming the land under a former patent from the United States. This court determined that the legal title to the premises was in the complainant under the second patent, reversed the decree, and remanded the cause "for further proceed-

ings in conformity to the opinion of the court" (*Maguire v. Tyler*, 8 Wall. 650, 672, 19 L. Ed. 420.) The opinion given, declared also that on the merits (which were gone into, and in which utterance was given as to every point which it was necessary to decide in order to dispose of the case on them), the case was with the plaintiff or complainant. On the presentation of the mandate to the supreme court of the state, they directed it to be filed, and entered up an order reversing their former decree, and the cause again coming up to be disposed of, the court decided that the legal title to the premises was vested by the second patent in the complainant, as declared by this court, and that on such a title under the laws and practice of the state there was a plain and adequate remedy at law, and that equity had no jurisdiction of the case made by the petition, and, therefore, decreed dismissing the petition. To this decree the complainant sued out a second writ of error, under the twenty-fifth section. Held, that whether the legal title was in the complainant, and whether he had an adequate remedy at law, are questions that could only have been properly made in the court of original jurisdiction, or "perhaps before this court on the first writ of error; but it is too late to raise such questions after the whole case had been decided, and the cause remanded for final judgment." *Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 573.

16. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934.

17. *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. Ed. 246; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 35 L. Ed. 303; *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 349, 50 L. Ed. 507.

has an adequate remedy at law is not made until the hearing, and the subject matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though if taken in limine it might have been worthy of attention.¹⁸

A plaintiff, who has voluntarily invoked the equity jurisdiction of the court, is not in a position to urge, on appeal, that his complaint should have been dismissed because of the adequacy of the remedy at law. Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time.¹⁹

c. Defects in Appeal or Writ of Error.—The rule of court is that where there is a substantial defect in the appeal or writ of error, the objection may be taken at any time before the judgment; on the ground that the case is not legally before the court, and that it has not jurisdiction to try it.²⁰

d. Power of Court to Render a Judgment.—An objection that the court has not decided correctly is a very different thing from an objection that the court has no power to decide.²¹ Therefore, where the consideration of a question is *prima facie* within the jurisdiction and control of a state court—such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs—if the person who gave the mortgage becomes bankrupt and his assignee goes into the state court, submits to its jurisdiction, and nowhere asserts, in any way, the rights of the Federal courts in the matter—he cannot, after taking his chance for a decision in his favor, and getting one against him, raise in this court the point of want of jurisdiction in the state court.²²

e. Sufficiency of Amount in Controversy.—The failure of a bill to allege the proper jurisdictional amount, in order to give the circuit court jurisdiction, cannot be made in this court, where no objection thereto has been raised in the circuit court.²³

f. Venue.—Objection that a suit was brought in the wrong district comes too late after the defendant has pleaded in bar.²⁴

18. PARTIES—**a. For Want of Proper Parties.**—**In General.**—An objection for the nonjoinder of proper though not indispensable parties comes too late in this court.²⁵ Objections to parties, or for the want of proper parties, should be

18. *Wylie v. Cox*, 15 How. 415, 420, 14 L. Ed. 753; *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021; *Insley v. United States*, 150 U. S. 512, 515, 37 L. Ed. 1163; *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. Ed. 113; 1 *Daniell's Chan. Pl. & Pr.* (4th Ed.), p. 555. *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 349, 50 L. Ed. 507.

19. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 536, 33 L. Ed. 1021; *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. Ed. 113.

20. **Defects in appeal or writ of error.**—*Wilson v. Life, etc., Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032, citing *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727.

The plaintiff Sigg was denominated in the petition and writ "J. J. Sigg;" the omission of his Christian name at full length was alleged as error. He may have had no Christian name; he may have assumed the letters "J. J." as distinguishing him from other persons of the name

Sigg. Objections to the name of the plaintiff cannot be taken advantage of, after judgment; if J. J. Sigg was not the person to whom the promise was made; was not the partner of Theodore Nicolet & Co.; advantage should have been taken of it sooner; it is too late to allege it as error, in this court. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

21. **Power of court to render a judgment.**—*Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389, 390.

22. *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389, cited in *Upton v. Kent*, 105 U. S. 646, 26 L. Ed. 1200.

23. **Sufficiency of amount in controversy.**—*Giles v. Harris*, 189 U. S. 475, 485, 47 L. Ed. 909.

24. **Venue.**—Texas, etc., *R. Co. v. Saunders*, 151 U. S. 105, 38 L. Ed. 90, citing *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; Texas, etc., *R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829.

25. **For want of proper parties.**—*Gibbs v. Diekma*, 131 U. S., appx. clxxxvi, 26 L. Ed. 176, 177; *Landram v. Jordan*, 203 U. S. 56, 51 L. Ed. 88; *West v. Smith*, 8 How. 402, 12 L. Ed. 1130.

Although an objection, for want of proper parties, may be taken at the

made in the court below, where amendments may be granted in the discretion of the court. Parties improperly joined may, on motion, be stricken out, and new parties may be added by a supplemental libel or petition.²⁶

How Taken.—Where the want of parties does not appear on the face of the bill, the objection must be set up by plea or answer, and cannot be made for the first time in this court.²⁷

Exceptions to General Rule.—But this court will reverse and remand a case defective as to parties, although this deficiency has not been made a point in the court below.²⁸ It is well settled, that neither the act of congress of 1837 (5 U. S. Stat. at L. 321, § 1), nor the 47th rule of this court, enables the circuit court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the appellate court.²⁹ So also, where an objection is made for the first time on appeal that the proper parties defendant were not made in the court below, if proper, the case may be sent back, and an amendment made there. By the Virginia practice new parties can be admitted as late as the final hearing.³⁰ Where the objection is not merely that the proper parties were not before the court, but that a bill in chancery, being set down for a hearing as to those who had answered, and also as to those against whom it had been taken as confessed, the court had decreed against a part only, when it ought to have decreed against the whole, it is no answer to this objection that no exception was taken at the hearing for the want of proper parties. The error was in dismissing the bill as to any of them, when the proper parties for a decree as to all of them were before them.³¹

b. *For Misjoinder of Parties.*—An objection that there is a misjoinder of parties, cannot be taken for the first time in the appellate court.³² On appeal to

hearing, yet the objection ought not to prevail upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

The objection that the defendants to an amended bill were all necessary parties to a supplemental bill filed in the same cause, cannot be made for the first time in this court. *McBurney v. Carson*, 99 U. S. 567, 25 L. Ed. 378.

Admiralty.—Objections to want of proper parties being matter which should be taken in the court below, a party cannot, in an admiralty proceeding by the owners of a vessel, to recover damages for a cargo lost on their ship by collision, object here, for the first time, that the owners of the vessel were not the owners of the cargo, and therefore that they cannot sustain the libel. Independently of this, as vessels engaged in transporting merchandise from port to port are "carriers"—if not exactly "common carriers"—and as carriers are liable for its proper custody, transport and delivery, so that nothing but the excepted perils of the sea, the act of God, or public enemies, can discharge them—it would seem that they might sustain the action within the principle of the *Propeller Commerce*, 1 Black 574, 582, 17 L. Ed. 107. *Schooner Commander-in-Chief*, 1 Wall. 43, 17 L. Ed. 609.

Where it appears that the party or

parties named as libelants are competent to prosecute the suit, the nonjoinder of others having an interest in the controversy must be shown by exception, and, if not made to appear in the court below, cannot be made available as an original objection in the appellate tribunal. *Schooner Commander-in-Chief*, 1 Wall. 43, 17 L. Ed. 609.

^{26.} *Schooner Commander-in-Chief*, 1 Wall. 43, 52, 17 L. Ed. 609.

^{27.} *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469, citing *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

^{28.} *Hoovey v. Wilson*, 9 Wall. 501, 19 L. Ed. 762.

^{29.} *Coiron v. Millaudon*, 19 How. 113, 15 L. Ed. 575, citing *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

^{30.} *West v. Smith*, 8 How. 402, 12 L. Ed. 1130.

^{31.} *Mandeville v. Riggs*, 2 Pet. 482, 488, 7 L. Ed. 593.

^{32.} **For misjoinder of parties.**—*Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279; *Griffin v. Reynolds*, 17 How. 609, 15 L. Ed. 229; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes

this court from a district court, it was held that an objection cannot be taken here for the first time that there is a misjoinder of parties; besides the difficulty may be obviated by a *nolle prosequi* in the district court.³³ When a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear on the face of the bill, the proper mode to take advantage of it is by plea and answer. The objection of misjoinder of complainants should be taken either by demurrer, or on the answer of the defendants. It is too late to urge a formal objection of the kind, for the first time, at the hearing.³⁴

c. *Multifariousness*.—The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.³⁵

d. *For Misnomer*.—Objections for misnomer cannot be taken advantage of after judgment, or in this court.³⁶

e. *Capacity to Sue*.—**In General**.—Where an objection to the institution of a suit against a defendant in three distinct capacities is not taken in the court below at any stage in the case, it cannot be taken here.³⁷ Although the bill makes no distinction between the two characters in which an executor acts, namely, as an executor proper, and as an executor having a power coupled with a trust, yet if no objection is taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary.³⁸ An objection for the first time in this court that a suit was brought by "Albert Baldwin, in his capacity of president of the New Orleans National Bank," comes too late.³⁹

By District Attorney.—An objection cannot be made for the first time in this court that a suit brought by a district attorney of the United States to set aside a patent conveying public lands, was not brought under authority from the attorney general.⁴⁰

Married Women.—The objection that an action for personal injuries brought by a married woman cannot be maintained, because her husband alone could sue therefor, cannot be considered by the supreme court of the United States when the point was not made below.⁴¹

f. *Substitution or Intervention*.—Exceptions to the rulings of the court upon motions for leave to intervene or be substituted in the place of or admitted with other parties, must be taken whilst the jury are at the bar; they cannot be taken for the first time in this court.⁴²

too late. Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted. *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809.

33. *Griffin v. Reynolds*, 17 How. 609, 15 L. Ed. 229, citing *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *United States v. Leffler*, 11 Pet. 86, 9 L. Ed. 642; *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973.

34. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

35. **Multifariousness**.—*Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

36. **For misnomer**.—*Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

37. **Capacity to sue**.—*Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

38. *Taylor v. Benham*, 5 How. 233, 34, 12 L. Ed. 130.

39. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764.

40. *Western Pac. R. Co. v. United*

States, 108 U. S. 510, 27 L. Ed. 806, cited and approved in *Mullan v. United States*, 118 U. S. 271, 276, 30 L. Ed. 170.

An objection cannot be made for the first time in this court that the district attorney had no authority to file a bill in the circuit court in the name of the United States to vacate a patent for land. *McLaughlin v. United States*, 107 U. S. 526, 27 L. Ed. 621. Compare *Mullan v. United States*, 118 U. S. 271, 30 L. Ed. 170.

41. *Texas, etc., R. Co. v. Humble*, 181 U. S. 57, 60, 45 L. Ed. 747.

42. **Substitution or intervention**.—Where there was an affidavit made, after verdict and judgment, that the affiant was the real party in interest, and prayed to be substituted for, or admitted with, the defendant, and the court overruled the motion, an exception to this ruling will not bring up the points which were raised at the trial; nor will it bring up the rul-

19. **PLEADINGS**—a. *Declaration*.—An objection to a too general allegation of injury should be made in the court below. It cannot be made here for the first time and after the case has been heard below.⁴³

Description of Parties.—Where no objection is made in the court below to a pleading which describes the party by the initials only of his Christian name, it will not be considered here, although such pleading be defective.⁴⁴

Amendments.—An objection cannot be presented for the first time in this court that the petition was not amended.⁴⁵

Separately Stating and Numbering Causes of Action.—An objection that the plaintiff failed to separately state and number his two causes of action as required by the Ohio practice is waived, where no motion to that end was made in the court below.⁴⁶

b. *Plea or Replication*.—In **General**.—Where the parties go to trial without objection for want of a plea or replication, and judgment is entered for the plaintiff, it is too late to take the objection in this court.⁴⁷ Where a case has been tried and a verdict rendered as if the pleadings had been perfect, an objection for the failure to demur or to reply to a special plea setting up a matter of defense, comes too late after a trial and verdict below as if the pleadings had been perfect in form.⁴⁸ Where in a suit to set aside tax deeds a plea in bar is overruled, and afterwards an answer is filed setting out and relying on the same facts, but no objection is made on this ground in the trial court, this court will not consider whether the plea is properly overruled.⁴⁹

Replication.—The point cannot be first made in this court that no replication has been made to an answer in chancery, and, therefore, that the answer is to be taken as conclusively true in all points. If such a point is meant to be insisted on here, it should have been made in the court below.⁵⁰ An objection that a replication is not in sufficient form under Rule 66 of the equity rule cannot be first made in this court. The objection if not made below is waived.⁵¹

ing upon the motion. Exceptions must be taken or the points reserved whilst the jury are at the bar. *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012.

Parties not claiming under the United States, who are allowed to intervene in proceedings of the district court to correct surveys of Mexican land grants in California, under the act of June 14th, 1860, must claim under cessions of the former Mexican government. The order of the district court, allowing a party thus claiming to intervene, is a determination that he possesses such interest derived from that government as to entitle him to contest the survey; and objection to his intervention, on the ground that he possesses no such interest, cannot be taken for the first time in this court. *Alviso v. United States*, 8 Wall. 337, 19 L. Ed. 305.

43. **Declaration**.—The *Quickstep*, 9 Wall. 665, 19 L. Ed. 767.

44. *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72.

45. *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328.

46. *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 32 L. Ed. 970.

47. **Plea or replication**.—*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 30 L. Ed. 1140.

It is too late to urge for the first time in the supreme court of the United States

the objection that a surety should have set up as an affirmative defense by answer or plea, and not by demurrer, the fact that such substantial changes were made in the contract as would release the said surety if made without his assent. *United States v. Freel*, 186 U. S. 309, 319, 46 L. Ed. 1177.

48. *Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050.

49. *Gage v. Bani*, 141 U. S. 344, 35 L. Ed. 776.

50. *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769, citing *Clements v. Nicholson*, 6 Wall. 299, 310, 18 L. Ed. 786.

51. *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786.

Even if, as a matter of technics, the replication was a departure from the complaint, it is not easy to see how the defendant could have availed himself of such a defect in a court of error. His proper course, if he wished to invoke the rigor of the law, was to raise the question either by a demurrer or by a motion; but his conduct in agreeing to a change of venue, after the pleadings had been perfected, in entering into a stipulation as to the principal facts of the case, and in going to trial upon the issue made up, ought to preclude him from opening the pleadings at the trial. *Ankeny v. Clark*, 148 U. S. 345, 355, 37 L. Ed. 475.

Although the filing of replications to pleas during the progress of the trial, and without leave of the court, is improper and irregular, yet the objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, comes too late after judgment is entered.⁵²

Conclusion of Plea.—It is not a matter for reversal that a plea concludes to the court instead of to the country, where the objection is not made in the lower court.⁵³

c. *Filing Pleadings.*—**Leave of Court.**—An objection to an amended bill in chancery because not filed with the leave of the court below (as it is contemplated by Rule 45 of the equity rules that such bills should be), cannot be first made in this court. The objection if not made below is waived.⁵⁴

Failure to File.—The objection comes too late in the appellate tribunal that relief was improperly awarded the defendants by the court below because they filed no cross complaint.⁵⁵ An assignment of error that the complainant failed to file a replication to his answer, leave to do so having been granted by the court on the complainant's motion, will be overruled, where it appears that the parties went to the hearing as if it had been done, submitting the case upon the proofs which have been taken, as though a formal issue had been perfected.⁵⁶

d. *Variance.*—It is well settled in this court that an objection that the evidence does not support a joint action against all of the defendants—in other words, a variance between the pleadings and proofs—is one which should be taken at the trial, and cannot be raised for the first time in the appellate court.⁵⁷ An objection of variance between the allegations and proof must be taken when the evidence is offered. It cannot be taken advantage of after it is closed.⁵⁸

20. **THE RECORD.**—An objection that a certificate had been improperly made a part of the record after the bill of exceptions had been completed and signed will not be considered where it was not presented to the court whose judgment is here for review. The record must be taken as it was presented to the appellate court below.⁵⁹ Where no objection is made in the court below to the record upon the ground that the transcript is incomplete or not properly authenticated, it cannot be taken for the first time in this court.⁶⁰

21. **REFERENCE**—a. *Exceptions to Master's Report*—(1) *Necessity for Excepting Below.*—**In General.**—The findings of the master are prima facie correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party.⁶¹

As a general rule no exceptions can be made in the appellate court to a master's report, which were not taken below,⁶² unless exceptions to it have been filed

52. *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 36 L. Ed. 495.

53. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

54. **Filing pleadings.**—*Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786.

55. *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. Ed. 113, citing *Coburn v. Cedar Valley Land, etc., Co.*, 138 U. S. 196, 34 L. Ed. 876.

56. *National Bank v. Insurance Co.*, 104 U. S. 54, 77, 26 L. Ed. 693, citing *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

57. **Variance.**—*O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669; *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. Ed. 1006; *Pine River Logging Co. v. United States*, 186 U. S. 279, 287, 46 L. Ed. 1164.

58. *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791.

The objection of variance not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; nor can it avail him on a motion for a new trial. *Roberts v. Graham*, 6 Wall. 578, 581, 18 L. Ed. 791.

59. **The record.**—*Keyser v. Hitz*, 133 U. S. 138, 146, 33 L. Ed. 531.

60. *Carpenter v. Strange*, 141 U. S. 87, 101, 35 L. Ed. 640.

61. **Necessity for objecting below.**—*Metsker v. Bonebrake*, 108 U. S. 66, 72, 27 L. Ed. 654.

62. *Equity Rule* 83; *Brockett v. Brockett*, 3 How. 691, 692, 11 L. Ed. 786; *MeMicken v. Perin*, 18 How. 507, 511, 15 L. Ed. 504; *Story v. Livingston*, 13 Pet. 359, 366, 10 L. Ed. 200; *Metsker v. Bone-*

in the court below in the manner pointed out in the seventy-third chancery rule of this court.⁶³ Thus, the objection cannot be made for the first time in this court, that the report of the referee finds certain facts inferentially and not directly.⁶⁴ An objection cannot be taken for the first time on appeal to the incompleteness of the master's report.⁶⁵ If the master's report of amount due is too great, it should be excepted to. It is too late to object to it here for the first time.⁶⁶ "Where the master upon the reference has followed the decree and enforced its directions, no objection can be taken upon appeal as to what he has done, when the appeal arises upon exceptions to his report."⁶⁷

Rule 83 has no reference to a report by a master of a mere ministerial matter like a sale, but only to his report upon matters heard and determined by him.⁶⁸

Commissioner in Admiralty.—Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be

brake, 108 U. S. 66, 71, 27 L. Ed. 654; *Burns v. Rosenstein*, 135 U. S. 449, 455, 34 L. Ed. 193; *West v. Smith*, 8 How. 402, 12 L. Ed. 1130; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 362, 36 L. Ed. 732; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385; *Hudgins v. Kemp*, 20 How. 45, 54, 15 L. Ed. 853; *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894; *The Ship Virgin v. Vyffhous*, 8 Pet. 538, 8 L. Ed. 1036; *The Vanderbilt*, 6 Wall. 225, 18 L. Ed. 823; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658.

And in *McMicken v. Perin*, 18 How. 507, 15 L. Ed. 504, it was held directly that this court will not review a master's report upon objections taken here for the first time. *Topliff v. Topliff*, 145 U. S. 156, 173, 36 L. Ed. 658.

Strictly, in chancery practice, though it is different in some of the states of the union, no exceptions to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors, or to reconsider his opinions. A party neglecting to bring in exceptions before the master, cannot afterwards except to the report, unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to re-examine it, with liberty to the party to make objections to it. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

It was held by this court, in *Story v. Livingston*, 13 Pet. 359, 366, 10 L. Ed. 200, that proper practice in chancery requires that no exceptions to a master's report be made which were not taken before the master, the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the court, upon motion, see reason to be dissatisfied with the report and refer it to the master for review, with liberty to the party to take objec-

tion. *Topliff v. Topliff*, 145 U. S. 156, 173, 36 L. Ed. 658.

^{63.} *Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786.

^{64.} *Lumber Co. v. Buchtel*, 101 U. S. 633, 25 L. Ed. 1072.

^{65.} *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 35 L. Ed. 951.

^{66.} *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385, 386.

^{67.} *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215; *New Orleans v. Warner*, 180 U. S. 199, 203, 45 L. Ed. 493.

Where a master, on reference, has followed the order of the judgment and enforced its directions, no objection can be taken, on appeal, to what he has done when the appeal arises upon exceptions to his report, and not on objection to the original judgment under which the reference to him was made. *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215.

^{68.} *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 363, 36 L. Ed. 732.

In affirmance of this principle, Rule 21 (Sub. 2) requires that "when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it." This presupposes that the particular exception relied upon was taken in the court below, and was passed upon by the court adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court. It would be manifestly unjust if this court, after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, when if exception had been duly taken, the error could have been at once corrected. *Topliff v. Topliff*, 145 U. S. 156, 173, 36 L. Ed. 658.

entertained in this court in a case of collision, where it appears that neither party excepted to the report of the commissioner.⁶⁹

Limitations of General Rule.—But it is not necessary to take exceptions in the court below to the report of auditors, if the errors appear upon the face of the report.⁷⁰

(2) *Form and Sufficiency of Exceptions.*—Exceptions to the report of a master must state, article by article, the parts of the report which are intended to be excepted to.⁷¹ But in another case it was said that an exception to a master's report is not in the nature of a special demurrer, and is not required to be so full and specific. It is only necessary that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. An exception so made brings up for examination all questions of fact and law arising upon the report of the master, relative to that subject.⁷²

Where a series of propositions are embodied in the report or a referee, and are excepted to in a mass, if any one of the propositions is correct, the exception will not be good. The party should, by his exception, direct the attention of the court to the specific proposition or propositions on which he relies, and separate it or them from the rest.⁷³

Parties excepting to a report of a commissioner in admiralty proceedings, should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is. Ex. Gr. If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected.⁷⁴

22. REMOVAL OF CAUSES.—Where no question was raised in the court below as to the regularity of the proceedings by which a case was removed from a state court to a federal court, this relieves this court from the necessity of considering the question.⁷⁵ Where there are averments of diverse citizenship, and this averment is not traversed, it must be deemed to have been conclusively established, and the defendant cannot be heard to raise such an objection for the first time in an appellate court.⁷⁶ Hence an objection to the time of filing the petition for removal cannot be raised for the first time in this court, but must be held to have been waived by not taking it below.⁷⁷

23. SHERIFFS' SALES.—An assignment of error that the sale and adjudication

69. *The Vanderbilt*, 6 Wall. 225, 18 L. Ed. 823.

70. *Himely v. Rose*, 5 Cranch 313, 3 L. Ed. 111, citing *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 2 L. Ed. 208.

71. **Form and sufficiency of exceptions.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

Exceptions to the report of a master, in chancery proceedings, are in the nature of a special demurrer, and the party objecting must point out the errors; otherwise, the parts not excepted to will be taken as admitted. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

72. *Foster v. Goddard*, 1 Black 506, 17 L. Ed. 228.

73. *Boogher v. New York Life Ins. Co.*, 103 U. S. 90, 26 L. Ed. 310.

74. *Schooner Commander-in-Chief*, 1 Wall. 43, 17 L. Ed. 609.

Where a master found the amount due, but stated no account, and his report was excepted to as being excessive, not sufficiently proved, erroneous under the pleadings, and founded on illegal evidence, such general objections may justly be treated as frivolous, and if overruled and the case brought here on appeal, this court cannot say that particular charges were wrongly admitted, or particular credits wrongly thrown out. *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

75. **Removal of causes.**—*The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851.

76. *Cutler v. Huston*, 158 U. S. 423, 39 L. Ed. 1040.

77. *Martin v. Baltimore, etc., R. Co* 151 U. S. 673, 687, 38 L. Ed. 311.

of the property by the deputy sheriff was null and void on account of the insufficiency of the bid, not made below, cannot be considered here.⁷⁸

24. **EQUITY, ADMIRALTY AND MARITIME CAUSES.**⁷⁹—By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found in the record, as evidence; unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent."⁸⁰ An objection for the first time in this court in a case in prize, that all the depositions in the record, except those preparatorio, should be stricken out, or disregarded by the court on the appeal, for the reason that it does not appear that an order had been granted on behalf of either party to take further proof, comes too late. It should be made in the court below.⁸¹ Likewise, an objection that a case was not brought up within the requirements of the act of 1845, so as to give the district court jurisdiction, because it was not shown that the vessels were of the burden of twenty tons and upwards, or enrolled and licensed for the coasting trade, should be taken by the respondents in the progress of the trial below, or it is untenable.⁸² The claimant of a vessel libeled for repairs, cannot be permitted in this court to contest the amount of libellant's claim, except in so far as specific objections appear by the record to have been taken to it in the court below.⁸³

Where exceptions of form are taken on a libel in admiralty in the district court, but are not found in the record of the appeals from the district to the circuit court, or from the circuit court to this one, and do not appear to have been brought to the attention of the circuit court, or acted on in any manner by it, they must be held in this court to have been waived.⁸⁴

25. **STATUTE OF LIMITATIONS.**—Where the record shows that no question as to the application of the statute of limitation to the case was raised in the court below, either in pleading on the trial or before judgment, it is too late for the defendant to raise the point for the first time in the appellate court. This principle is always applied to questions which are not questions of jurisdiction.⁸⁵

26. **STIPULATIONS.**—It is too late to urge in this court stipulations between parties not brought to the attention of the court below.⁸⁶

27. **VERDICT.—Form and Sufficiency.**—Where no exception or objection is taken in the court below to the form and sufficiency of the verdict, it cannot be raised for the first time on appeal.⁸⁷ Thus, it is not a matter for reversal that the language of the verdict is that we find the "issue" instead of the "issues," where the objection was not made in the court below.⁸⁸

Responsiveness.—Where the verdict is not responsive to all the issues, it is competent for the court to amend the same, but such objection comes too late for the first time in this court.⁸⁹

78. **Sheriffs' sales.**—*Flournoy v. Last-
rapes*, 131 U. S., appx. clxi, 25 L. Ed. 406.

79. See the title **ADMIRALTY**, vol. 1, p. 119.

80. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

81. *The Georgia*, 7 Wall. 32, 19 L. Ed. 122; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

82. *The Eagle*, 8 Wall. 15, 19 L. Ed. 365.

83. *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

84. *The Vaughan and Telegraph*, 14 Wall. 258, 20 L. Ed. 807.

85. **Statute of limitations.**—*Upton v. Kent*, 105 U. S. 646, 26 L. Ed. 1200, citing *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42.

86. **Stipulations.**—*Carr v. Fife*, 156 U.

S. 494, 39 L. Ed. 508.

87. **Verdict.**—*National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682.

88. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

In an action of debt the jury was sworn to try "the issue." Two issues were joined and the jury found "the issue" for the plaintiff and assessed his damages. It was held that this court would decline to hear an objection made in this court for the first time, that the jury was sworn to try, and in fact tried, but one issue, whereas there were two issues. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, citing *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

89. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

The jury, in rendering their verdict,

Report of Assessors of Damages.—Where on looking into the record of the case, there is found no exception to a ruling of the court upon the trial, nor any exception to the report of the assessors, nor of any ruling of the court in relation to it, there is nothing in the record which can be reviewed here upon error, and the judgment of the court will be affirmed.⁹⁰

28. **QUESTIONS RELATING TO WILLS.**—A claim under a will cannot be set up for the first time in this court.⁹¹ And it seems that an objection that a devise is void because of the alienage of the devisee, cannot first be taken by him in this court on a writ of error to the judgment of a circuit court on a special case, although the record discloses the fact of alienage.⁹²

29. **WITNESSES**—a. *Competency.*—An objection cannot be made in this court to a release under which a witness was sworn, unless the objection was made in the court below, and an exception taken.⁹³ In an admiralty suit, an objection to the deposition of a witness, on the ground of incompetency from interest, must be made at the hearing; it comes too late if it be deferred until the argument.⁹⁴

b. *Examination.*—Although the plaintiff's counsel objects to a question as being leading, and excepts to the opinion of the court, yet if no exception is actually prayed by the court and signed by the judge, this court cannot consider the exception as actually taken.⁹⁵ If it is intended to raise, on a writ of error, the point that a cross-examination was not responsive to anything elicited on the direct, an objection must have been taken on that ground at the trial.⁹⁶

30. **CRIMINAL PROCEEDINGS.**—Though no specific exception is taken by the prisoner, based upon the fact that he was called upon to challenge jurors not before him, yet a general exception taken to the action of the court in prescribing the method of procedure, is sufficient.⁹⁷ An objection to the sufficiency of the allegations in the indictment is not available on a writ of error.⁹⁸ Where the record

failed to respond separately to the distinct issues they were sworn to try. The defendant had pleaded three pleas: 1. Covenants performed. 2. Payment. 3. Set-off, greater in amount than the claim of the plaintiff. On these three pleas the jury gave a general verdict of damages in favor of the plaintiff, on which judgment was entered. In the circuit court no exception was taken to the verdict. The counsel for the plaintiff contended that this was error in the circuit court, which was properly to be corrected in the supreme court. By the court: Objections of this character, that are neither taken at the usual stage of the proceedings, nor prominently presented on the face of the record, but which may be sprung upon a party after an apparent waiver of them by his adversary, and still more after a trial on the merits, can have no claim to the favor of the court; but should be entertained in obedience only to the strict requirements of the law. *Roach v. Hulings*, 16 Pet. 319, 10 L. Ed. 979.

90. *Weed v. Crane*, 154 U. S., appx, 579, 19 L. Ed. 712.

91. **Questions relating to wills.**—Where a testator made certain devises to his two grandchildren, "provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three-fourth parts shall be equally divided between Sarah Smallwood and others," etc., and the two

grandchildren lived many years after they arrived at full age, and then both died without issue, but the plaintiffs below claimed, in this court, that they were entitled to recover a part, because they were a portion of the heirs of the two grandchildren, as this point was not made in the court below, and therefore cannot be made here. *Doe v. Watson*, 8 How. 263, 12 L. Ed. 1072.

92. *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99.

93. **Competency.**—*Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404.

94. *Nelson v. Woodruff*, 1 Black 156, 17 L. Ed. 97.

95. **Examination.**—In the course of the trial of the cause in the circuit court, the counsel for the plaintiff objected to a question put by the defendant's counsel to a witness, as being a leading question. By the court: Although the plaintiff's counsel objected to this question, and said that he excepted to the opinion of the court, no exception is actually prayed by the party and signed by the judge. This court cannot consider the exception as actually taken, and must suppose it was abandoned. *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

96. *Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406.

97. **Criminal proceedings.**—*Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011.

98. *Connors v. United States*, 158 U. S. 408, 39 L. Ed. 1033.

on an appeal to the supreme court of the Philippine Islands does not disclose that an objection was taken to the sufficiency of a complaint for crime before the trial, on the ground that the complaint did not sufficiently state the essential ingredients of the offense charged, the objection cannot be considered by the supreme court on the appeal.⁹⁹

31. THEORY OF THE CASE.—Where the case has been tried in the court below on one theory agreed upon between the parties, a different theory cannot be taken for the first time in this court.¹

32. PEREMPTORY EXCEPTIONS IN LOUISIANA.—Peremptory exceptions, in the jurisprudence of that state, are of two classes, of which the first is equivalent in import to a demurrer at common law, and of course must in all cases be adjudged by the court. Somewhat different rules apply in the second class, which, without going into the merits of the cause, show that the plaintiff cannot maintain the action either because it is prescribed or because the cause of action has been destroyed or extinguished. Such an exception may be pleaded in every stage of the litigation previous to the definitive judgment, but the rule is that it must be pleaded specially, and that sufficient time must be allowed to the adverse party to make defense.²

33. WAIVER OF EXCEPTIONS AND OBJECTIONS.—In General.—We have repeatedly held that, where a party upon a trial excepts to a ruling of the court, but does not stand upon such exception, and acquiesces in the ruling and elects to proceed with the trial, he thereby waives his exception.³ So, also, where a party voluntarily submits himself and his rights to the jurisdiction of the state court; and being summoned he appears without objection and presents his claim for adjudication in that court, it is too late to object in this court to the power of the state court to act in the premises and render judgment.⁴ Though a party may have taken exceptions before a trial to the refusal of a court then to suppress a deposition, yet, if he allow the deposition to be read in the trial without objection, he cannot avail himself of his previous exception in the supreme court.⁵

But a motion for a new trial is not a waiver of exceptions.⁶

The cross-examination of a witness by the opposite party is considered as a waiver of exceptions to the regularity of the deposition.⁷

By not resting on his motion for a nonsuit, and by thereafter offering his own evidence, the defendant waives his motion, and the overruling thereof cannot be assigned for error here.⁸

Where a defendant moves the court to direct a verdict in his favor, but the court denies this motion and the defendants except, but they do not stand on their exception, but proceed to introduce testimony in their own behalf, as this court has repeatedly held they thereby waive their exception.⁹

99. *Serra v. Mortiga*, 204 U. S. 470, 31 L. Ed. 571.

1. **Theory of the case.**—*New York, etc., R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292.

2. **Peremptory exceptions in Louisiana.**—*Montgomery v. Samory*, 99 U. S. 482, 486, 25 L. Ed. 375. See the title DEMURRERS.

3. **Waiver of exceptions and objections.**—*Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. Ed. 266; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. Ed. 740; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686; *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405; *Campbell v. Haverhill*, 155 U. S. 610, 612, 39 L. Ed. 280; *Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867.

An exception is waived by going to

trial on the merits. *Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

4. *Scott v. Kelley*, 22 Wall. 57, 22 L. Ed. 729, citing *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389.

5. *Ray v. Smith*, 17 Wall. 411, 21 L. Ed. 666. See also, *Brown v. Tarkington*, 3 Wall. 377, 378, 18 L. Ed. 255.

6. *United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319.

7. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

8. *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597; *Runkle v. Burnham*, 153 U. S. 216, 222, 38 L. Ed. 694.

9. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 39 L. Ed. 627; *Dogk v. Gassert*, 149 U. S. 17, 37 L. Ed. 631; *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746, citing

Where, at the close of the plaintiff's evidence, the defendant moves to dismiss, which motion is denied, and the defendant excepts thereto, but thereupon he proceeds with the case, and adduces evidence on his part, this waives the exception, and the action of the court in overruling a motion to dismiss cannot be assigned for error.¹⁰

Where no argument has been submitted for the plaintiff in error, this court will infer that the exceptions relied upon in the court below have been abandoned.¹¹

An objection to the jurisdiction of the circuit court presented by filing a demurrer for the special and single purpose of raising it, is not waived by answering to the merits upon the demurrer being overruled.¹²

IX. Transfer of Cause.

A. In General.—While this court has always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, and that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time it has been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction.¹³

Runkle v. Burnham, 153 U. S. 216, 38 L. Ed. 694.

It is settled that an exception to the refusal of the trial court to instruct the jury to find for the defendant is waived if made by defendant without resting his case. *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405; *Union Pac. R. Co. v. Callaghan*, 161 U. S. 91, 95, 40 L. Ed. 628; *Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867.

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that she was not entitled to recover, cannot be assigned for error, because the defendant at the time of requesting such an instruction had not rested its case, but afterwards went on and introduced evidence in its own behalf. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. Ed. 266; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 530, 30 L. Ed. 740; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. Ed. 296.

10. *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597, citing *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405.

An objection that an appeal is not well taken because the complainant obtained leave to amend after the decree to dismiss the bill was entered, will not be sustained where it appeared from the record that the decree to dismiss the bill was regularly stricken out before the leave to amend was granted and afterwards when the complainant elected not to amend, the bill was ordered to be dismissed by reason of the demurrer. *McCormick v. Gray*, 13 How. 26, 39, 14 L. Ed. 36.

At the trial in the circuit court of an action brought to recover damages for deceit alleged to have been practiced by

the plaintiff in error and acting by one, G., the evidence in behalf of the plaintiffs being closed, the defendant moved to dismiss the complaint upon the ground that the contract in relation to the property in question was alone with G. That motion was denied and the defendant then introduced evidence in his behalf. It was held that as the defendant did not rest upon the denial of his motion to dismiss, but introduced evidence, he could not assign the refusal to dismiss as error. *Sigafus v. Porter*, 179 U. S. 116, 121, 45 L. Ed. 113, citing and approving *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597; *Runkle v. Burnham*, 153 U. S. 216, 38 L. Ed. 694.

11. *Duvall v. United States*, 154 U. S., appx., 548, 18 L. Ed. 252; *Robbins v. Chicago*, 4 Wall. 657, 671, 18 L. Ed. 427.

12. *In re Atlantic City R. Co.*, 164 U. S. 633, 41 L. Ed. 579, citing *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943. See *First Nat. Bank v. Chicago Title, etc., Co.*, 198 U. S. 280, 289, 49 L. Ed. 1051.

A failure on the part of adverse claimants to abandon their claims to property not in the possession of the assignee in bankruptcy, and the fact that they followed the case after their objections to the jurisdiction of the district court had been overruled, does not amount to a waiver of the objections to the jurisdiction of the court, or to a consent to an exercise of jurisdiction against which they protested. *First Nat. Bank v. Chicago Title, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051, citing *Louisville Trust Co. v. Comings*, 184 U. S. 18, 46 L. Ed. 413.

13. **Transfer of cause in general.**—*Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 337, 44 L. Ed. 1088.

How Transfer Effected.—If a case is to pass from one court to another, this is done by filing a transcript of the record of the one in the other.¹⁴ Such transfers are generally in appellate proceedings; yet something of the same kind is appropriate and necessary in the orderly administration of affairs to transfer, by order of the federal court, a case from the state court to itself.¹⁵

Effect of Failure to Comply with Rules of Court.—Because the lower court has made no attempt to comply with the rules of the federal supreme court prescribing the steps to be taken in transferring a cause, does not deprive this court of its jurisdiction of the case or the appellant of his right to be heard. "In such case, there is undoubtedly in this court, as in all appellate courts, a means of enforcing compliance with the rule, without permitting its jurisdiction, or the rights of appellant, to be defeated."^{15a}

B. Entitling the Cause.—Where the docket title of a cause is wrong,¹⁶ it may and should be corrected by the record filed.¹⁷

Description of Parties.—It is not a fatal defect in a writ of error that it describes the parties as plaintiffs and defendants in error, as they appear in this court, instead of describing them as plaintiffs and defendants, as they stood in the court below, if the names of all the parties are given correctly. The description, although not in the usual or even the most appropriate form, is sufficient. If there is any doubt about the relation of the parties to the suit below, it can be solved by the record.¹⁸

C. Prayer for and Allowance of Appeal.—1. **NECESSITY FOR ALLOWANCE.**—An allowance of an appeal,¹⁹ or writ of error to a state court,²⁰ are essential to the exercise of the appellate jurisdiction of this court.²¹

But no formal allowance by the circuit court of a writ of error from this court to review a judgment of that court is required.²² It is enough that

14. *Virginia v. Paul*, 148 U. S. 107, 37 L. Ed. 386.

15. **Removal of causes.**—*Pennsylvania Co. v. Bender*, 148 U. S. 255, 259, 37 L. Ed. 441. See the title REMOVAL OF CAUSES.

15a. **Failure to comply with rules of court as affecting appeal.**—*United States v. Adams*, 6 Wall. 101, 110, 18 L. Ed. 792.

16. **Entitling the cause.**—*United States v. Jahn*, 155 U. S. 109, 38 L. Ed. 87; *Kilian v. Ebbinghaus*, 111 U. S. 798, 28 L. Ed. 593.

17. Where after a decree was pronounced in the circuit court, the record states "From which decree an appeal was prayed to the supreme court of the United States, on the 18th December, 1852, and to them it was granted," it was held, that the word "defendants" omitted in this prayer, must have been a clerical omission, as it appears the appeal was "granted to them;" that is, to the defendants. *Adams v. Law*, 16 How. 144, 149, 14 L. Ed. 880.

18. **Description of parties.**—*Mussina v. Cavazos*, 6 Wall. 355, 361, 18 L. Ed. 810.

19. **Necessity for allowance.**—*Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Pierce v. Cox*, 9 Wall. 786, 19 L. Ed. 786; *Washington County v. Durant*, 131 U. S., appx. lxxx, 18 L. Ed. 169; *Washington County v. Durant*, 7 Wall. 694, 19 L. Ed. 164.

A petition for an appeal to this court from the circuit court, filed in the office of the clerk of the circuit court, merely,

unaccompanied by an allowance of the appeal by that court, does not bring the case up. An appeal thus made dismissed. *Barrell v. Western Transp. Co.*, 3 Wall. 424, 18 L. Ed. 168.

Consent of parties.—The United States supreme court has no jurisdiction, unless it appears that an appeal had been taken in the district court, and the consent of parties cannot cure the defect. *Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143.

An allowance by a circuit court of an appeal taken by a receiver, is equivalent to leave by the court to the receiver to take an appeal. *Farlow v. Kelley*, 131 U. S., appx. cci, 26 L. Ed. 427.

20. *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588, 20 L. Ed. 463, distinguishing *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377.

Where there is no proper allowance of the writ of error, the appeal will be dismissed. *Bartemeyer v. Iowa*, 14 Wall. 26, 27, 20 L. Ed. 792.

21. An appeal to this court in a proper case is matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking our jurisdiction. A writ of error is the process of this court, and it is issued, therefore, only upon our authority; but an appeal can be taken without any action by this court. *Brown v. McConnell*, 124 U. S. 489, 490, 31 L. Ed. 495.

22. **Necessity for allowance of writ by circuit court.**—*Davidson v. Lanier*, 4

it is issued and served by copy lodged with the clerk of the court to which it is directed.²³

There must be evidence in the record of this allowance. Where the record shows no allowance of an appeal in the court below, this is usually a sufficient ground for dismissal.²⁴

But this court will not dismiss for want of an allowance of an appeal, when it is satisfactorily shown by the affidavits that an appeal was actually allowed, without giving the appellant the opportunity to make record proof of the fact.²⁵

Appeals in Equity and Admiralty Cases.—The allowance of an appeal under § 692, Rev. Stat. (now superseded), followed, of course, if prayed for by one who has the right to it. The language of the statute is, "shall be allowed," which means "must be allowed," when asked for by one who stands in such relation to the cause that he can demand it. The question upon such an application is not what will be gained by an appeal, but whether the party asking it can appeal at all.²⁶ Section 692 of the Revised Statutes provides that an appeal shall be allowed from all final decrees in the circuit courts, etc., when the matter in dispute exceeds \$5,000, and that this court "shall receive, hear, and determine such appeals." This makes appeals to this court, within the prescribed limits, a matter of right, and requires us, when they are taken, to hear and decide them.²⁷

2. THE PETITION OR APPLICATION—a. *Necessity for.*—While it is the practice (and one which should never be departed from) to present a petition to the court when a review is desired, asking for a writ of error or an appeal, as the one or other is the appropriate remedy, such petition and the order thereon are neither of them absolutely necessary. When the case comes up, the writ of error gives the court jurisdiction.²⁸

Wall. 447, 453, 18 L. Ed. 377, distinguished in *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588, 20 L. Ed. 463 (error to state court); *Ex parte Virginia Commissioners*, 112 U. S. 177, 178, 28 L. Ed. 691.

The writ of error is a common-law writ, and is almost as old as the common law itself. This writ, to operate as a supersedeas, must be issued within ten days after the rendition of the judgment, and on security being given for a sum exceeding the amount of the judgment. Where no supersedeas is required, security for the costs of the supreme court must be entered. So that, in these respects, the writ of error is said to be a writ of right, though regulated by statute. *United States v. Addison*, 22 How. 174, 16 L. Ed. 304, 305.

23. *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377.

24. Must be evidence of allowance in record.—*Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257; *Pierce v. Cox*, 9 Wall. 786, 19 L. Ed. 786; *Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 635, citing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163.

Where the record does not show that the appeal asked for was rendered, the appeal must be dismissed. *Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 653, citing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall.

541, 19 L. Ed. 99; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163.

25. When no dismissal for want of allowance.—*Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257.

Where it appears from the affidavits, that an appeal was in fact prayed and allowed, and that the condition of the record is due to the omission of the clerk below to make the proper entry, the appeal will not be dismissed on the ground that the record shows no allowance of an appeal. *Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257.

26. Allowance of appeals in equity and admiralty causes.—*Ex parte Jordan*, 94 U. S. 248, 251, 24 L. Ed. 123.

27. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 295, 25 L. Ed. 932.

28. Necessity for petition for appeal.—*Ex parte Ralston*, 119 U. S. 613, 30 L. Ed. 506.

However, where the clerk of the court, the deputy clerk, the crier, the marshal of the United States and his deputy, who are in attendance on the court, all corroborate, on oath, the statement of the judge, and say no application was made in open court for the appeal; and no entry on the docket is found of such an application, nor does it appear from the certified copy of the petition for an appeal to have been filed, or that an entry of it was made on the docket, the appeal will be dismissed. *Mussina v. Cavazos*, 20 How. 280, 15 L. Ed. 878.

Act for Settlement of Land Claims in California.—The 9th section of the act of March 3rd, 1851, providing for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of a case decided by them to the district court of the United States for California by way of appeal, directed that the United States or the claimant might file a petition, praying an appeal to the district court, and other sections pointed out the mode of proceeding.²⁹ But this was all changed by an act passed on the 31st of August, 1852 (10 Stat. at L. 99), which directed that the filing of a transcript with the clerk of the district court would, ipso facto, operate as an appeal.³⁰

b. Right to File.—An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted.³¹

c. Form.—The act of congress does not require an appeal to be made in open court—or to be in writing—or entered on the minutes of the court—or to be recorded. It is often made before a judge in vacation, when it cannot be recorded in the order book as a part of the proceedings of the court. And the law makes no difference as to the form in which it is to be made, whether it be taken in court or out of court before a judge. In either case it may be made orally or in writing. And the only difference is, that this court has decided that where the appeal is made in open court, during the term at which the decree is passed, no citation is necessary to the adverse party. He is presumed to be in court, and therefore to have notice. But when the appeal is taken out of court, the citation is necessary to give him notice. In all other respects the same rules apply to either mode of taking an appeal.³²

d. Amendment of Petition.—When any question is made as to the allowance of an amendment of a petition for an appeal, the usual practice is to remand the case to the lower court to deal with that question. But when the parties consent to the amendment and to the facts which justify and require it, the amendment may be made in the appellate court.³³

e. Petition as Part of Record.—The petition for the allowance of a writ of error forms no part of the record of the court below.³⁴

3. SPECIAL ALLOWANCE.—The special allowance of a writ of error to reverse a former judgment in the same cause, under which a reversal was had, cannot be made applicable to a writ where such case is entirely different from what it was before.³⁵

29. Appeals under act to settle private land claims in California.—United States v. Ritchie, 17 How. 525, 15 L. Ed. 236, reaffirmed in Fremont v. United States, 17 How. 442, 15 L. Ed. 241.

30. United States v. Ritchie, 17 How. 525, 15 L. Ed. 236, reaffirmed in Fremont v. United States, 17 How. 442, 15 L. Ed. 241.

31. Right to file application without authority given.—Ex parte Dorr, 3 How. 103, 11 L. Ed. 514.

32. Form.—Reilly v. Lamar, 2 Cranch 344, 2 L. Ed. 300; Yeaton v. Lenox, 7 Pet. 220, 8 L. Ed. 664; Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511; S. C., 15 L. Ed. 514.

As to form of allowance to court of claims, see United States v. Adams, 6 Wall. 101, 18 L. Ed. 792.

33. Amendment of petition.—Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162; Kennedy v. Bank, 8 How. 586, 12 L. Ed. 1209; Gates v. Goodloe, 101 U. S. 612, 25 L. Ed. 895; Bowden v. Johnson, 107 U. S. 251, 27 L. Ed. 386.

34. Petition as part of record.—War

field v. Chaffe, 91 U. S. 690, 23 L. Ed. 383.

A motion for a writ of certiorari for diminution of the record, in not stating that the plaintiff in error filed a petition for the allowance of a writ of error must be denied, where the motion was not made at the first term as required by Rule 14 of this court, and no satisfactory cause is shown for the delay, and where "the copy of docket entries, submitted with the motion, while it shows that a petition for a writ of error was filed on that day, does not show that a writ of error was then allowed or sued out; and the plaintiff in error afterwards obtained the allowance of a writ of error from the circuit court to the district court, which he abandoned, and, instead thereof, applied for and obtained the present writ of error from this court." Chappell v. United States, 150 U. S. 499, 506, 40 L. Ed. 510, reaffirmed in Merritt v. President and Trustees of Bowdoin College, 167 U. S. 798, 42 L. Ed. 1209.

36. Special allowance.—National Bank v. Miller, 25 L. Ed. 529.

4. **FORM AND SUFFICIENCY OF ALLOWANCE.**—The statute makes no provision in terms for the form of the allowance of an appeal.³⁷ "But as there can be no appeal without the taking of security, either for costs, or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed, when necessary, by the signing of a citation, is, in legal effect, the allowance of an appeal. * * * Until the security has been accepted, the allowance of an appeal cannot be said to have been perfected."³⁸ In other words, an actual allowance of an appeal may be inferred where the record shows that an appeal was prayed for in open court, and an appeal bond filed and approved by one of the judges.³⁹

In ordinary cases the signing of a citation in time by the proper justice or judge is a sufficient allowance of an appeal.⁴⁰

Allegations in Supersedeas Bond.—But where there is no other allowance

37. Form and sufficiency of allowance.

—Rev. Stat., § 692; *Sage v. Central R. Co.*, 96 U. S. 712, 714, 24 L. Ed. 641.

38. Acceptance of security and signing of citation constitutes an allowance.

—*Sage v. Central R. Co.*, 96 U. S. 712, 714, 24 L. Ed. 641; Rev. Stat., § 1012; *Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989; *Brown v. McConnell*, 124 U. S. 489, 490, 31 L. Ed. 495; *Wauton v. De Wolf*, 142 U. S. 138, 139, 35 L. Ed. 965.

A circuit judge, by taking security and signing the citation, allows an appeal. No formal order of allowance is necessary. *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989, citing *Sage v. Central R. Co.*, 96 U. S. 712, 24 L. Ed. 641; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121.

In *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office. In *re McKenzie*, 180 U. S. 536, 45 L. Ed. 657, approved in *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 261, 32 L. Ed. 448.

39. Railroad Co. v. Bradleys, 7 Wall. 575, 19 L. Ed. 274.

It was held in *Railroad Co. v. Bradleys*, 7 Wall. 575, that where an appeal had been prayed for, and subsequently an appeal bond, approved by one of the judges, had been filed in the court, it would be inferred that an appeal had been allowed, although there was no express order to that effect in the record. *Ex parte Cutting*, 94 U. S. 14, 21, 24 L. Ed. 49.

40. Signing of citation constitutes an allowance.—*Brown v. McConnell*, 124 U. S. 489, 492, 31 L. Ed. 495.

To get an appeal after the term at which the decree is rendered a party must apply to the proper justice or judge to sign a citation. If he signs it, he furnishes the appellant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that to give this court jurisdiction both of the subject matter of

the appeal and of the parties, is to serve his citation and to docket the case here in time. *Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495.

"In *Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495, it was held that the signing of a citation returnable to the proper term of this court, though without the acceptance of security, nevertheless constituted an allowance of appeal which would enable this court to take jurisdiction and to afford the appellants an opportunity to furnish the requisite security here." In *re McKenzie*, 180 U. S. 536, 547, 45 L. Ed. 657.

In *Stewart v. Masterson*, 124 U. S. 493, 31 L. Ed. 507, the decree from which the appeal was taken was rendered November 7th, 1884, and contained on its face the allowance of an appeal to this court. That appeal was returnable to October term, 1885, which began October 12th of that year. It does not appear that any bond was approved during the term in which the decree was rendered, but one was approved October 10th, which was before the beginning of the return term. The citation was signed November 2, 1885, after that term began, requiring the appellee to appear in this court on the second Monday in October 1886. This citation was served February 17th, 1886, but the case was not docketed in this court until June 11th, 1886, which was after our term of 1885 ended, but before that of 1886 began. Held, that the signing of the citation November 2, 1885, is in effect the allowance of a new appeal, returnable at the term of 1886. Following *Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495.

Cases distinguished and reconciled.—The signing of a citation returnable to the proper term, but no acceptance of security, is enough of itself to constitute an allowance of an appeal such as will give this court jurisdiction, and this court, before dismissing the case peremptorily may permit the appellants to give the requisite security here. The court said: "There is nothing in the case of *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163, or in that of *United States v. Curry*, 6 How. 106, 12 L. Ed. 363, which is at all

of an appeal or writ of error, except that disclosed in the bond for supersedeas filed by the defendant in which it was alleged that the defendant had "prosecuted an appeal or writ of error to the supreme court of the United States to reverse the judgment," this court will order the cause to be docketed and dismissed.⁴¹

5. ALLOWANCE BY WHOM.—Whoever can sign a citation may allow an appeal; and by § 999, Rev. Stat., it is provided that this may be done by a judge of the circuit court or a justice of this court. The power is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held.⁴² Therefore, after the term at which a final decree was rendered, any justice of this court may, within the time prescribed by law, allow an appeal, and approve the bond which is to operate as a supersedeas.⁴³

Appeals from District to Circuit Court.—Under former statutes it was held that though upon appeals from the district court the district judge has no vote in the circuit court, he has in all other respects the powers of a member of the court, and may consequently allow appeals from its decisions.⁴⁴

The judicial act directed that a writ of error must be allowed by a judge.⁴⁵ But it is not now required that a writ of error be allowed by a judge. It is enough that it is issued and served by copy lodged with the clerk of the court to which it is directed.⁴⁶

Under Circuit Court of Appeals Act.—An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in §§ 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district.⁴⁷

Under § 11 of the circuit court of appeals act which provides that "all provisions of law, now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error," it was held that any justice of this court, not necessarily the justice assigned to the circuit in which the court is held, may in or out of court allow the writ of error.⁴⁸

inconsistent with our present ruling to the effect that in ordinary cases the signing of a citation in time by the proper justice or judge is a sufficient allowance of an appeal. *Castro's Case*, arose under the act of March 3, 1851, 9 Stat. 631, c. 41, to ascertain and settle private land claims in California, which required (§ 9) appeals to be granted by the district court on the application of the party against whom the judgment was rendered. Clearly a citation signed by a judge out of court would not be the allowance of an appeal under that statute, because that appeal must be allowed by the court. *Curry's Case* arose under the act of May 26, 1824, 4 Stat. 52, c. 173, which required an appeal to be taken within one year from the time of the rendition of the judgment (§ 2), and the citation was not signed before the end of that time. The jurisdiction of this court depended, therefore, entirely on the first appeal, which had become inoperative by failure to docket it at the return term." *O'Reilly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659; *Brown v. McConnell*, 124 U. S. 489, 490, 31 L. Ed. 495.

41. Allegations in supersedeas bond.—*Tuskaloosa Northern R. Co. v. Gude*, 141 U. S. 244, 35 L. Ed. 742.

42. Who may allow an appeal.—*Sage v. Railroad Co.*, 96 U. S. 712, 715, 24 L. Ed. 641.

43. Any justice of the supreme court may allow an appeal.—*Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641.

44. Appeals from district to circuit courts.—*Rodd v. Heartt*, 17 Wall. 354, 357, 21 L. Ed. 627, approved in *Huntington v. Ladley*, 176 U. S. 688, 44 L. Ed. 630; *Baker v. Power*, 124 U. S. 167, 169, 31 L. Ed. 382.

45. Allowance of writ of error.—*Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664.

46. Present rule as to allowance of writ of error.—*Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377.

47. Allowance under court of appeals act.—Rule 36, 139 U. S. appx., 706; *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424.

48. Any justice, though not assigned to circuit, may allow.—*Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424; *In re Claassen*, 140 U. S. 200, 35 L. Ed. 409.

6. **TIME OF ALLOWANCE**—a. *At Term or in Vacation*.—The act of March, 1803, which gives an appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that an appeal must be prayed in court when the decree is pronounced. But if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.⁴⁹

Application in Session.—Application for a writ of error made to the court in session will not be entertained, except when a justice of the federal supreme court, on consideration of the record, deems it proper to indorse thereon a request that counsel be permitted to proceed in that way.⁵⁰

Allowance in Vacation.—The act of congress does not require an appeal to be made in open court—or to be in writing—or entered on the minutes of the court—or to be recorded. It is often made before a judge in vacation, when it cannot be recorded in the order book as a part of the proceedings of the court. And the law makes no difference, as to the form in which it is to be made, whether it be taken in court or out of court before a judge. In either case it may be made orally or in writing. And the only difference is, that this court has decided that where the appeal is made in open court, during the term at which the decree is passed, no citation is necessary to the adverse party. He is presumed to be in court, and therefore to have notice. But when the appeal is taken out of court, the citation is necessary to give him notice. In all other respects the same rules apply to either mode of taking an appeal.⁵¹

Appeals from District of Columbia.—An appeal to this court from the supreme court of the District of Columbia, may be allowed by that court sitting in special term. The court while sitting in special term is still the supreme court, and as such capable of allowing an appeal to this court from one of its final decrees, though rendered at general term.⁵² But the allowance of an appeal by the supreme court of the District of Columbia, while in session at special term, will not do away with the necessity of a citation, because the allowance would not have been made at the same term in which the decree was rendered.⁵³

b. *Allowance Nunc Pro Tunc*.—Where the record shows no allowance of an appeal in the court below, but it appears from affidavits that an appeal was in fact prayed and allowed, the cause will be passed to the next rules, in order that the counsel for the appellant may move upon proper showing for an entry nunc pro tunc of the prayer and necessary allowance of appeal.⁵⁴

Accordingly, where a motion for a certiorari by the appellant is dismissed because the record failed to show an allowance of appeal, but the cause

49. **At term or in vacation**.—*Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664.

As to appeals from court of claims, see *United States v. Adams*, 6 Wall. 101, 109, 18 L. Ed. 792.

A party wishing an appeal, should make an application for its allowance in open court, or to the judge at his chambers, and should name his securities. *Mussina v. Cavazos*, 20 How. 280, 15 L. Ed. 878, 879.

50. **Application in session**.—*In re Ingalls*, 139 U. S. 548, 35 L. Ed. 266, citing *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. Ed. 682; *Wood Mowing, etc. Co. v. Skinner*, 139 U. S. 293, 35 L. Ed. 193.

51. **Allowance in vacation**.—*Hudgins v. Kemp*, 18 How. 530, 537, 15 L. Ed. 511, citing *Reily v. Lamar*, 2 Cranch 344, 2 L. Ed. 300; *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664, cited on this point in *Hudson v. Parker*, 156 U. S. 27, 283, 39 L. Ed. 424, 426.

52. **Allowance of appeals from the district**.—*Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132.

53. **Necessity for citation**.—*Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132, citing *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664; *Railroad Company v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

54. **Allowance nunc pro tunc**.—*Chicago v. Bigelow*, 131 U. S. appx. xciii, 19 L. Ed. 257. See *United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954.

Appeal dismissed for want of jurisdiction, where the decree was rendered June 13th, 1861, but no appeal was prayed for or allowed until June term, 1865, when, on motion of the defendants below, an appeal was allowed nunc pro tunc, as of June 13th, 1861, there having been no citation to the appellees, and the record not having been brought up at the next term. *Garrison v. Cass County*, 5 Wall. 823, 18 L. Ed. 491.

is passed to the second rules to enable the counsel for the appellant to move for an entry nunc pro tunc of the prayer and necessary allowance of appeal, if such an entry shall be made by direction of the court below, the motion for certiorari may be hereafter renewed.⁵⁵

c. *Presumptions on Appeal.*—This court will not presume, against the explicit statements in the record to the contrary, that a writ of error was allowed the day before the judgment sought to be reviewed was rendered.⁵⁶

7. **ORDER OF ALLOWANCE**—a. *Form and Requisites.*—An order of a court or a judge allowing an appeal, is in effect nothing more than an order to send the transcript of the record to the appellate court. It is the clerk's authority for making the return to the superior court. And that order cannot be legally given until the security required by law is offered and approved.⁵⁷

Designation of Appellees.—The order allowing an appeal need not name the appellees by their individual names.⁵⁸

b. *Entry of Order.*—The clerk can certify that the appeal was made without an order being previously entered in the order book, and it is his duty so to do. The entry of the order is not necessary to give validity to the appeal.⁵⁹ Because where the record as certified to us, shows that a petition for appeal was filed, that the appeal was allowed, that the bond containing a recital that the appellant had obtained an appeal and filed a copy thereof in the clerk's office, was filed and approved and that the citation was served and duly filed, this is a plain showing on the record that the appeal as allowed was duly filed.⁶⁰

c. *Opening and Vacating Order.*—(1) *Power of Court.*—The allowance of an appeal is a judicial act of the court in term time, and is such a judicial order made in the cause as that it may be set aside and vacated upon the request of that party to whom it was allowed. There is nothing in this which interferes with the rule that where an appeal is allowed all jurisdiction in the suit appealed is transferred to this court.⁶¹

(2) *Grounds for Vacating.*—Where an appeal to this court is allowed on condition that bond should be given as designated, but this is not done nor any other step in effectuation of the appeal taken, the order of allowance may be vacated on a subsequent day of the same term.⁶²

(3) *At What Stage of Proceedings.*—The general power of the circuit court over its own judgments, decrees, and orders during the existence of the term at which they are made is undeniable, and an order allowing an appeal is subject to that power so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal.⁶³ But where an appeal has been allowed, and the bond for the appeal accepted, and the case docketed in

55. *Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257.

56. *Presumptions on appeal.*—*Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

57. *Form and requisites of order of allowance.*—*Hudgins v. Kemp*, 18 How. 530, 538, 15 L. Ed. 511.

58. *Necessity for naming appellees in order.*—An objection, on motion to dismiss, that in the order allowing the appeal, the appellees are not named, but it is stated only that "the other parties of said cause, original intervening (as appearing in the said final decree) are appellees," is not a good one, where the bond on such appeal is given to the clerk of the circuit court for the use and benefit of twenty-five appellees, naming them, and among them are by name the five appellees by whom the motion on that ground was made. *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

59. *Entry of order of allowance.*—*Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511, 512; *S. C.*, 15 L. Ed. 514.

60. *Proof of allowance.*—*Harkrader v. Wadley*, 172 U. S. 148, 43 L. Ed. 399, citing *Credit Co. v. Arkansas, etc.*, *R. Co.*, 128 U. S. 258, 32 L. Ed. 448; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989.

61. *Power of court to vacate allowance.*—*Phillips v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040. See generally, the title **JUDGMENTS AND DECREES.**

62. *Grounds for vacating appeal.*—*Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 35, 37 L. Ed. 986.

63. *At what stage of proceedings.*—Ex parte *Roberts*, 15 Wall. 384, 21 L. Ed. 131; *Phillips v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121; *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025; *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 35, 37

this court, the jurisdiction of the court below is gone. From that time the suit is cognizable only in this court. Therefore, an order of the court below purporting to set aside and vacate the formal order of allowance of an appeal, is void.⁶⁴

(4) *Remedies*.—Where an appeal has been improperly allowed, a motion to dismiss and not a mandamus is an adequate remedy for vacating the allowance thereof.⁶⁵

Hence, if a court of claims under the second section of the act of June 25th, 1868 has granted an appeal, mandamus will not lie to cause them simply to vacate the allowance of it.⁶⁷

d. *Relation*.—The order allowing an appeal has relation back to the date of the prayer for allowance, and is to be considered as made on that day.⁶⁸

e. *Conclusiveness of Order*.—The order of a judge allowing an appeal, so far from being conclusive upon the court, does not even imply that the judge himself, has a settled opinion concerning the appellant's right.⁶⁹

8. **EFFECT OF ALLOWANCE**.—The allowance of an appeal in the court appealed from cannot enable this court to review the judgment of that court in any other form of proceeding than the law prescribes. Nor will it justify this court in obtaining an appeal from any but a final decree.⁷⁰

9. **PROOF OF ALLOWANCE**.—This court will not dismiss for the want of an allowance of an appeal, when it is satisfactorily shown by the affidavits that an

L. Ed. 986; *Ayers v. Wiswall*, 112 U. S. 190, 28 L. Ed. 693.

Case reconciled.—There is nothing to the contrary in *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917, in which it was held that our jurisdiction may be maintained when the record on appeal has been filed here during the term to which the appeal was returnable, even though bond had not been approved and citation signed. No such state of case is presented, nor was the question of the power of the court below to set aside its order of allowance involved in that case or in others in which like rulings have been made. *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 35, 37 L. Ed. 986.

64. **No power to vacate after docketing case here**.—*Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025, citing *Phillips v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121.

The circuit court has no power to set aside an order allowing an appeal after the appeal has been prosecuted and the record filed here. "Although in a doubtful case we shall not disturb the ruling of a circuit court granting or vacating an appeal, yet when we are fully satisfied that the amount in controversy is not sufficient to give us jurisdiction, we ought not to attempt an inquiry into the merits of the case which is sought to be appealed." *Rector v. Linscomb*, 141 U. S. 557, 559, 35 L. Ed. 857.

66. **Motion to dismiss**.—Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

A motion to dismiss the appeal where it has been improperly allowed is an adequate remedy, and this is an additional reason why a mandamus commanding the court below to vacate the allowance thereof should not be granted. Ex parte Russell, 13 Wall. 664, 671, 20 L. Ed. 632.

67. **Vacating allowance by court of**

claims.—Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

Where the court of claims has improperly granted an appeal, this court cannot grant a mandamus to the court of claims to cause them to vacate their allowance of the appeal. That would be to use the writ for the purpose of compelling the inferior court to decide a case or question in a particular manner. A motion to dismiss the appeal where it has been improperly allowed is an adequate remedy, and this is an additional reason why a mandamus commanding the court below to vacate the allowance thereof should not be granted. Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

68. **Relation**.—*Latham v. United States*, 131 U. S., appx. xcvi, 19 L. Ed. 452; *Latham v. United States*, 9 Wall. 145, 19 L. Ed. 771. See generally, the title **RELATION**.

Thus a motion to dismiss an appeal from the judgment of the court of claims, on the ground that it was not allowed within the 90 days fixed by the statute, will be denied, although it appears that the order of allowance was not made within the statutory time, if it also appears, on examination, that the prayer for allowance was within that time. Because the order allowing the appeal must have relation back to the date of the prayer for allowance, and be considered as made on that day. *Latham v. United States*, 131 U. S., appx. xcvi, 19 L. Ed. 452; *Latham v. United States*, 9 Wall. 145, 19 L. Ed. 771.

69. **Conclusiveness of order allowing an appeal**.—*Callan v. May*, 2 Black 541, 17 L. Ed. 281.

70. **Effect of allowance**.—*United States v. Emholt*, 105 U. S. 414, 26 L. Ed. 1077, citing *Callan v. May*, 2 Black 541, 17 L. Ed. 281.

appeal was actually allowed, without giving the appellant the opportunity to make record proof of the fact.⁷¹ The want of record evidence in the circuit court that an appeal was prayed is no ground of dismissal; the certificate of the clerk that it was so prayed is all that is required in this court.⁷²

10. **MANDAMUS TO COMPEL ALLOWANCE.**—As a general rule, mandamus is the proper remedy where an appeal has been improperly denied.⁷³

Thus, a writ of mandamus will lie to the court of claims to compel them to allow an appeal from a decree entered up in that court.⁷⁴

Showing as to Right.—But to entitle a petitioner to a writ of mandamus to compel a circuit court to allow an appeal from its decree, he must show that he has a clear right to an appeal which has been refused him by that court.⁷⁵

Mandamus by Strangers or Interveners.—Moreover, mandamus does not lie to compel a circuit court to allow an appeal from its decree by a person not an original party to the suit, unless it appears that his petition to be allowed to intervene was granted, or that he at least acted, or was treated, as a party.⁷⁶

Adequacy of Remedy.—A writ of mandamus will not be granted to compel the allowance of a writ of error when the party aggrieved has another remedy.⁷⁷

Hearing and Determination.—Matters only fit to be considered on the hearing of the appeal will not be considered on a motion for leave to file a petition for a writ of mandamus directing the judges of the circuit court to allow the appeal and approve a sufficient bond.⁷⁸

11. **VACATION OR REVOCATION OF ALLOCATUR.**—The ordinary proceeding to vacate a writ of error is a motion to dismiss it.⁷⁹

D. Limitations upon Time for Taking.—1. **IN GENERAL.**—Five years formerly was the time allowed for prosecuting appeals to and writs of error out of this court.⁸⁰

But under the act of 1824, the party against whom the decree is entered may appeal within one year.⁸¹

71. Proof of allowance.—*Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257.

Although the failure of the record to show an allowance of appeal in the court below is usually sufficient ground for dismissal, a motion to dismiss will not be allowed where it appears from affidavits that an appeal was in fact prayed and allowed, and the condition of the record is due to the omission of the clerk below to make the proper entry. *Chicago v. Bigelow*, 131 U. S., appx. xciii, 19 L. Ed. 257.

72. Certificate of clerk.—*Hudgins v. Kemp*, 18 How. 530, 538, 15 L. Ed. 511.

73. Mandamus to compel allowance of appeal.—*Ex parte Railroad Co.*, 95 U. S. 221, 24 L. Ed. 355; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *Life, etc., Ins. Co. v. Adams*, 9 Pet. 571, 9 L. Ed. 233; *Mussina v. Cavazos*, 20 How. 280, 281, 15 L. Ed. 878.

Mandamus lies from this court to the circuit court of the United States to compel the allowance of an appeal from a final decree denying parties the right to appeal. *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123.

74. Mandamus to court of claims.—*Ex parte Pargoud*, 154 U. S., appx., 567, 19 L. Ed. 620, following *Ex parte Zellner*, 7 Wall. 244, 19 L. Ed. 665.

75. Sufficiency of showing for issuance of mandamus.—*Ex parte Cutting*, 34

U. S. 14, 24 L. Ed. 49; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212.

76. Right of strangers to mandamus.—*Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49.

77. Adequacy of other remedies.—*Ex parte Virginia Commissioners*, 112 U. S. 177, 28 L. Ed. 691.

78. Hearing and determination of motion.—*In re Farmers' Loan, etc., Co.*, 129 U. S. 206, 32 L. Ed. 656.

79. Vacation or revocation of allocatur.—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 234, 33 L. Ed. 892.

80. Limitation under former statutes.—*Erwin v. Lowry*, 7 How. 172, 184, 12 L. Ed. 655; *Cambuston v. United States*, 95 U. S. 285, 24 L. Ed. 448; *The Protector*, 12 Wall. 700, 20 L. Ed. 463.

By the judiciary acts of 1789 and 1803, the party may take his appeal at any time within five years after the passing of the decree by the inferior court. *United States v. Pacheco*, 20 How. 261, 15 L. Ed. 820.

Construction of resolution of 1876.—Under the resolution of June, 1876, limiting a period beyond which appeals are not to be entered, it was held that the judges might use a discretionary power where particular circumstances, consistent with justice and right, may, in their opinion, require it. *Lake v. Hubert*, 2 Dall. 41, 1 L. Ed. 280.

81. Appeals under act to try validity of

It is now provided by § 1008 of the Revised Statutes that no judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order.⁸²

What Law Governs Appeals.—But even in the absence of an express provision, the same rule is applicable to appeals as to writs of error.⁸³

2. IN PARTICULAR PROCEEDINGS AND COURTS—*a. In General.*—Where an appeal is allowed from a particular court or in a particular proceeding, but the act does not impose any limitation of time within which appeals may be allowed, it will be subject to the general regulations prescribed by the judiciary act.⁸⁴

*b. Bills of Review.*⁸⁵—It was formerly held that appeals in equity causes being limited by the judiciary acts of 1789, c. 20, § 22, and of 1803, c. 353, § 2, to five years after the decree, the same period of limitation is applied to bills of review.⁸⁶ Accordingly, the rule now is that bills for the review of errors apparent of record must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed.⁸⁷

c. Causes of Admiralty and Maritime Jurisdiction.—The rules, regulations and restrictions contained in the judiciary act, respecting the time within which a writ of error shall be brought, namely 2 years from the final judgment or decree, are applicable to causes of admiralty and maritime jurisdiction.⁸⁸

claimants claims to lands in Mississippi.—*United States v. Boisdore*, 7 How. 659, 12 L. Ed. 860.

82. Limitation under § 1008.—*Rev. Stat.*, § 1008; *Farrar v. Churchill*, 135 U. S. 609, 612, 34 L. Ed. 246; *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792; *Whittitt v. Union, etc., R. Co.*, 122 U. S. 363, 30 L. Ed. 1150.

No decree in any action in equity can be reviewed by this court on appeal, unless the appeal is taken within two years after the entry of such decree. *Rev. Stat.*, § 1008.

83. Rule governing writs of error also governs appeals.—*The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202; *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 356; *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246; *Cook v. Street*, 163 U. S. 682, 41 L. Ed. 317; *The Protector*, 12 Wall. 700, 20 L. Ed. 463.

The same rule is applicable to appeals as to writs of error. Section 1012 of the Revised Statutes declares that "appeals from the circuit courts, and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of error." This provision applies to the time within which appeals may be brought, as well as to other regulations concerning them. *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448, citing *The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202; *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 356; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989.

84. Limitations in particular courts and

proceedings.—*Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

Appeals from district courts of California.—As the act of congress passed on the 3d of March, 1851, does not specify the time within which an appeal must be made to this court from the district courts of California, the subject must be regulated by the general law respecting writs of error and appeals. Either party is at liberty, therefore, to appeal from such a decree within five years from the time of its rendition. *United States v. Pacheco*, 20 How. 261, 15 L. Ed. 820.

85. See the title BILLS OF REVIEW.

86. Limitations upon bills of review.—*Thomas v. Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202; *Kennedy v. State Bank*, 8 How. 586, 609, 12 L. Ed. 1209, citing *Whiting v. Bank of United States*, 13 Pet. 6, 15, 10 L. Ed. 33.

87. Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97, citing *Thomas v. Harvey*, 10 Wheat. 146, 6 L. Ed. 287; *Ensminger v. Powers*, 108 U. S. 292, 27 L. Ed. 732.

A bill of review must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed, where the review sought is not founded on matters discovered since the decree. *Ensminger v. Powers*, 108 U. S. 292, 302, 27 L. Ed. 732, citing *Thomas v. Harvey*, 10 Wheat. 146, 6 L. Ed. 287; *Whiting v. Bank of United States*, 13 Pet. 6, 10 L. Ed. 33; *Kennedy v. State Bank*, 8 How. 586, 12 L. Ed. 1209; *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607.

88. Causes of admiralty and maritime jurisdiction.—*The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202; *Credit Co. v. Arkansas*,

d. *Appeals from Territorial Courts.*—The probate court of Utah has jurisdiction to determine the conflicting rights of claimants to lots forming part of the lands in that territory entered as a town site under the act of congress of March 2, 1867 (14 Stat. 541), and an appeal may be taken from the judgment of that court to the district court, within one year after it has been rendered.⁸⁹

e. *From Court of Claims.—In General.*—Formerly, appeals from the court of claims had to be taken within ninety days after the judgment or decree was rendered.⁹⁰ But this period was enlarged to six months by § 10 of the Tucker act.⁹¹

Postponement, Suspension or Interruption.—When the party desiring to appeal signifies his intention to do so in any appropriate mode within the ninety days allowed by the statute of March 3, 1863 for taking an appeal from the court of claims, the limitation of time ceases to affect the case; and such is also the effect of the third rule of the supreme court concerning such appeals.⁹²

f. *From District to Circuit Courts.*—When such appeals were allowed it was held that the ten days' limitation for giving notice after the entry of the decree or decision from which the appeal from the district to the circuit court is taken, taken literally does not extend to writs of error, "but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word appeal at the commencement of the second clause means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that prescribed in the judiciary act or the act to amend the judiciary system."⁹³

g. *Settlement of Private Land Claims in California.*—Under the act of May 23, 1828, relating to private land claims in Florida, the claimant must appeal within four months. The object of the law was to obtain a speedy settle-

etc., R. Co., 128 U. S. 258, 32 L. Ed. 148; Cook v. Street, 163 U. S. 682, 41 L. Ed. 317.

Section 1012 of the Revised Statutes declares that "appeals from the circuit courts, and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of error." This provision applies to the time within which appeals may be brought, as well as to other regulations concerning them. The San Pedro, 2 Wheat. 132, 4 L. Ed. 202; Villabolas v. United States, 6 How. 81, 12 L. Ed. 356; Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989; Credit Co. v. Arkansas, etc., R. Co., 123 U. S. 258, 260, 32 L. Ed. 448; Cook v. Street, 163 U. S. 682, 41 L. Ed. 317.

89. *Appeals from territorial courts.*—Cannon v. Pratt, 99 U. S. 619, 25 L. Ed. 446.

90. *United States v. Adams*, 6 Wall. 101, 18 L. Ed. 792.

Relation back of order of allowance.—A motion to dismiss an appeal from the judgment of the court of claims, on the ground that it was not allowed within the 90 days fixed by the statute will be denied, although it appears that the order of allowance was not made within the statutory time, if it also appears on examination that the prayer for allowance was within the time, because the order

allowing the appeal must have relation back to the date of the prayer for allowance, and be considered as made on that day. Latham v. United States, 131 U. S., appx. xvii, 19 L. Ed. 452.

91. *Limitations under Tucker act.*—United States v. Davis, 131 U. S. 36, 33 L. Ed. 93.

92. *From court of claims.*—United States v. Adams, 6 Wall. 101, 18 L. Ed. 792.

When such appeal is granted.—A finding which merely recites the evidence in the case, consisting mainly of letters and affidavits, is not a compliance with the third rule of the supreme court which provided that "In all cases an order of allowance of appeal by the court of claims, or by the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal;" but a finding that a certain instrument was not made in fraud or mistake is a proper finding without reporting any of the evidence on which the fact was found. United States v. Adams, 6 Wall. 101, 18 L. Ed. 792.

93. *From district to circuit courts.*—14 Stat. at L. 520; Morgan v. Thornhill, 11 Wall. 65, 75, 20 L. Ed. 60; 1 Stat. at L. 85; 2 Stat. at L. 244; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 267, 21 L. Ed. 493.

ment in the judicial tribunals of claims made under Spanish titles, and it was to accomplish this object that, instead of limiting the time for appealing to the supreme court to five years, as in the act of 1803, it was reduced to four months.⁹⁴

h. *In Criminal Cases.*—By § 6 of the act of congress of February 6, 1889, 25 Stat. 656, c. 113, it was provided that in all cases of conviction of crime, the punishment for which provided by law is death, tried before any court of the United States, a writ of error may issue for the revision of the final judgment of such court, if sued out upon a petition filed with the clerk of the court in which the trial shall have been had, "during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record."⁹⁵

When Statute Begins to Run.—Under this statute the judgment does not become final against the accused until an entry is made by the court below that the prisoner was asked whether he had anything to say why sentence should not be pronounced. Therefore a writ of error prosecuted within sixty days from that time is seasonably sued out.⁹⁶

i. *Cross Appeals.*—Where the petition for a cross appeal, the order allowing it and the bond are not filed in the circuit court until after two years have elapsed from the date of the entry of the decree, the cross appeal must be dismissed.⁹⁷

3. WHEN STATUTE BEGINS TO RUN.—**In General.**—The language of the statute is, that "no judgment, decree, or order of a circuit or district court, in any civil action at law or in equity, shall be reviewed in the supreme court on writ of error or appeal unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order."⁹⁸ Under this statute, it is well settled that the period prescribed by the statute for suing out appeals and writs of error does not begin to run until the judgment or decree is not only rendered but actually entered.⁹⁹ But as the entry sets the statute in

94. **Settlement of private land claims in California and Florida.**—*Villabolas v. United States*, 6 How. 81, 12 L. Ed. 356.

The district court, in the exercise of its jurisdiction, under an act entitled "An Act to ascertain and settle the private land claims in the state of California," approved March 3, 1857 (9 Stat. 631), rendered a decree November 12, 1859, rejecting the claim of A. He died January 22, 1869, and his executrix was, by an order of the court entered April 3, 1875, permitted to become the party claimant of the land. She thereupon moved for a new trial and the reversal of the decree. The motion was overruled; and, on the same day, an appeal was allowed her from the decree and from the order refusing a new trial. Held, that the appeal from the decree was not taken in time. *Cambuston v. United States*, 95 U. S. 285, 24 L. Ed. 448.

95. **Limitations in criminal cases.**—*Ball v. United States*, 140 U. S. 118, 129, 35 L. Ed. 377.

96. **When act of 1889 begins to run.**—*Ball v. United States*, 140 U. S. 118, 35 L. Ed. 377.

97. **Cross appeals.**—*Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246.

98. Rev. Stat., § 1008.

99. **Statute runs from actual entry of judgment.**—*Polleys v. Black River Imp. Co.*, 113 U. S. 81, 28 L. Ed. 938; *Bronson v. Railroad Co.*, 2 Black 524, 530, 17 L.

Ed. 359; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665.

When is a judgment "rendered or passed?"—By the twenty-second section of the judiciary act, modified by the second section of the act of March 3, 1803, an appeal from a final decree must be taken within five years after the rendering or passing of the judgment or decree complained of. And by the twenty-third section, as modified above, the appeal is a supersedeas, and stays execution in cases only where it is taken and a copy lodged for the adverse party within ten days (Sundays exclusive) after rendering the judgment or passing the decree complained of. The time to be taken as when the judgment or decree may be said to be rendered or passed may admit of some latitude, and may depend somewhat upon the usage and practice of the particular court. In the case of a simple judgment or decree, such as an affirmance or reversal, and the like, there would seem to be no difficulty in taking the appeal at any time within the ten days after the decision on the case was pronounced. But where the decree is special, and its terms to be settled, there is a propriety in waiting for its settlement before taking the appeal. Whether taken or not may sometimes depend upon the decree as settled. In the second circuit, with the practice of which I am the most

operation, the time when the decree takes full effect is immaterial.¹

It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question.²

The ten days given by the 23d section of the judiciary act, to take a writ of error from this court, run from the day when judgment is entered in the court where the record remains; and when judgment is given in the highest court of a state on appeal or writ of error from an inferior one, and, on affirmance, the record is returned to such inferior court with order to enter judgment there, they run from the day when judgment is so there entered.³

Entry Nunc Pro Tunc.—the date of entry is the actual and formal entry and not the date of an entry nunc pro tunc.⁵ In other words, the actual time of

familiar, it is supposed by many of the profession that the proper time for taking the appeal in such a case is after the settlement of the decree. As this court, however, has always held, that if an appeal is taken in court at the time of rendering the decision, or during the term, no citation is necessary, and as appeals are, perhaps, more frequently taken within the ten days after the decision is pronounced and entered on the minutes by the clerk, it may be admitted that when thus taken it is regular, and stays execution in the court below. And we are also of opinion, that if taken within ten days after the decree is settled and signed by the judge, and filed with the clerk, that it is in time to stay the proceedings. *Silsby v. Foote*, 20 How. 290, 295, 15 L. Ed. 822. See *Polleys v. Black River Imp. Co.*, 113 U. S. 81, 83, 23 L. Ed. 938.

Illustrative Cases.—On the 6th of October, 1880, a decree was entered in a circuit court of the United States dismissing a bill brought to quiet title. Complainant appealed, and the appeal was dismissed at October term, 1880, it not appearing that the matter in dispute exceeded \$5,000. In the circuit court W. then suggested the complainant's death, appeared as sole heir and devisee, filed affidavits to show that the amount in dispute exceeded \$5,000, and took another appeal August 30, 1881, which appeal was docketed here September 24, 1881, and was dismissed April 5, 1884, for want of prosecution. Another appeal was allowed by the circuit court in September, 1884, and citation was issued and served and the case was docketed here again. Held, that the decree appealed from being rendered in 1880, an appeal from it taken in 1884 was too late. *Whitsett v. Union, etc., R. Co.*, 129 U. S. 363, 30 L. Ed. 1150, following *Scarborough v. Pargoud*, 108 U. S. 567, 24 L. Ed. 824.

"The statute in force when the decree was rendered provided that writs of error and appeals should not be brought to this court except within five years after passing or rendering the decree or judgment complained of. 1 Stat. 85, § 22. As

this decree was rendered Nov. 12, 1859, and the appeal not taken until April 3, 1875, it is clear that the motion to dismiss should be granted, unless the petition for rehearing or motion for a new trial suspended the operation of this statute." *Cambuston v. United States*, 95 U. S. 285, 287, 24 L. Ed. 448.

1. Time when decree takes effect immaterial.—*Radford v. Folsom*, 131 U. S. 392, 33 L. Ed. 263.

2. Filing of writ postpones running of statutes.—*Brooks v. Norris*, 11 How. 204, 207, 13 L. Ed. 665; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 335, 44 L. Ed. 1688. See post, next section.

3. That writ of error may operate as supersedeas.—*Green v. Van Buskirk*, 3 Wall. 448, 18 L. Ed. 245.

5. Entry Nunc Pro Tunc.—*Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448.

Where the question was, whether a party should be heard on appeal, and the effect of refusal to hear him would have been left in full force a decree that the court was "not prepared to sanction," it was held: That an order to enter up a decree was not to be taken as the date of a decree entered subsequently "now for then," but that the date was the day of the actual and formal entry. *United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677.

Though a decree have been entered "as" of a prior date—the date of an order settling apparently the terms of a decree to be entered thereafter—the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree. *Providence Rubber Co. v. Good-year*, 6 Wall. 153, 18 L. Ed. 762.

Necessity for formal order of allowance.—In *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989, which was a motion to dismiss because the appeal was not taken within two years after the entry of the decree, it appeared from the record that the decree was entered on the 2d of August, 1879, and on the same day, "the complainants prayed an appeal, which was

presenting and filing the appeal cannot be anticipated by entering an order *nunc pro tunc*. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."⁶ But where an appeal was prayed for in time, and is granted, but the clerk, for some unexplained reason, neglects to make an entry in his minutes of what was thus done, this court will grant an application to the court below to amend the record so that it may appear that the appeal had been prayed for, according to the facts, in which the judgment was rendered, and will order that an entry be made, *nunc pro tunc*, of the appeal in the cause.⁷

Superadded Directions.—The date of entry will not be postponed merely by directions added to credit certain amounts on the decision already rendered.⁸

Judgment for Costs.—And time is reckoned from the main decision, and not from a subsequently rendered judgment for costs.⁹

Judgment on Cross Bill or Complaint.—The right of a defendant to appeal from a judgment ordering an accounting before a referee and dismissing a cross bill or complaint, so far as the cross bill is concerned, will be preserved, and time will run against him only from the time of the entry of the final judgment after a hearing under the accounting.¹⁰

The Nebraska statute limiting the right of an appeal from an assessment of damages by commissioners appointed in proceedings for the condemnation of land, did not intend that that period should commence to run at any time

allowed upon their giving bond according to law. No bond was ever given under this allowance, and the case was not docketed here at the October term, 1879. On the first of August, 1881, the circuit judge approved a bond for an appeal from the decree and signed a citation. The bond was on the same day filed with the clerk, and the citation served on the 18th of August. On the 8th of October the circuit court entered an order allowing the appeal *nunc pro tunc* as of August 1. The case was regularly docketed in this court on the 13th of October." It was held that the appeal was taken in time, and that the order of October 8th, was not required to give effect.

6. An expired appeal cannot be renewed by *nunc pro tunc* entry.—*Credit Co. v. Arkansas, etc.*, 128 U. S. 258, 32 L. Ed. 448, reaffirmed in *Cook v. Street*, 163 U. S. 682, 41 L. Ed. 317; *Garrison v. Cass County*, 5 Wall. 823, 18 L. Ed. 491.

7. *Nunc pro tunc* entry to supply clerical omissions.—*United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954, cited in *Gonzales v. Cunningham*, 164 U. S. 612, 623, 41 L. Ed. 572.

8. Superadded directions.—*Bank v. Shefey*, 140 U. S. 445, 35 L. Ed. 493.

The final decree in a suit in equity, entered October 10, 1885, adjudged and decreed that there was due to the administratrix of J. F. a sum named in the decree, and that if, within ninety days from that date the court should be satisfied that a certain other sum named as paid for the purchase of notes, etc., had inured to the benefit of J. F. or his estate, that sum should be credited on the amount so decreed to be paid. Held, that for the pur-

pose of an appeal, the date of the decree was October 10, 1885. *Radford v. Folsom*, 131 U. S. 392, 33 L. Ed. 203.

9. Computation of time.—When a decree dismissing a bill was entered April 21, 1883, and judgment for costs was rendered June 16, 1883, and the appeal was allowed June 16, 1885, it was held that an application for the allowance of an appeal made June 15, 1885, and allowed June 16, 1885 was not taken in time, because the final decree was that of April 21, 1883. *Fowler v. Hamill*, 139 U. S. 549, 35 L. Ed. 266, citing *Silby v. Foote*, 20 How. 290, 15 L. Ed. 822; *Credit Co. v. Arkansas, etc.*, 128 U. S. 258, 32 L. Ed. 448.

10. Decree dismissing cross complaint.

—Where a bill prays for an injunction to restrain a defendant from interfering with a mining claim which the plaintiff by contract had licensed the defendant to work, and also prays for an accounting from the defendant for ore taken by the latter from the mine, and the defendant files a cross complaint praying for a specific performance by the plaintiff of the contract to convey, and the court at the same time that it grants the injunction and orders an accounting before a referee, dismisses the cross complaint, which judgment is affirmed on appeal to the highest court of the state, it was held that the right of the defendant to appeal from the decree, so far as their cross complaint is concerned, will be preserved; and the time will run against them, only from the time of the entry of the final decree after hearing under the accounting which is to be had. *Winters v. Ethell*, 132 U. S. 207, 32 L. Ed. 339.

prior to the final action of the board in presenting their report to the county court.¹¹

4. **POSTPONEMENT, SUSPENSION OR INTERRUPTION**—*a. When Is an appeal Taken.*—An appeal cannot be said to be “taken” any more than a writ of error can be said to be “brought” until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz, the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond and the citation.¹² In other words, as it is the filing of the writ of error in the court which rendered the judgment that removes the record, the writ of error is not brought in the legal meaning of the term until it is so filed,¹³ and the statute ceases to run from the day on which the writ of error is filed.¹⁴ Therefore, the day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.¹⁵

Filing Nunc Pro Tunc.—An attempt to anticipate the actual time of presenting and filing the appeal, by entering an order nunc pro tunc, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.¹⁶

An appeal in chancery is taken when the application for such appeal is properly presented to the trial court. And the time of its actual allowance is immaterial unless made beyond the term at which the decree was rendered.¹⁸

11. **Construction of Nebraska statute.**—*Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 30 L. Ed. 1214.

12. **When is an appeal taken.**—*Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 261, 32 L. Ed. 448; *Fowler v. Hamill*, 139 U. S. 549, 35 L. Ed. 266; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Cincinnati, etc., Co. v. Grand Rapids, etc., Co.*, 146 U. S. 54, 36 L. Ed. 885; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246; *Scarborough v. Pargoud*, 108 U. S. 567, 24 L. Ed. 824.

The act of 1789, ch. 20, § 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question. *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665.

Where a judgment was rendered on the 25th of October, 1843, and a writ of error allowed on the 19th of October, 1848, but not issued and filed until the 4th of November following, more than five years had elapsed after rendering the judgment, and the writ of error may be dismissed on the motion. It is the filing of the writ which removes the record from the inferior to the appellate court; and the day on which the writ may have been issued

by the clerk, or the day on which it is tested, are not material in deciding the question. *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665.

And so strictly has this rule been applied by this court that in *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 32 L. Ed. 448, an appeal was dismissed although it was shown by the record that the appeal was allowed on the last day on which an appeal could be taken, but where it also appeared that it was not presented to the court below, nor filed with the clerk, until five days after that time had expired.

13. *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246.

14. *Credit Co. v. Arkansas, etc.*, R. Co. 128 U. S. 258, 32 L. Ed. 448; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246; *Polleys v. Black River Imp. Co.*, 113 U. S. 81, 28 L. Ed. 938; *Scarborough v. Pargoud*, 108 U. S. 567, 24 L. Ed. 824; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665.

15. **Day of issuing or testing writ immaterial.**—*Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Scarborough v. Pargoud*, 108 U. S. 567, 24 L. Ed. 824; *Polleys v. Black River Imp. Co.*, 113 U. S. 81, 28 L. Ed. 938; *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 32 L. Ed. 448.

16. **Entry of appeal nunc pro tunc.**—*Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 261, 32 L. Ed. 448.

18. **When is a chancery appeal taken.**—*Radford v. Folsom*, 131 U. S. 392, 33

Cross appeals must be prosecuted like other appeals, and therefore the cross appeal is not taken until brought to the attention of the court whose decree it questions. Although the record may have been removed to this court upon appeal, yet the court below may allow a cross appeal, sign a citation, and approve a bond, within the two years prescribed. And so, when a cross appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross appeal under the statute.¹⁹

Perfecting Appeal.—It has been expressly decided by the supreme court in a number of instances that it is the allowance of the appeal, and not the perfecting of all the steps necessary to a hearing of the appeal in the court above, which saves the appellant or plaintiff in error from the bar of the statutory period of limitation fixed for the bringing of appeals and writs of error. Neither the issuing of the citation nor the giving of bond is jurisdictional.²⁰ But where an appeal is allowed but never prosecuted, no bond given or citation issued, and no return of the record made to the appellate court, the appeal ceases to have any operation, and is of no avail to the appellant.²¹ The acceptance of an appeal bond by a United States district judge after the term at which the decree was rendered, and where no citation was ever issued, does not constitute the allowance of an appeal.²²

b. *Motion for New Trial or Petition for Rehearing.*—**Motion or Petition for Rehearing.**—It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal.²³

L. Ed. 203; *Hewett v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 259, 32 L. Ed. 448.

19. **Cross appeals.**—*Farrar v. Churchill*, 135 U. S. 609, 612, 613, 34 L. Ed. 246.

20. **Necessity for perfecting appeal.**—*Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917; *Dodge v. Knowles*, 114 U. S. 430, 438, 29 L. Ed. 144; *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127; *The Dos Hermanos*, 10 Wheat. 306, 311, 6 L. Ed. 328.

21. *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 259, 32 L. Ed. 448.

22. *Radford v. Folsom*, 131 U. S. 392, 33 L. Ed. 203.

23. **Motion or petition for rehearing.**—*Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 36, 37 L. Ed. 986; *Voorhees v. Noye Mfg. Co.*, 151 U. S. 135, 38 L. Ed. 101; *Northern Pac. R. Co. v. Holmes*, 155 U. S. 137, 138, 39 L. Ed. 99; *Harrison v. Magoon*, 205 U. S. 501, 51 L. Ed. 900; *Brockett v. Brockett*, 2 How. 238, 249, 11 L. Ed. 251; *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488, 28 L. Ed. 492; *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244; *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 678, 42 L. Ed. 1192, reaffirmed in *International Trust Co. v. Weeks*, 193 U. S. 667, 48 L. Ed. 839.

Where a case is pending in the supreme court of a territory on a petition for rehearing, at the time when the territory is admitted as a state, and the plaintiff in error elects to continue the jurisdiction of the cause in the supreme court of the

state, instead of transferring it to the circuit court of the United States as he might have done, it was held that the time of the pendency of the petition for rehearing in the territorial court cannot be deducted, in view of the fact that the petition remained pending notwithstanding the admission of the state terminated the existence of the court in which it was originally filed. *Northern Pac. R. Co. v. Holmes*, 155 U. S. 137, 39 L. Ed. 99; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Cambuston v. United States*, 95 U. S. 285, 287, 24 L. Ed. 443.

The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Brockett v. Brockett*, 2 How. 238, 249, 11 L. Ed. 251; *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488, 28 L. Ed. 492; *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244; *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 36, 37 L. Ed. 986.

"It was expressly ruled in *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of. *Slaughter House Cases*, 10 Wall. 273, 289, 19 L. Ed. 915; *Memphis v. Brown*, 94 U. S. 715, 717,

A motion for a new trial like a petition for rehearing filed during the term in which the judgment is rendered postpones the running of the period of limitation for the allowance of a writ of error until the motion is disposed of.²⁴ Therefore, the limitation prescribed by § 11 of the circuit court of appeals act, for taking appeals to the court of appeals, does not commence to run until a motion for a new trial is disposed of.²⁵

Limitation of General Rule.—The rule that an application for a rehearing, made before the time for appeal has expired, suspends the running of the period for taking an appeal, is not applicable when that period has already expired. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."²⁶

24 L. Ed. 244." *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488, 489, 28 L. Ed. 492.

24. Motion for new trial.—*Memphis v. Brown*, 94 U. S. 715, 717, 24 L. Ed. 244; *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488, 28 L. Ed. 492; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Slaughter House Cases*, 10 Wall. 273, 289, 19 L. Ed. 915; *Cambuston v. United States*, 95 U. S. 285, 24 L. Ed. 448.

25. Appeals to court of appeals.—*Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192; *International Trust Co. v. Weeks*, 193 U. S. 667, 48 L. Ed. 839.

Within the meaning of § 11 of the act of March 3, 1891, c. 517, 26 Stat. 826, providing that "no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed," it is held that a judgment of the circuit court of appeals is not final so that the jurisdiction of the appellate court may be invoked, while it is under the control of the trial court through the pendency of a motion for a new trial. Therefore the limitation prescribed by this section does not commence to run until the motion for a new trial is overruled. *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192, reaffirmed in *International Trust Co. v. Weeks*, 193 U. S. 667, 48 L. Ed. 839.

In *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244, the judgment was in mandamus, and a motion had been made to set it aside, which was denied, and thereupon the judgment was re-entered. The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably sued out within § 1007, Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in *Brockett v. Brockett*, 2 How. 238, 241, 11 L. Ed. 251, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did

not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the term of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a supersedeas." No reference was made to any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed § 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial. *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 678, 42 L. Ed. 1192, reaffirmed in *International Trust Co. v. Weeks*, 193 U. S. 667, 48 L. Ed. 839.

26. Limitation of rule that petition for rehearing arrests the statute.—*Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 261, 32 L. Ed. 448; *Conboy v. First Nat. Bank*, 203 U. S. 141, 145, 51 L. Ed. 128.

"No doubt the decision cited and others show that where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error on appeal does not begin to run until the petition for rehearing is disposed of. But there are limits to even that rule. When an appeal in bankruptcy, required by general orders in Bankruptcy, xxxvi, 2, to be brought within thirty days after the judgment or decree, was not brought within that time, the fact that a petition for rehearing was filed within the time required by the court below, but after the thirty days, was held not to prolong the time for appeal. 'The appellant could not reinvest himself with that right by filing a petition for rehearing.' *Conboy v. First Nat. Bank*, 203 U. S. 141, 145, 51 L. Ed. 128." *Harrison v. Magoon*, 205 U. S. 501, 503, 51 L. Ed. 900.

c. *War and Stay Law Period*.—The time during which the courts in the Confederate States were closed to a citizen of the United States is, in a suit brought by them since, to be excluded from the computation of the time fixed by the statute of limitations limiting the right of appeal from the inferior federal state courts to this court to five years from the time when the decree complained of was rendered.²⁷ The act of March, 1867, allowing appeals from federal courts, in districts where the regular sessions of such courts subsequently to the rendering of the judgment had been suspended by rebellion, to be brought within one year from the date of the passage of the act, is an enabling act, not a restraining one.²⁸

d. *Disabilities*.—Section 1008 of the Revised Statutes provides that "no judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree or order; provided, that where a party entitled to prosecute a writ of error or take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."²⁹ When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue.³⁰ The disability must exist at the time when the cause of action accrues. A disability subsequently accruing does not interrupt the statute.³¹ The evident meaning is, that if the party is an infant, insane, or in prison when the judgment or decree is entered, and therefore when he or she becomes entitled to the writ of error or appeal, the time to take it is extended. In all the old statutes this was expressed in some form or other; this was their settled meaning.³²

5. *COMPUTATION OF TIME*.—The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the

27. *War and stay law period*.—The Protector, 9 Wall. 687, 19 L. Ed. 812, following *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939.

The doctrine declared in *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939, that statutes of limitations do not run during the rebellion against a party residing out of the rebellious state, so as to preclude his remedy for a debt against a person residing in one of them, held applicable to the judiciary acts of 1789 and 1803, limiting the right of appeal from the inferior federal courts to this court, to five years from the time when the decree complained of was rendered. The Protector, 9 Wall. 687, 19 L. Ed. 812.

Alabama was one of the states named in the first proclamation of blockade, and the first proclamation as to the termination of the war. Accordingly an appeal from the decree by the circuit court of Alabama of 5th of April, 1861, which was filed in the clerk's office on the 17th of May, 1871, was dismissed; it being held on the principles above stated, that more than five years had elapsed between the date of the decree and the filing of the appeal, allowing the suspension of the time produced by the war. The Protector, 12 Wall. 700, 20 L. Ed. 463.

28. The Protector, 9 Wall. 687, 19 L. Ed. 812.

29. *Whitsitt v. Union, etc.*, R. Co., 122 U. S. 363, 364, 30 L. Ed. 1150.

30. *Disabilities subsequently accruing*.—*Walden v. Gratz*, 1 Wheat. 292, 4 L. Ed. 94; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38; *Harris v. McGovern*, 99 U. S. 161, 25 L. Ed. 317; *McDonald v. Hovey*, 110 U. S. 619, 28 L. Ed. 269; *Bauserman v. Blunt*, 147 U. S. 647, 657, 37 L. Ed. 316.

31. "In view of these authorities and of the principles involved in them, and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of congress, either in the 22d section of the act of 1789, or in the 2d section of the act of 1872, or in the 1008th section of the Revised Statutes, to change the rule which had always, from the time of Henry VII, been applied to statutes of limitation, namely, the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it." *McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. Ed. 269.

32. *McDonald v. Hovey*, 110 U. S. 619, 627, 28 L. Ed. 269.

day thus designated, and to include the last day of the specified period.³³ Therefore in computing the two years after the entry of a final judgment, decree or order, sought to be reviewed in this court, within which the writ of error must be brought or the appeal taken, the day of the entry of such judgment, decree or order should be excluded.³⁴

6. **PLEADING THE STATUTE.**—According to the English practice, the defendant must avail himself of the defense that two years has elapsed before the writ of error was brought by plea. He cannot take advantage of it by motion, nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court. But according to the established practice of this court he need not plead it, he may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court. And either party, without any formal assignment of error or plea, may avail himself of any objection which appears upon the record itself. If the bar arising from the lapse of time is apparent on the record, the defendant may take advantage of it by motion to quash or to dismiss the writ.³⁵

7. **EFFECT OF CIRCUIT COURT OF APPEALS ACT.**—The act of March 3, 1891, c. 517, 26 Stat. at L. 826, providing that writs of error or appeals in cases taken to the supreme court from the circuit court of appeals created by the act of 1891, shall be limited to one year, relates only to writs of error or appeals from the supreme court to the circuit court of appeals, and does not change the limit of two years as regards the cases which could be taken from the circuit and district courts of the United States to the supreme court; nor does it operate to reduce the time in which writs of error could issue from the supreme court to the state courts.³⁶ In other words, § 1008 of the Revised Statutes, giving two years for

33. Computation of time.—*Sheets v. Selden*, 2 Wall. 177, 190, 17 L. Ed. 822.

34. Day of entry of judgment excluded.—*Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448; *Smith v. Gale*, 137 U. S. 577, 578, 34 L. Ed. 792.

"A writ of error, allowed out of court, is neither considered as brought, even for the purpose of computing the time of limitation if suing it out, nor does it operate as a supersedeas, until it has been filed in the clerk's office of the court to which it is addressed. *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 260, 32 L. Ed. 448, and cases cited; *Foster v. Kansas*, 112 U. S. 201, 28 L. Ed. 629." *Hudson v. Parker*, 156 U. S. 277, 288, 39 L. Ed. 424; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 335, 44 L. Ed. 1088.

"In *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448, a final decree had been entered in the circuit court for the eastern district of Arkansas dismissing a bill for want of equity on the 22d of January, 1883, and on the 22d of January, 1885, a petition for an appeal was presented to Mr. Justice Miller in Washington and allowed, citation signed, and bond approved. These papers were filed with the clerk of the circuit court, January 27, 1885, being five days after the expiration of two years from the date of the final decree. It was ruled that an appeal could not be said to be 'taken' until it was in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the

cause and making it its duty to send it to the appellate court." In *re McKenzie*, 180 U. S. 536, 546, 547, 45 L. Ed. 657.

Appeals were granted and the original citation and the original writ of supersedeas together with certified copies of the assignment of errors and of the supersedeas bond and of the orders allowing the appeals were filed in the district court. This was held by the circuit court of appeals sufficient to give effect to the appeals. It was held by the supreme court of the United States that if this judgment of the circuit court of appeals is treated as open to re-examination it is correct. In *re McKenzie*, 180 U. S. 536, 45 L. Ed. 657.

35. Pleading the statute.—*Brooks v. Norris*, 11 How. 204, 207, 13 L. Ed. 665, 666.

36. Effect of circuit court of appeals act.—*Allen v. Southern Pac. R. Co.*, 173 U. S. 479, 43 L. Ed. 775, reaffirmed in *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 44 L. Ed. 374; *Excelsior, etc., Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 46 L. Ed. 910.

The act of March 3, 1891, c. 517, 26 Stat. at L. 826, refers to the jurisdiction of the courts created by the act of 1891; it follows that the limitation of time as to appeals or writs of error found in the concluding sentence of the circuit court of appeals act, refers only to writs of error or appeal dealt with by the section, and not to such remedies when applied to the district or circuit courts of the United States, which were not referred to in the

the bringing of a writ of error, or the taking of an appeal, to review the judgments or decrees of the circuit or district courts, was not repealed by the judiciary act of March 3, 1891.³⁷

E. The Writ of Error—1. PURPOSE OR OBJECT OF WRIT.—The writ of error is addressed to the judgment, and its office is to remove the judgment of the subordinate court into this court for re-examination.³⁸

2. NECESSITY OF WRIT.—We have repeatedly held that the writ of error in cases at law is essential to the exercise of the appellate jurisdiction of this court. And it is undoubtedly true that this court has gone very far in requiring strict compliance with the acts of congress under which cases are transferred from inferior tribunals to this court.³⁹ In other words, the writ of error is not a mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this court.⁴⁰

A case brought into this court by agreement of parties and without the issuing or service of a writ of error will be dismissed.⁴¹

3. FORM AND REQUISITES—*a. Form.*—Successive statutes have recognized the power of this court to make rules, not inconsistent with the laws of the United States, prescribing the forms of writs and other process, at common law, as well as in equity or admiralty, in all the courts of the United States.⁴² The form of a writ of error provided under the 9th section of the act of 1792 (1 Stat. at L., 275), has been in use ever since. It runs in the name of the president, and bears the teste of the chief justice of this court. It is in form and in fact, the process of this court, directed to the judges of the circuit court, commanding them to return with said writ, into this court, a transcript of the record of the case mentioned in the writ.⁴³ By the ninth section of the act of May 8, 1792, c. 36 (1 Stat. 278), it was made the duty of the clerk of this court to transmit to the clerks of the several courts the form of a writ of error approved by two of the justices of this court. This was done, and the form adopted required the writ

section in question. *Allen v. Southern Pac. R. Co.*, 173 U. S. 479, 43 L. Ed. 775, reaffirmed in *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 44 L. Ed. 374.

37. Section 1008 not repealed by court of appeals act.—*Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 70, 44 L. Ed. 374, following *Allen v. Southern Pac. R. Co.*, 173 U. S. 479, 43 L. Ed. 775.

38. Purpose or object of writ.—*Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 131, 23 L. Ed. 260; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

39. Necessity of writ.—*Mussina v. Cavazos*, 6 Wall. 355, 358, 18 L. Ed. 810; *Washington County v. Durant*, 131 U. S., appx. lxxx, 18 L. Ed. 169; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447; *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

A writ of mandamus will not lie from this court to compel the clerk below to send up a transcript of the record, where no writ of error has in fact been issued. In this case the court said: "Certainly it has been the prevailing custom from the beginning for the clerk of this court, or the clerk of the circuit court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court. Consequently, the simple lodging of the allowance with him

cannot be considered as a demand for the writ; and, besides, this proceeding is not to require him to issue the writ, but to furnish a transcript to be annexed to and returned with the writ (Rev. Stat., § 997), which it is not his duty to give until there is a writ to which it can be annexed and with which it can be returned." *Ex parte Ralston*, 119 U. S. 613, 615, 30 L. Ed. 506, citing *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447.

40. Writ of error essential to appellate jurisdiction.—*Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

41. Stipulation of parties to dispense with writ.—*Washington County v. Durant*, 131 U. S., appx. lxxx, 18 L. Ed. 169.

42. Power of court to prescribe form of writ.—Acts of May 8, 1792, ch. 36, § 2; 1 Stat. 276; May 19, 1828, ch. 68, §§ 1, 3; 4 Stat. 281; August 23, 1842, ch. 188, § 6; 5 Stat. 518; *Wayman v. Southard*, 10 Wheat. 1, 27, 29, 6 L. Ed. 253; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Beers v. Haughton*, 9 Pet. 329, 360, 9 L. Ed. 145; *Ward v. Chamberlain*, 2 Black 430, 436, 17 L. Ed. 319; *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424.

43. Form of writ prescribed by act of 1792.—*Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

to be issued in the name of the president of the United States, and have the teste of the chief justice of this court.⁴⁴

Section 1004 of the Revised Statutes is as follows: "Writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts under the seals thereof, as by the clerk of the supreme court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the supreme court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six."⁴⁵

b. Requisites and Sufficiency.—(1) *In General.*—The writ of error must strictly comply with the requirements of the statute, or it will be dismissed.⁴⁶ The want of a writ of error, such as is prescribed by the act of congress, stands on a different ground from the want of a citation. Where the power of the court to hear and determine the case is conferred by acts of congress, and the same authority which gives it jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provision of the law, nor to change and modify it.⁴⁷

(2) *Description of Judgment.*—Where the judgment is not properly described in the writ of error, it will be dismissed on motion.⁴⁸ Hence, where a writ of error describes a judgment as rendered in favor of a firm without naming the persons who composed the firm, such a writ of error is irregular, and this court will not undertake to review a judgment thus described.⁴⁹

Reinstatement.—But leave will be given to counsel to move for its reinstatement during the present term.⁵⁰

(3) *Naming Return Day.*—The failure of the writ of error to name a return day for the writ is a fatal error, which is not waived or cured by a general appearance, and the case must be dismissed for want of jurisdiction.⁵¹ But the defect is one that is amendable under § 1005 of the Revised Statutes, upon application by the plaintiff in error to amend, and service of citation.⁵²

(4) *Teste.*—The writ of error must be under the teste of the chief justice of this court.⁵³ A writ of error will be dismissed for want of the teste required by the process act of 1789 (1 Stat. at Large 93), although the defect in the teste was occasioned by an oversight of a clerk below. And the teste cannot be amended here without a departure from our established practice.⁵⁴

Writs of Error to Territorial Courts.—A writ of error from the United

44. *Bondurant v. Watson*, 103 U. S. 281, 289, 26 L. Ed. 447.

45. **Provisions of § 1004.**—*Bondurant v. Watson*, 103 U. S. 281, 289, 26 L. Ed. 447.

46. **Requisites and sufficiency in general.**—*Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

47. *Carroll v. Dorsey*, 20 How. 204, 207, 15 L. Ed. 803, citing *United States v. Curry*, 6 How. 106, 114, 12 L. Ed. 363.

48. **Description of judgment.**—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879, citing *Smyth v. Pevine*, 12 How. 327, 13 L. Ed. 1008.

49. **Description of judgment in favor of partnership.**—*Godbe v. Tootle*, 154 U. S. appx., 576, 19 L. Ed. 831, citing *Mussina v. Cavazos*, 6 Wall. 355, 362, 18 L. Ed. 810. See ante, "Parties and Persons Entitled to Appeal," VI.

50. **Reinstatement.**—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879.

Dismissal without prejudice.—Where two writs of error are sued out to the supreme court of a state to review its

judgment, and one of the writs incorrectly describes the date of the entry of the judgment of the state court, but the second writ of error correctly describes the date on which the judgment was entered, the former writ may be dismissed without prejudice to the proceedings on the latter. *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 49 L. Ed. 639, citing *Wheeler v. Harris*, 13 Wall. 51, 20 L. Ed. 531; *Silsby v. Foote*, 26 How. 290, 15 L. Ed. 822.

51. **Naming return day.**—*Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803; *Porter v. Foley*, 21 How. 393, 16 L. Ed. 151.

52. **Amendment.**—*Sea v. Connecticut Mut. Life Ins. Co.*, 154 U. S. appx., 659, 25 L. Ed. 882.

53. **Teste.**—*Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447.

54. **No amendment of clerical errors.**—*Moulder v. Forrest*, 154 U. S. appx., 567, 19 L. Ed. 154, citing *Virginia Valley Ins. Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 91; *Porter v. Foley*, 21 How. 393, 16 L. Ed. 151.

States supreme court to a territorial supreme court, bearing the teste of the clerk of the supreme court of the territory, instead of the teste of the chief justice of the United States supreme court, is void.⁵⁵

A writ of error must bear teste of the term next preceding that to which it is returnable.⁵⁶ Thus, a writ of error, issued in September, may bear teste of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of August term between the teste and return of the writ.⁵⁷ But it is no objection to the writ that it bears teste on the day of its issue.⁵⁸

(5) *Sealing*.—The authorities are uniform that all process issuing from a court, which by law authenticates such process with its seal, is void if issued without a seal.⁵⁹ A paper purporting to be a writ of error, if without a seal, is void.⁶¹

Time of Affixing Seal.—A writ of error not sealed until eleven days after the judgment which it would seek to reverse was rendered, cannot operate as a supersedeas, and it cannot be amended in this respect.⁶²

(6) *Date*.—A mistake in the date of the writ of error does not vitiate the writ.⁶³

(7) *Indorsement*.—When a judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, the omission of the clerk of the circuit court of appeals to indorse the writ of error as filed cannot prevent a transfer of the cause.⁶⁴

c. *Exceptions and Objections*.—Objections to the form of a writ of error not taken below will not be entertained here to defeat the jurisdiction of this court.⁶⁵

4. **ISSUANCE AND SERVICE OF WRIT**—a. *In General*.—Writs of error to the circuit court, under the 22d section of the judiciary act, issued as a matter of course, and could be obtained from the clerk of the circuit court, and, when filed in his office by the party, were duly served.⁶⁶

55. Teste of writ to territorial court.—*Germain v. Mason*, 154 U. S., appx., 587, 20 L. Ed. 689; *Wells v. McGregor*, 13 Wall. 188, 20 L. Ed. 538.

Montana.—Where the writ of error to the supreme court of the territory of Montana bears the teste of the clerk of the supreme court of the territory of Montana and not the teste of the chief justice of this court, the writ of error will be dismissed. *Germain v. Mason*, 154 U. S., appx., 587, 588, 20 L. Ed. 689, following *Wells v. McGregor*, 13 Wall. 188, 20 L. Ed. 538.

56. Teste must be of term preceding return of writ.—*Hamilton v. Moore*, 3 Dall. 371, 1 L. Ed. 642.

57. Blackwell v. Patten, 7 Cranch 277, 3 L. Ed. 342.

58. May bear teste on day of issue.—Rev. Stat., § 912; *Atherton v. Fowler*, 91 U. S. 143, 149, 23 L. Ed. 265.

59. Writ of error must be sealed.—*Ætna Ins. Co. v. Hallock*, 6 Wall. 556, 558, 18 L. Ed. 948; *Overton v. Cheek*, 22 How. 46, 16 L. Ed. 285; *Texas, etc., R. Co. v. Kirk*, 111 U. S. 486, 28 L. Ed. 481.

We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. *Overton v. Cheek*, 22 How. 46, 16 L. Ed. 285; *Ætna Ins. Co. v. Hallock*, 6 Wall. 556, 558, 18 L. Ed. 948.

61. Writ void if without a seal.—*Overton v. Cheek*, 22 How. 46, 16 L. Ed. 285.

When no writ of error has been certified with the transcript, and the paper purporting to be a writ of error, being without seal, was void, and two terms of this court have intervened, not including the present term, since the transcript was certified without a writ of error, the cause must be dismissed. *Overton v. Cheek*, 22 How. 46, 16 L. Ed. 285.

62. Time of affixing seal.—*Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863, following *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

63. Date of writ immaterial.—*O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

A mistake in the date of the writ of error is not important, when it is clear that such mistake is a clerical one merely, and when, from the judgment described and the number given to it, the party cannot be misled. *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377.

64. Indorsement.—*Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. Ed. 1088.

65. Exceptions and objections.—*Amadeo v. Northern Assur. Co.*, 201 U. S. 194, 202, 50 L. Ed. 722.

66. Issuance and service of writ in general.—*Bartemeyer v. Iowa*, 14 Wall. 26, 20 L. Ed. 792.

b. *Issuance.—Whence Issued.*—Formerly, writs of error to remove causes to the supreme court from inferior courts, could regularly issue only from the clerk's office of the supreme court.⁶⁷ But this decision led to the enactment of the ninth section of the act of 1792, 1 Stat. at Large 278, by which it was provided that the clerk of the supreme court, assisted by any two justices of said court, should prescribe the form of a writ of error, copies of which should be forwarded to the clerks of the circuit courts; and that such writs might be issued by these clerks, under the seals of their respective courts.⁶⁸ And it is by virtue of this act alone that the clerk of a circuit court, or of a district court exercising the jurisdiction of a circuit court, is authorized to issue a writ of error to remove a case to this court.^{68a}

The present statute provides that writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the supreme court. When so issued they shall be as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the supreme court, in pursuance of § 9 of the act of May 8, 1792, ch. 36.⁶⁹

From Territorial Courts.—The act of 1838 providing that writs of error and appeals from the final decision of the supreme court of the territory, shall be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gives to the clerk of the territorial court the power to issue the writ of error.⁷⁰

c. *Service.*—(1) *Necessity for Service.*—Cases cannot be brought within the appellate jurisdiction of this court by agreement of parties, and without an appeal allowed or writ of error served.⁷¹ But the fact that another writ of error and another citation, not served, were issued, cannot prejudice the writ and citation which were duly issued and served.⁷²

Appeals from District to Circuit Courts.—When the statute allowed appeals in such cases, a party claiming a writ of error from the district to the circuit court had to comply with the regulations contained in the judiciary act as to the service of the writ.⁷³

(2) *Time of Service.*—The writ must be served before the return day by filing it in the clerk's office.⁷⁴

67. **From whence issued.**—*West v. Barnes*, 2 Dall. 401, 1 L. Ed. 433.

68. **May be issued by clerk of trial court under act of 1792.**—*Mussina v. Cavazos*, 6 Wall. 355, 357, 18 L. Ed. 810; *Buel v. Van Ness*, 8 Wheat. 312, 5 L. Ed. 624.

Writs of error, under the judiciary act, could only issue from the clerk's office of this court, but it was provided by the ninth section of the act of the eighth of May, 1792, that the form of a writ of error approved by any two judges of the supreme court should be forthwith transmitted to the clerks of the circuit courts, and the provision was that they may issue writs of error agreeably to such form as nearly as the case may admit, under the seal of such courts, returnable to the supreme court. 1 Stat. at Large 278. *Barton v. Forsyth*, 5 Wall. 190, 192, 18 L. Ed. 545.

68a. *Insurance Co. v. Mordecai*, 21 How. 195, 200, 16 L. Ed. 94.

69. Rev. Stat., § 1004.

70. **Review of judgment of territorial courts.**—*Sheppard v. Wilson*, 5 How. 210, 12 L. Ed. 120.

71. **Necessity for service of writ.**—*Washington County v. Durant*, 7 Wall. 694, 19 L. Ed. 164; S. C., 131 U. S., appx. lxxx, 18 L. Ed. 169.

72. *Davidson v. Lanier*, 4 Wall. 447, 153, 18 L. Ed. 377.

73. **Appeals from district to circuit courts.**—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

A party claiming a writ of error from the circuit courts to the district courts in cases at law, under the jurisdiction created by the bankrupt act, must comply with the regulations contained in the judiciary act as to the service of the writ. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 266, 21 L. Ed. 493.

74. **Time of service.**—*Washington v. Dennison*, 6 Wall. 495, 496, 18 L. Ed. 863.

Where it is assigned as reason for dismissing the writ, that the writ of error, the bond, the citation, and the copy of the writ of error for the defendants, were not seasonably served or filed, but it appears from the record, that the judgment of the supreme court of the state to which the writ of error was issued, was rendered

(3) *Manner of Serving*.—Service of a writ of error, in the practice of this court, is the lodging of a copy of the same in the clerk's office where the record remains.⁷⁶ When a writ of error is deposited with the clerk of the court to whom judges it is directed it is served.⁷⁷

(4) *Effect of Failure to Serve*.—The general principle is that all writs, which have not been served, and under which nothing has been done, expire on the day to which they are made returnable. They no longer confer any authority; an attempt to act under them is a nullity, and new writs are necessary, if the party wishes to proceed. Hence we have the alias writ, and others in numerical succession indefinitely.⁷⁸

5. *RETURN*.—a. *In General*.—The transcript which the clerk sends here is the return to the writ, and should be accompanied by it.⁷⁹

In Criminal Cases.—In regard to the return of the writ of error, the law makes no distinction between a civil and a criminal case. The same return is required in both. In the language of Mr. Chief Justice Marshall: "If the sanction of the court could be necessary for the establishment of this position, it has been silently given."⁸⁰

What Law Governs.—Where an act giving an appeal to this court in a particular case contains no provision concerning returns, it is subject to the general regulations contained in the judiciary act.⁸¹

An appeal will be dismissed with costs, on a certificate of the clerk that no return has been filed.⁸²

b. *Sufficiency of Return*.—(1) *In General*.—The clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of the proceedings, in the cause, under his hand, and the seal of the court.⁸³

But the return of a copy of the record, under the seal of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case.⁸⁴

on the 31st of October, 1871, and on the 10th of November, 1871, the writ of error was issued returnable from the first Monday in December, and was served by filing in the clerk's office; that the writ is dated on the 16th of October, 1871, which date, however, was obviously a mistake as this was before the judgment of the firm, that the case was removed by service on the 10th of November; that the citation was served on the 3rd of February, 1872, it was held that the motion to dismiss must be denied, because this was sufficient to advise the opposite party that the cause had been removed to this court, and was served and returned within the term. *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

76. *Manner of serving*.—*Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, 270; *Gumbel v. Pitkin*, 113 U. S. 545, 546, 28 L. Ed. 1128; *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588.

77. *Mussina v. Cavazos*, 6 Wall. 355, 359, 18 L. Ed. 810; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. Ed. 1088.

78. *Effect of failure to serve*.—*Mussina*

v. Cavazos, 6 Wall. 355, 18 L. Ed. 810, following *Vilabolos v. United States*, 6 How. 81, 12 L. Ed. 352.

79. *Return of writ*.—*Mussina v. Cavazos*, 6 Wall. 355, 358, 18 L. Ed. 810.

In *Mussina v. Cavazos*, 6 Wall. 355, 359, 18 L. Ed. 810, Mr. Justice Miller said, that an examination of all the records of cases decided in this court will show that in four cases out of five there has been neither an assignment of errors, nor any prayer for reversal. And therefore, in spite of the statute it is not believed to be absolutely necessary that there shall be return at the same time, an assignment of errors, a prayer for the reversal of the judgment, and a citation to the adverse party.

80. *Returns in criminal cases*.—*Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483.

81. *What law governs*.—*Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

82. *Appeal will be dismissed for want of return*.—*Norwich, etc., Steamboat Co. v. Steamboat*, 17 How. 17, 15 L. Ed. 42; *Vilabolos v. United States*, 6 How. 81, 12 L. Ed. 352; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

83. *Sufficiency of return in general*.—Rule, 3 Dall. 356, 1 L. Ed. 634. See post, "Assignment of Errors," X.

84. *Return of copy of record sufficient*.—*Martin v. Hunter*, 1 Wheat. 304, 305, 4 L. Ed. 97.

(2) *Original or Copy.*—**In General.**—The writ of error by which a case is transferred from a circuit court to this court is the writ of the supreme court, although it may be issued by the clerk of the circuit court; and the original writ should always be sent to this court with the transcript.⁸⁵

Effect of Loss of Original Writ.—But it is not essential to the jurisdiction of this court that the original writ and the transcript should both be returned on the first day of the term next after the issuing of the writ. It is sufficient if, during the life of the writ, a good and sufficient return to it was made, by sending to this court an authenticated transcript of the record. Therefore, where it appears that the original writ was lost or destroyed this court nevertheless has jurisdiction; if taking the copy of the writ found in the record to be a true copy, it is established by affidavits that a writ of error was issued and served and that a transcript of the record, with a copy of the writ, was returned and filed in this court, before the first day of the next term after it was issued, and that the original writ was destroyed.⁸⁶ An original writ has fulfilled its functions when the defendant is brought into court. If lost, the court can provide, in its discretion, for filing of a copy.⁸⁷

What Law Governs Appeals.—And the same rule applies in cases of appeals, for the act of 1803, which first authorized appeals, subjects them to the rules and regulations which govern writs of error.⁸⁸

The reason of the rule is stated as follows: It is believed to be well settled, that rights acquired under a valid writ or process, while it was in force, cannot be defeated by the loss or destruction of the writ; if its existence, and the acts done under it, can be substantiated by other testimony. It is as reasonable to hold that a judge of this court would lose his right to sit in this place, if his commission was burned up, as to hold that the court loses the right to hear a case, because the writ was burned before it reached the court, but after it had effected its purpose, by bringing here the transcript.⁸⁹

c. *Time and Place of Return.*—**To What Term—In General.**—It may now be regarded as settled, that the writ of error, or the allowance of an appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error, or the appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or a new appeal.⁹⁰

85. *Original writ to be returned.*—Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810.

86. *Effect of loss or destruction of original writ.*—Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810, commenting on and explaining Castro v. United States, 3 Wall. 46, 18 L. Ed. 163; Villabolas v. United States, 6 How. 81, 12 L. Ed. 352.

87. *New York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380.

Refusal of clerk to return.—In *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169, the writ of error, which issued from this court, was filed with the clerk below. No return being made to it, a rule from this court was served on him by the marshal, to which he paid no attention. This court then, on motion of the attorney general, permitted him to file a copy of the record, duly authenticated, which had been secured for his private use; "to have the same effect and legal operation as if returned by the clerk with the writ of error;" and on this record the case was

heard and decided, although the original writ of error was never returned.

88. *What law governs appeals.*—Mussina v. Cavazos, 6 Wall. 255, 356, 18 L. Ed. 810, distinguishes Villabolas v. United States, 6 How. 81, 12 L. Ed. 352; Castro v. United States, 3 Wall. 46, 18 L. Ed. 163, on the ground that in these cases the appeals were dismissed, because no returns of the transcripts to this court were made, until by analogy to the writ of error, the time for making such returns had passed.

89. *Reason of rule.*—Mussina v. Cavazos, 6 Wall. 355, 360, 18 L. Ed. 810.

90. *Time and place of return.*—United States v. Hodge, 3 How. 534, 11 L. Ed. 714; Villabolas v. United States, 6 How. 81, 90, 12 L. Ed. 352; United States v. Curry, 6 How. 106, 112, 12 L. Ed. 363; Steamer Virginia v. West, 19 How. 182, 15 L. Ed. 594; Virginia Valley Ins. Co. v. Mordecai, 21 How. 195, 200, 16 L. Ed. 94; Mesa v. United States, 2 Black 721, 17 L. Ed. 350;

Rule 8 of this court provides that in cases when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day.⁹¹

Rule Governing Appeals.—And under the act of 1803, subjecting appeals to the rules and regulations which govern writs of error, the same rule applies in either case.⁹²

But if a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error, waives all objection to the irregularity of the return.⁹³

Intervention of Term.—The general rule undoubtedly is that where a whole term intervenes between the issuance of the writ, it is absolutely void and cannot be amended,⁹⁴ though the contrary seems to have been held in one case at least.^{94a}

To What Day of Term—In General.—The act of 1789, § 22, requires that

Castro v. United States, 3 Wall. 46, 50, 18 L. Ed. 163; *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154; *Caillott v. Deetken*, 113 U. S. 215, 28 L. Ed. 983.

A writ of error is always returnable to the term of the appellate court next following the date of the writ, and the citation is returnable to the same term; therefore, unless the writ and citation are both served before the term, the case is not removed to the appellate court, and the writ, if returned afterward, will be quashed. *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 352, citing *Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137; *Bailiff v. Tipping*, 2 Cranch 406, 2 L. Ed. 320; *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588; *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638; *Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889.

By the act of 1828 relating to private land claims in Florida, the claimant must appeal within four months; and the act of 1803 subjects appeals to the rules and regulations prescribed by law in cases of writs of error. Now, the writ of error is always returnable to the term of the appellate court next following the date of the writ; and the citation required by the act of 1789 (which is a summons to the opposite party to appear) must be returnable to the same term, and unless the writ and citation are both served before the term, the case is not removed to the appellate court, and the writ, if returned afterwards, will be quashed. (*Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137; *Bailiff v. Tipping*, 2 Cranch 406, 2 L. Ed. 320; *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588; *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638; and *Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889.) It follows that, where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered. (*Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664.) The entry of the appeal in the clerk's office is analo-

gous to the issuing a writ of error; it is returnable to the next term of the appellate court; and a citation to the opposite party to appear is necessary. *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352, 356, explained in *Mussina v. Cavazos*, 6 Wall. 355, 358, 18 L. Ed. 810.

91. Rule 8 stated.—*National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362.

92. What law governs appeals.—*Mussina v. Cavazos*, 6 Wall. 355, 358, 18 L. Ed. 810; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352.

93. When returnable at subsequent term.—*Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588; *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638.

The court refused to quash a writ of error on the ground that the record was not filed with the clerk of the court until the month of June, 1832, the writ having been returnable to January term, 1832. The defendant in error might have availed himself of the benefit of the twenty-ninth rule of the court, which gave him the right to docket and dismiss the cause. "This court decided, in the case of *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588, that provided the service be before the return day of the writ, a return at a subsequent day will be sustained. (*French v. Bank of Columbia*, 4 Cranch 141, 150, 2 L. Ed. 576; 2 Peter's Cond. Rep. 76.)" *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638, 639.

94. Intervention of term.—A writ of error issued in September may bear teste of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the teste and return of the writ. *Hamilton v. Moore*, 3 Dall. 371, 1 L. Ed. 642; *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803; *Blair v. Miller*, 4 Dall. 21, 1 L. Ed. 724.

94a. *Blackwell v. Patten*, 7 Cranch 277, 3 L. Ed. 342.

the writ of error should be made returnable on a certain day therein named,⁹⁵ a writ of error made returnable to a day different from the return day fixed by statute as the day on which the term commences, will be dismissed.⁹⁶

Returnable to First Day of Next Term.—According to the settled practice, if the writ of error is sued out before the first day of the term, it must be made returnable on the first day of the next term, and so as to the citation; and, if sued out after, it must be made returnable the first day of the succeeding term,⁹⁷ if made returnable to any subsequent day, it is erroneous, and will be dismissed on motion.⁹⁸

A writ of error returnable on the third Monday in January cannot be supported, and does not bring the case before the court.⁹⁹

When Returnable at Subsequent Day.—The writ may be returned with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ, and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term.¹

d. *Specification of Return Day in Writ.*—A motion to dismiss a writ of error will be granted, because of an omission to state with certainty the return day of the writ.²

e. *Compelling Return.*—A rule may be issued on the marshal of the district to compel him to return the writ.³

f. *Waiver.*—The appearance of the defendant in error waives all objection to the irregularity of the return.⁴

6. AMENDMENT OF WRIT.—a. *Right to Amend.*—Prior to the statute writs of error were not amendable.⁵

95. **To what day of term returnable.**—*Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

96. **Dismissal.**—*Agricultural Co. v. Pierce County*, 6 Wall. 246, 18 L. Ed. 739.

97. **Returnable to first day of next term.**—*Villabolas v. United States*, 6 How. 81, 89, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 112, 12 L. Ed. 363; *Virginia Valley Ins. Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94; *Washington v. Dennison*, 6 Wall. 495, 496, 18 L. Ed. 863.

98. *Virginia Valley Ins. Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

99. **Cannot be returned to subsequent day of term.**—*Porter v. Foley*, 21 How. 393, 16 L. Ed. 154, citing *Virginia Valley Ins. Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

1. **When writ returnable at subsequent day.**—*Virginia Valley Ins. Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94, 95.

The twenty-second section of the judiciary act provides that, "Judgments and decrees of the district courts may be re-examined, and affirmed or reversed in a circuit court, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal; with a citation, etc. And upon like process may judgment in the circuit courts be re-examined in the supreme

court." It will be seen that the act requires that all these things must be returned together "at the time and place mentioned in the writ," that is to say, on the first day of the term next after the issuing of the writ. Yet we have repeatedly held, that if returned on any day during that term, we will hear and decide the cause. It cannot, therefore, be maintained, that a rigid and literal fulfillment of everything prescribed in that section, is an absolute and indispensable requisite to the appellate jurisdiction of this court." *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

2. **Specification of return day in writ.**—*Sea v. Connecticut Mut. Life Ins. Co.*, 154 U. S., appx., 659, 25 L. Ed. 882, citing *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

3. **Compelling return.**—*Oswald v. New York*, 2 Dall. 402, 1 L. Ed. 433; *United States v. Booth*, 18 How. 476, 478, 15 L. Ed. 464. See ante, "Over State Courts," III. D. 7.

4. **Appearance as waiver of irregularities.**—*Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588.

5. **No right to amend prior to statute.**—*Carroll v. Dorsey*, 20 How. 204, 206, 15 L. Ed. 803; *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94; *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154; *Texas, etc. R. Co. v. Kirk*, 111 U. S. 486,

Statutory Changes.—But by a provision of the first judiciary act of the United States, "no summons, writ, declaration, return, process, judgment, or other proceedings, in civil causes in any court of the United States shall be abated, arrested, quashed or reversed, for any defect or want of form;" but the court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and the court shall amend every such defect and want of form, other than those which the party demurring so expresses; and "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions" as it shall, in its discretion and by its rules, prescribe.⁶

By the act of June 1, 1872, c. 255, § 3, re-enacted in the Revised Statutes, Congress, enacted that this court "may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; provided the defect has not prejudiced, and the amendment will not injure, the defendant in error."⁷

28 L. Ed. 481; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 39 L. Ed. 725.

A review of the early practice as to amendments.—"An amendment presupposes jurisdiction of the case. And this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of congress—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not a mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law. Upon this principle, the court have uniformly refused to amend writs of error; and this must now be regarded as the settled practice of the court. It has repeatedly refused to amend, where the partnership name of a firm was used instead of the proper names of the parties; and in like manner it has refused to amend where the name of one or more of the parties were given, and the rest designated as others joined with them, without setting out the names of those intended to be included as others. But the precise point now before us was decided in the case of *Hines v. Papin*, at December term, 1857. The same error was committed in that case which had been committed in this; and the error was equally apparent, as in the present instance, from the recital in the bond and the citation and service. The case was,

indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process. But here there is no appearance for the parties who are named as plaintiffs in the writ of error; and if we order the amendment, we should make them defendants in a suit in which they are not bound to appear in that character. It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible. The opinion in the case of *Hines v. Papin*, above referred to, was delivered orally, and not reduced to writing, and consequently does not appear in the printed reports. The court have, therefore, deemed it advisable to state now the practice and doctrine of the court in this respect, in order that suitors may be aware of the necessity of paying proper attention to the process they issue, and not subject themselves to costs and delays by errors which a clerk, in the hurry and pressure of other business, will unavoidably sometimes commit." *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

6. The provisions of the first judiciary act.—Act of September 24, 1789, ch. 20, § 32; 1 Stat. 91; Rev. Stat., § 954; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 344, 39 L. Ed. 725.

7. The provisions of the present judiciary act.—17 Stat. 197; Rev. Stat., § 1005;

Power of Circuit and District Courts.—The power to amend all process returnable to the circuit court is vested in that court as fully as it is in the supreme court; and the express provision is that the supreme court may allow an amendment of a writ of error when there is a mistake in the title of the writ or a seal to the writ is wanting, or when the writ is returnable on a day other than the day of the commencement of the term next ensuing; and, by the true construction of the provision upon the subject, the same power of amendment is vested in the circuit and district courts in all cases where the process is returnable in those respective courts.⁸

b. *Discretion of Court.*—But the amendment rests in the discretion of the court, and will not be allowed if there is danger of prejudice to the adverse party, or if there is any other good reason against it, as, for instance, that the main question presented by the record has been often decided by this court.⁹

c. *Amendable Defects.*—(1) *In General.*—Where a writ is colorably issued from this court, it may be amended under § 1005 of the Revised Statutes; otherwise not, as where the writ is void.¹⁰ By § 1005 of the Revised Statutes, we are authorized to allow an amendment of a writ of error, when there has been a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, "and in all other particulars of form."¹¹

Dismissal.—If defects in a writ of error cannot be cured by amendment, this entitles the defendant in error to a dismissal.¹²

Where Objection Is Jurisdictional.—Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case.¹³

(2) *Error as to Return Day.*—At first, it was treated by this court, as of course, that a writ of error, which contained no return day, might be amended by inserting the day.¹⁴ Afterwards, adopting a stricter rule, it was held that a writ of error did not give this court jurisdiction, and could not be amended, if the return day was wrongly stated.¹⁵

But under act of June 1, 1872, c. 255, § 3 and § 1005 of the Revised Statutes, a writ may be amended which contains a wrong return day,¹⁶ or no

Walton v. Marietta Chair Co., 157 U. S. 342, 346, 39 L. Ed. 725; Bondurant v. Watson, 103 U. S. 281, 26 L. Ed. 447.

8. **Power of circuit and district courts.**—17 Stat. 197; Hampton v. Rouse, 15 Wall. 686, 21 L. Ed. 250; Semmes v. United States, 91 U. S. 21, 24, 23 L. Ed. 193.

9. **Discretion of court.**—Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; Walton v. Marietta Chair Co., 157 U. S. 342, 347, 39 L. Ed. 725.

10. **Amendable defects in general.**—Bondurant v. Watson, 103 U. S. 281, 289, 26 L. Ed. 447; Texas, etc., R. Co. v. Kirk, 111 U. S. 486, 28 L. Ed. 481.

11. Texas, etc., R. Co. v. Kirk, 111 U. S. 486, 487, 28 L. Ed. 481.

12. **Dismissal.**—Evans v. Brown, 109 U. S. 180, 27 L. Ed. 898.

13. **Where objection is jurisdictional.**—Wilson v. Life, etc., Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; Estes v. Trabue, 128 U. S. 225, 230, 32 L. Ed. 437.

14. **Early rule as to amending errors in return day.**—Mossman v. Higginson, 4 Dall. 12, 1 L. Ed. 720; Course v. Stead, 4 Dall. 22, 1 L. Ed. 724.

A writ of error, regularly tested, with a blank for the return day, was allowed to be amended, the term to which it was

returnable, the time when it was filed in the court below, and when in the supreme court, appearing by indorsements on the writ. Mossman v. Higginson, 4 Dall. 12, 1 L. Ed. 720.

15. **Later rule as to amending errors in return day.**—Insurance Co. v. Mordecai, 21 How. 195, 16 L. Ed. 91; Porter v. Foley, 21 How. 393, 16 L. Ed. 154.

A writ of error, not returned at the term to which it is returnable, is a nullity. Blair v. Miller, 4 Dall. 21, 1 L. Ed. 724.

16. **Present rule as to amending errors in return day.**—Hampton v. Rouse, 15 Wall. 686, 21 L. Ed. 250; Semmes v. United States, 91 U. S. 21, 23 L. Ed. 193; National Bank v. Bank of Commerce, 99 U. S. 608, 25 L. Ed. 362; McVeigh v. United States, 8 Wall. 640, 19 L. Ed. 511; Atherton v. Fowler, 91 U. S. 143, 23 L. Ed. 265.

Where a writ of error was made returnable to the first Monday of December (a return day then, within a month, abolished by act of congress), instead of being made returnable the second Monday of October, next ensuing, the day which the act fixed thenceforth as the return day, held that the mistake was amendable under the third section of the

return day at all,¹⁷ or that is made returnable on a wrong day.¹⁸

An omission to state with certainty the return day of a writ of error is an amendable defect under § 1005, of the Revised Statutes; but where no application is made by the plaintiff in error for leave to amend, and no citation has ever been served, this court will not on its own motion make any order in that behalf.¹⁹

New Citation.—Where a writ of error and citation are returnable on the second Monday, instead of the third Monday as is proper, and the court on motion of plaintiff in error grants an order allowing the writ to be amended by inserting the third Monday of the term as the return day thereof, it has been held that a new citation should issue to notify the defendant in error of what has been done.²⁰

(3) *Absence of or Mistake in Teste.*—At first it was treated by this court as of course, that the want of a date to the teste of a writ of error, might be made good by amendment, when there was enough in the record to amend by.²¹ But in a later case it was held that such a defect could not be supplied by amendment.²²

Under the act of June 1, 1872, c. 255, § 3, this court may allow a writ of error to be amended which bears a wrong teste.²³

(4) *Absence of or Mistake in Seal.*—The supreme court may allow an amendment of a writ of error when a seal to the writ is wanting,²⁴ and, under the act

act of June 1st, 1872, "to further the administration of justice," which empowers the court to allow amendments in certain cases, including the case "where the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ." *Hampton v. Rouse*, 15 Wall. 686, 21 L. Ed. 250.

17. Amendment where writ contains no return day.—*Atherton v. Fowler*, 91 U. S. 143, 23 L. Ed. 265; *Evans v. Brown*, 109 U. S. 180, 27 L. Ed. 898.

18. Writ returnable to wrong day.—*Texas, etc., R. Co. v. Kirk*, 111 U. S. 486, 28 L. Ed. 481.

Where a writ of error is not made returnable on any particular day, the plaintiff in error under the authority of § 1005, may amend the writ by inserting the proper return day. *Evans v. Brown*, 109 U. S. 180, 27 L. Ed. 898.

19. Omission to state return day.—*Sea v. Connecticut Mut. Life Ins. Co.*, 154 U. S., appx., 659, 25 L. Ed. 882.

20. New citation must issue after amendment.—*National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362, citing *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33.

Where a judgment was rendered October 5, and the present term commenced October 15, and the writ of error and citation were returnable on the "second Monday in October next," the court, March 17, grants, on motion of the plaintiff in error, an order allowing the writ to be amended by inserting the third Monday of the term as the return day thereof, but requires him to cause a new citation returnable on the first Monday of the following May to be issued and served. "Rule 8 of this court provides that in cases

when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day. By § 1005 of the Revised Statutes this court is authorized at any time, in its discretion and upon such terms as it may deem just, to allow an amendment of a writ of error when it is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error. Section 999, Rev. Stat., provides that the adverse party shall have at least thirty days' notice of a writ of error by citation." *National Bank v. Bank of Commerce*, 99 U. S. 608, 24 L. Ed. 33.

21. Absence of or mistake in teste.—*Mossman v. Higginson*, 4 Dall. 12, 1 L. Ed. 720; *Course v. Stead*, 4 Dall. 22, 1 L. Ed. 724.

22. In 1869, a majority of the court, upon the authority of *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94; *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154, and without referring to the early case of *Course v. Stead*, 4 Dall. 22, 1 L. Ed. 724, held that defect in the teste of a writ of error could not be supplied by amendment. *Moulder v. Forrest*, 154 U. S., appx., 567, 19 L. Ed. 154.

23. Present rule as to amending writ bearing wrong teste.—*Texas, etc., R. Co. v. Kirk*, 111 U. S. 486, 28 L. Ed. 481; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 39 L. Ed. 725.

24. Absence of or mistake in seal.—*Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193.

of June 1, 1872, c. 255, § 3, this court has allowed a writ of error to be amended which bore a wrong seal.²⁵ But formerly it was held, that a writ of error not sealed until eleven days after the judgment which it would seek to reverse was rendered, could not operate as a supersedeas, and could not be amended in this respect.²⁶

(5) *Mistake in Title of Writ.*—The supreme court may allow an amendment of a writ of error when there is a mistake in the title of the writ.²⁷

(6) *Defects with Respect to the Parties.*—**Former Rule.**—Formerly it was held that where there is a defect of the title of the parties in an appeal, the writ cannot be amended according to the repeated decisions of this court. And this rule applies to appeals in admiralty.²⁸ For example, prior to the enactment of § 1005 of the Revised Statutes allowing amendments of writs of error in certain cases, it was held that where an appeal is taken in the names of the individual members of a firm instead of in the name of the firm, the appeal would be dismissed on account of such irregularity.²⁹ And a writ of error or an appeal could not be amended, if it described either party only as "the heirs" of a person named,³⁰ or by the name of one person "and others,"³¹ or by the name of a person "& Co."³²

Present Rule.—Section 1005 of the Revised Statutes authorizes this court in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances.³³

25. Writ bearing wrong seal amendable.—Texas, etc., *R. Co. v. Kirk*, 111 U. S. 486, 28 L. Ed. 481.

26. Washington v. Dennison, 6 Wall. 495, 18 L. Ed. 863, following *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

27. Mistake in title of writ amendable.—Semmes v. United States, 91 U. S. 21, 23 L. Ed. 193.

28. Defects with respect to the parties formerly unamendable.—Freeborn v. Protector, 11 Wall. 82, 20 L. Ed. 47, citing *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154; *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237; *Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Wilson v. Life, etc.*, Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; *Smyth v. Pevine*, 12 How. 327, 13 L. Ed. 1008; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879.

It was held that a writ of error could not be amended, if the real parties were transposed, although, as the court said: "It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight of the clerk by whom it was issued." *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

29. Partnerships.—Freeborn v. Protector, 11 Wall. 82, 20 L. Ed. 47.

30. Description of either party as "the heirs."—*Wilson v. Life, etc., Ins. Co.*, 12 Pet. 140, 9 L. Ed. 1032.

31. Designation of some parties as "and others."—*Deneale v. Archer*, 8 Pet. 526, 8 L. Ed. 1032; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879; *Miller v. McKenzie*, 10 Wall. 582, 19 L. Ed. 1043.

32. "And company."—*Mussina v. Cavazos*, 6 Wall. 355, 361, 18 L. Ed. 810; *Freeborn v. Protector*, 11 Wall. 82, 20 L. Ed. 47, two justices dissenting, upon the ground that the amendment might and should be permitted under § 32 of the judiciary act of 1789.

33. Power to amend under 1005 of the Revised Statutes.—*Pearson v. Yewdall*, 95 U. S. 294, 296, 24 L. Ed. 436; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386.

Where a writ of error is defective in the statement of the parties thereto, the right to amend is not absolute, under § 1005, Rev. Stat.; but the court, in its discretion, may allow the requisite amendment to be made upon such terms as it may deem just. *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436.

In *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436, the court declined to allow an amendment to a writ of error so as to cure a defect in the parties, inasmuch as the question made by the assignment of error had been settled by repeated decisions, and therefore was no longer open to discussion here.

May substitute one name for another.—Where the writ of error describes the plaintiff in error "W. N. Walton, adm'r of the estate of Latimer Bailey, d'cd."

Defects Amendable under the Present Statute.—Under the act of June 1, 1872, c. 255, § 3, this court has allowed a writ of error to be amended which described either party by the name of a partnership, and not by the names of the individuals composing it;³⁴ or gave the Christian name of the plaintiff below and defendant in error as Henry, when, as appeared from the record, it should have been George,³⁵ or named only one defendant in error, when there were more.³⁶

Nonjoinder of Sureties.—Where the defendant appeals from the special term of the supreme court of the District of Columbia to the general term, and gives sureties, and the general term affirms the special term and enters judgment against the defendant and his sureties, if the defendant brings a writ of error to this judgment without joining the sureties, the writ of error will be dismissed, but a motion to rescind the judgment of dismissal, and restore the cause to the docket and to amend the writ of error by inserting therein as plaintiffs in error the names of the sureties, will be granted.³⁷ But where the judgment is entered against the principal and sureties in a suit against a postmaster on his official bond, and the sureties sue out a writ of error to the judgment without joining the principal, the writ of error cannot be amended by adding the omitted parties as plaintiffs in error.³⁸

and it was manifestly intended to be sued out by and in behalf of the administrator of Latimer Bailey's estate, because the record sent up with the writ of error showed that the whole controversy was whether a certain person was legally such administrator, in place of Walton, by whom the original action had been brought. "The case is clearly one in which 'the statement of the title of the action or parties thereto in the writ is defective,' and in which 'the defect can be remedied by reference to the accompanying record,' and the amendment asked for cannot prejudice the adverse party." *Walton v. Marietta Chair Co.*, 157 U. S. 342, 347, 39 L. Ed. 725.

Where the record shows who are the members of a partnership, in the name of which an appeal has been taken, held, that the defect may, under § 1005, Rev. Stat., be cured by an amendment substituting their names. *Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 590, explaining *Freeborn v. Protector*, 11 Wall. 82, 20 L. Ed. 47, on the ground that it was decided prior to the statute.

34. Description by name of partnership.—*Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 590; *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. Ed. 1128; *Estes v. Trabue*, 128 U. S. 225, 32 L. Ed. 437; *United States v. Schoverling*, 146 U. S. 76, 36 L. Ed. 893.

"This appeal was prosecuted as against the firm, but this defect may be cured by amendment, and the motion to that effect is granted. *Estes v. Trabue*, 128 U. S. 225, 32 L. Ed. 437." *United States v. Schoverling*, 146 U. S. 76, 82, 36 L. Ed. 893.

35. Error in Christian name.—*Pacific Nat. Bank v. Mixer*, 114 U. S. 463, 29 L. Ed. 221.

Where a writ of error in describing the plaintiff in error, gives him no Christian

name beyond initial letters, the writ of error may be amended, where the affidavit filed in opposition to the motion to amend shows that he has a Christian name. The court said, "the description of him by initials is but an illustration of loose and careless practice which this court does not countenance." *Walton v. Marietta Chair Co.*, 157 U. S. 342, 39 L. Ed. 725, citing *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72.

36. Failure to name all appellees.—*Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 432.

37. Nonjoinder of sureties.—*Inland, etc., Coasting Co. v. Tolson*, 136 U. S. 572, 34 L. Ed. 539.

In *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 432, after judgment had been rendered here reversing the judgment below, which had passed in favor of the plaintiffs below, the court discovered that the writ of error was sued out and citation directed and served against only one of those plaintiffs, and that the preliminary appeal bond was made to him alone. The supersedeas bond was, however, executed to all the plaintiffs, and the subsequent proceedings generally bore a plural title. The special circumstances of the case were held to justify the amendment of the writ of error and the issue of a new citation. Distinguished in *Dolan v. Jennings*, 139 U. S. 385, 387, 388, 35 L. Ed. 217.

38. Failure to join principal to suit by surety.—*Mason v. United States*, 136 U. S. 581, 34 L. Ed. 545.

Laches.—In *Mason v. United States*, 136 U. S. 581, 34 L. Ed. 545, the application to amend being made more than two years after the entry of judgment, and the omitted parties being in no way in court, the application was denied and the writ of error dismissed. See *Estes v.*

(7) *Omission to Allege Jurisdiction*.—At first it was treated by this court as of course, that the omission to state the district in which the circuit court was held might be made good by amendment, when there was enough in the record to amend by.³⁹

d. *Amendments by Record*.—There must be enough in the record to amend by.⁴⁰ But a clerical mistake in a writ of error may be amended by the citation.⁴¹

e. *Motion for Leave*.—Leave to amend must be applied for. This court will not amend of its own motion.⁴²

A motion to remand a cause to the court below with leave to amend the writ of error will be denied, where the writ has not been properly returned.⁴³

7. DISMISSAL.—Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case; and it will then, of its own motion, dismiss the case, without awaiting the action of a party.⁴⁴

8. VARIANCE.—A variance between the writ of error and citation is ground for dismissal.⁴⁵

F. The Citation—1. DEFINITION, DISTINCTIONS AND OFFICE.—A citation is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine.⁴⁶

Distinction between Citation and Service of Process.—There is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit.⁴⁷

The office of the citation is to bring up the parties.⁴⁸

2. WHAT LAW GOVERNS.—In General.—Where an appeal is allowed in a particular case or from a particular court, but the act makes no provision concerning the citation, it will be subject to the general regulations prescribed by the Revised Statutes.⁴⁹

Trabue, 128 U. S. 225, 32 L. Ed. 437, cited in *Dolan v. Jennings*, 139 U. S. 385, 388, 35 L. Ed. 217.

39. *Omission to allege jurisdiction*.—*Mossman v. Higginson*, 4 Dall. 12, 1 L. Ed. 720; *Course v. Stead*, 4 Dall. 22, 1 L. Ed. 724.

40. *Amendments by record*.—*Mossman v. Higginson*, 4 Dall. 12, 1 L. Ed. 720; *Course v. Stead*, 4 Dall. 22, 1 L. Ed. 724.

Error to state court.—Where, upon error to the supreme court of the state of Louisiana, the writ is in the name and bears the teste of the chief justice of the supreme court of Louisiana, and is signed by the clerk and sealed by the seal of that court, since such a paper has not a single requisite of a writ of this court, it cannot be amended. If this court should permit the parties to change the seal, or the title, or to do everything else which § 1095 of the Rev. Stat. allows, there would still be no writ, for nothing has been done either in the name of the president, or under the authority of the United States. *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447.

41. *Amendment by citation*.—*McVeigh v. United States*, 8 Wall. 640, 19 L. Ed. 511.

42. *Motion for leave*.—*Sea v. Connecticut Mut. Life Ins. Co.*, 154 U. S., appx., 659, 25 L. Ed. 882.

43. *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154.

44. *Dismissal*.—*Estes v. Trabue*, 128 U. S. 225, 32 L. Ed. 437.

45. *Variance*.—Writs of error dismissed in two cases; in one of which were but three plaintiffs in error, while the citation presented four; and in the other where the names in the citation were different from those in the writ of error; bonds, moreover, in both cases reciting but one person as plaintiff in error, when there were in fact three. *Kail v. Whitmore*, 6 Wall. 451, 18 L. Ed. 862.

46. *Citation defined*.—*Cohens v. Virginia*, 6 Wheat. 264, 411, 5 L. Ed. 257.

The citation is the regular and familiar process from a court of justice, notifying and requiring the defendant to appear and make his defense, if he has any, on the return day of the writ. *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

47. *Distinction between citation and service of process*.—*Nations v. Johnson*, 21 How. 195, 16 L. Ed. 628.

48. *Office of the citation*.—*Cohens v. Virginia*, 6 Wheat. 264, 410, 5 L. Ed. 257; *Atherton v. Fowler*, 91 U. S. 143, 146, 23 L. Ed. 265; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

49. *What law governs*.—*Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

By the thirteenth equity rule it is provided that "the service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual

Appeals from District to Circuit Courts.—A party claiming a writ of error from the district to the circuit court had to comply with the regulations contained in the judiciary act as to the required notice to the adverse party.⁵⁰

Bankruptcy Proceedings.—A party claiming a writ of error or an appeal from the circuit courts to the district courts under the jurisdiction created by the bankrupt act, had to comply with the regulations contained in the judiciary act as to the required notice to the adverse party.⁵¹

Under Circuit Court of Appeals Act.—As to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the circuit court or the district court, congress made no provision in the court of appeals act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system.⁵²

3. NECESSITY FOR—*a. In General.*—Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals.⁵³ Therefore, except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered,⁵⁴ a citation returnable at the same term with the appeal or writ of error, is necessary to perfect our jurisdiction of the appeal or the writ, unless it has been in some proper form waived.^{54a} And, al-

place of abode of each defendant, with some adult person who is a member or resident in the family;" and service of citation upon parties in this way would doubtless be sufficient. But we cannot be governed in the matter or our own process by the varying laws of the states and territories upon the subject, and actual notice, or notice directed by rule or special order, must be shown before we can treat parties as properly in court. *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 129, 26 L. Ed. 371.

50. Appeals from district to circuit courts.—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

51. Appeals in bankruptcy proceedings.—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 266, 21 L. Ed. 493. See the title BANKRUPTCY.

52. Review under court of appeals act.—*Hudson v. Parker*, 156 U. S. 277, 282, 39 L. Ed. 424; *Ballew v. United States*, 160 U. S. 187, 202, 40 L. Ed. 388.

53. Necessity for citation.—*Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628.

54. See post, the next section.

54a. A citation is generally necessary.—*The San Pedro*, 2 Wheat. 132, 142, 4 L. Ed. 202; *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664; *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 111, 12 L. Ed. 363; *Castro v. United States*, 3 Wall. 46, 50, 18 L. Ed. 163; *Alviso v. United States*, 5 Wall. 824, 18 L. Ed. 492; *Hewitt v. Filbert*, 116 U. S. 142, 143, 29 L. Ed. 581; *Garrison v. Cass County*, 5 Wall. 823, 18 L. Ed. 491; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Bacon v. Hart*, 1 Black 38, 17 L. Ed. 52; *Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 635, citing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall. 541,

19 L. Ed. 99; *Babbitt v. Shields*, 101 U. S. 7, 11, 25 L. Ed. 820; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *United States v. Hodge*, 3 How. 534, 11 L. Ed. 714; *Reily v. Lamar*, 2 Cranch 344, 2 L. Ed. 300; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511; *Ex parte Crenshaw*, 15 Pet. 119, 10 L. Ed. 682; *Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137; *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94; *Baillet v. Tipping*, 2 Cranch 406, 2 L. Ed. 320; *Radford v. Folsom*, 123 U. S. 725, 31 L. Ed. 292; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 36 L. Ed. 371.

January 13, 1890, being one of the days of the next regular term of the court, an appeal was prayed to this court; the appeal was allowed January 14, 1890, conditioned on giving bond, and certain findings of the supreme court were filed that day. January 24, 1890, the required bond was approved and filed, and the record was filed here. March 14, 1890, at October term, 1889. No citation was issued and served, nor has any appearance for appellee been entered, nor is any waiver of citation shown. Held, the appeal will be dismissed. *Jacobs v. George*, 150 U. S. 415, 416, 37 L. Ed. 1127; *Cook v. Street*, 163 U. S. 682, 41 L. Ed. 317; *Henry v. Alabama*, etc., R. Co., 164 U. S. 701.

Private land claim in Florida.—By the act of May 23d, 1828 (4 Statutes at Large 284), relating to private land claims in Florida, appeals from the superior court of the territory of Florida are governed by the laws of 1789 and 1803. Therefore, where an appeal was not made in open court, and at the term at which the final decree was passed, a citation was necessary, which must be signed by a judge, and not by the clerk. The act of 1828, above mentioned, allowed appeals to be prosecuted within four

though the records of the court show an allowance of an appeal in the court when the appellees were present by their solicitors, yet if it was at a term subsequent to the rendition of the decree, a citation is nevertheless necessary to bring the appellees to this court.⁵⁵

Dismissal.—Where the record does not show that there was any citation,⁵⁶ the appeal or writ of error will be dismissed.⁵⁷

But it may be reinstated where it appears that a citation was in fact served.^{57a}

Subsequent Citation.—And, an appeal having become void for want of a citation, a subsequent citation is without avail, because there is no subsisting appeal.⁵⁸

Effect of Nonservice.—But an appeal, although allowed out of term, is not avoided by the nonservice of a citation; but this court will impose such terms upon the appellant as, under the circumstances, may be legal and proper.⁵⁹

Necessity for Citation after Amendment of Writ of Error.—Where a writ of error is amended so as to make it returnable to the proper return day, a new citation should issue to notify the defendant in error of what has been done.⁶⁰

b. *Appeals Allowed in Open Court*—(1) *In General.*—Neither the signing nor the service of the citation is jurisdictional, its only office being to give notice

months, and placed them, in other respects, upon the same footing with writs of error under the act of 1803. Writs of error and citations are returnable to the term of the appellate court next following; and unless the writ and citation are both served before the term, the case is not removed to the appellate court. Consequently where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion. *Villabolo v. United States*, 6 How. 81, 12 L. Ed. 352.

55. *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

A citation is not required when the appeal is taken and perfected in open court during the term at which the decree complained of is entered; aliter, where, at a subsequent term, the appeal is allowed, although the solicitors of the appellee be present. *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

56. **Dismissal.**—*Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 635, citing *Brockett v. Brockett*, 2 How. 228, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163.

Unless an appellee voluntarily appears, we cannot proceed against him if the record does not show affirmatively that he has been brought within our jurisdiction by proper notice. *Haskins v. St. Louis, etc., R. Co.*, 109 U. S. 106, 107, 27 L. Ed. 873.

A motion on the part of the appellant to dismiss an appeal, on the ground that no citation was issued according to law, cannot be sustained. The appellant cannot be heard to object to a want of a citation occasioned by his own negligence. *Pierce v. Cox*, 9 Wall. 786, 19 L. Ed. 786.

57. *Hogan v. Ross*, 11 How. 294, 13 L. Ed. 702.

57a. **Reinstatement at subsequent term.**—An appeal from California dismissed at the last term for apparent want of a citation, now reinstated, it appearing that a citation had in fact been signed, served and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence. *Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721, citing *The Palmyra*, 13 Wheat. 1, 10, 6 L. Ed. 531.

58. **Subsequent citation.**—*Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

59. **Effect of nonservice of citation.**—*Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, citing *Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377, and distinguishing *Villabolo v. United States*, 6 How. 81, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 112, 12 L. Ed. 363; *Washington v. Dennison*, 6 Wall. 496, 18 L. Ed. 863.

Where the records of the court show an allowance of appeal at a term subsequent to the rendition of the decree, a citation is necessary to bring the appellees to this court. But in such case this court will not dismiss the appeal absolutely, but apply the rule acted upon in *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, and "grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper." *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

60. **New citation must issue after amendment of writ.**—*National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362, citing *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33.

to the appellees.⁶¹ Hence, it is well settled that a citation is not necessary when an appeal is taken or allowed in open court at the same term in which the judgment or decree was rendered, and is afterwards duly perfected.⁶² If by accident it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of two years from the rendition of the decree or before.⁶³

The reason is that the parties are constructively in court during the term and charged with notice of all done in the case affecting their interests.⁶⁴

But although a citation is not necessary to our jurisdiction, until such a citation is issued, and the missing party brought into this court, it is not proper for this court to take any action on the case.^{64a}

Entry of Appeal on Minutes.—But a citation only becomes unnecessary when the appeal is allowed in open court during the term at which the decree is

61. Signing and service of citation not jurisdictional.—*Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Mattingly v. North-western, etc., R. Co.*, 158 U. S. 53, 39 L. Ed. 894; *Cook v. Street*, 163 U. S., 682, 41 L. Ed. 317; *Henry v. Alabama, etc., R. Co.*, 164 U. S. 701; *Evans v. Bank*, 134 U. S. 330, 33 L. Ed. 917.

If an appeal allowed in open court at the term is docketed in this court at the return term, our jurisdiction of the appeal becomes perfect, and what remains to be done to get in the parties is matter of procedure only, and not jurisdictional, so far as the bringing of the appeal is concerned. *Dodge v. Knowles*, 114 U. S. 430, 438, 29 L. Ed. 145. As was said in that case: "The judicial allowance of an appeal in open court, at the term in which the decree has been rendered, is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned, by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal, allowed in open court and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was

made after the expiration of two years from the rendition of the decree, or before. The reason of this is, that the allowance by the court in session before the end of the term at which the decree was rendered, and when both parties are either actually or constructively present, is in the nature of an adjudication of appeal which, if docketed here in time, gives this court jurisdiction of the subject matter of the appeal, with power to make all such orders, consistent with the practice of courts of equity, as may be appropriate and necessary for the furtherance of justice. In legal effect, the judicial allowance of an appeal in this way transfers the cause to this court, if the appel-

lant docketed the appeal here at the proper time. If not docketed, the appeal which has been allowed becomes inoperative for want of due prosecution. *Grigsby v. Purcell*, 99 U. S. 505, 506, 25 L. Ed. 354, and cases there cited." *Hewitt v. Filbert*, 116 U. S. 142, 144, 29 L. Ed. 581.

62. Appeals taken in open court need no citation.—*Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144; *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Cook v. Street*, 163 U. S., 682, 41 L. Ed. 317; *Henry v. Alabama, etc., R. Co.*, 164 U. S. 701; *United States v. Virgil*, 10 Wall. 423, 427, 19 L. Ed. 954; *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286, 27 L. Ed. 117; *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587; *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822; *Vilabolas v. United States*, 6 How. 81, 12 L. Ed. 352, citing *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511; *Reily v. Lamar*, 2 Cranch 344, 2 L. Ed. 300; *United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810; *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448.

If the appeal is taken in open court, during the term in which it was rendered, in the presence of the appellee, no citation is necessary. *Mussina v. Cavazos*, 3 Wall. 355, 18 L. Ed. 810; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444.

If an appeal is taken in court, at the time of rendering the decision or during the term, no citation is necessary. *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822.

63. Opportunity to give notice will be furnished.—*Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

64. Reason of rule.—*Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495.

64a. *Mendenhall v. Hall*, 134 U. S. 559, 33 L. Ed. 1012.

rendered. This implies some action of the court while in open session, and, to be regular, should be entered on the minutes.⁶⁵

The mere presence of counsel in court at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, will not dispense with the necessity for a citation.⁶⁷

District of Columbia.—The allowance of an appeal by the supreme court of the District of Columbia, while in session at special term, will not do away with the necessity of a citation, because the allowance would not have been made at the same term in which the decree was rendered.⁶⁸

Showing on the Record.—The rule of practice that a citation is not required when the appeal is taken and perfected in open court during the term at which the decree complained of is entered "only dispenses with a citation when the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered; and, to be technically sufficient, so as to render a citation unnecessary, the taking of the appeal should in some form appear on the records of the court. The theory of the rule is, that as a party to a suit is constructively present in court during the entire term at which his cause is for hearing, and as the doings of the court are matter of record at the time, he is chargeable with notice of all that is done during the term affecting his suit; because, if actually absent when an order is made, he can on his return obtain full information by an examination of the minutes."⁶⁹

(2) *Appeals Perfected after the Term.*—**In General.**—The allowance of an appeal in open court at the term in which the final decree is rendered will obviate the necessity of citation, only where the appeal is perfected during the same term. If the appeal is not perfected during the term, a citation is necessary.⁷⁰ In other words, where the appeal is allowed at the term of the decree

65. Necessity for entry appeal.—*Vansant v. Gaslight Co.*, 99 U. S. 213, 25 L. Ed. 265.

Unless allowed in open court during the term at which the decree was rendered, an appeal will be dismissed, if no citation has been issued and the appellee does not appeal. "Here, although an appeal bond was approved by the chief justice of the court and filed with the clerk during the term, it does not appear to have been done while the court was actually in session. So far as the record shows, it was the act of the chief justice alone out of court. The entry on the order book is simply a direction to the clerk, by the solicitor of the appellant, to enter an appeal. It in no way indicates any action whatever either in or by the court." *Vansant v. Gaslight Co.*, 99 U. S. 213, 25 L. Ed. 265.

67. Mere presence of counsel not sufficient.—*Castro v. United States*, 3 Wall. 46, 50, 18 L. Ed. 163.

The mere presence of the district attorney of the United States in court, at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, will not dispense with citation. *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

68. Appeals from District of Columbia.—*Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132, citing *Yeaton v. Lenox*, 7

Pet. 220, 8 L. Ed. 664; *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

69. Record must show taking of the appeal.—*Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 662, 25 L. Ed. 587.

An appeal otherwise regular would not probably be dismissed absolutely for want of a citation, if it appeared by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done. *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 662, 25 L. Ed. 587.

70. Appeals perfected after the term require a citation.—*Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641; *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Radford v. Folsom*, 123 U. S. 725, 31 L. Ed. 292; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Omaha First Nat. Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881; *Henry v. Alabama, etc., R. Co.*, 164 U. S. 701.

Where an appeal is allowed in open court, during the term at which the decree appealed from is rendered, and that appeal is perfected by the filing in due time of a bond duly approved, and the transcript of the record is duly lodged in this court at the same ensuing term, in such manner as to give this court jurisdiction of the case, no citation is necessary, unless the bond is accepted after the

or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed.⁷¹

Where Security Not Furnished during Term.—Although an appeal is allowed in open court at the same term at which the decree appealed from is entered, yet if it does not appear that the appeal bond was accepted in open court, or at or during the term at which the appeal was allowed; a citation is necessary.⁷² Although, if the case is docketed here in time, it will not be dismissed at the return term until an opportunity has been afforded the appellant to give the requisite notice. The appeal taken in open court, if docketed here in time, gives this court jurisdiction of the subject matter and invests it with power to make all orders, consistent with proper practice which are needed in furtherance of justice.⁷³

term at which the appeal is allowed. *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

If the appeal is allowed in open court and entered in the minutes, no further service is required. But even such a mode of taking an appeal (called in the civil and canon laws an appeal, *apud acta*) will not avail, unless the appeal is duly prosecuted. *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 261, 32 L. Ed. 448.

71. *Jacobs v. George*, 150 U. S. 415, 416, 37 L. Ed. 1127.

72. **Citation necessary where appeal bond is not furnished during term.**—*Sage v. Railroad Co.*, 96 U. S. 712, 715, 24 L. Ed. 641; *Hewitt v. Filbert*, 116 U. S. 142, 144, 29 L. Ed. 581; *Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495; *Richardson v. Green*, 130 U. S. 104, 114, 32 L. Ed. 872; *Omaha First Nat. Bank v. Omaha*, 96 U. S. 737, 738, 24 L. Ed. 881; *Haskins v. St. Louis, etc.*, R. Co., 109 U. S. 106, 107, 27 L. Ed. 873; *Goodwin v. Fox*, 120 U. S. 775, 30 L. Ed. 815.

Although the appeal is allowed by an order of court, made in open court, at the same term at which the decree appealed from is entered, yet if the bond given to perfect the appeal is approved by the district judge out of court, although filed in the court on that day, a citation to the appellees is necessary. *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

"The judiciary act of 1789 (1 Stat. 84, § 22) made provision for a review by this court of judgments and decrees in civil actions and suits in equity in the circuit courts upon writs of error accompanied by a citation to the adverse party, 'signed by a judge of such circuit court or justice of the supreme court.' By the same section it was further provided, that 'every justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.'

The citation was essential to the validity of the writ, and without it the writ would be quashed. *Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137. The writ brought up the record, and the citation the parties. *Cohens v. Virginia*, 6 Wheat. 264, 410, 5 L. Ed. 257; *Atherton v. Fowler*, 91 U. S. 143, 146, 23 L. Ed. 265. As the security was to be given when the citation was signed, there could be no valid writ without the security." *Kitchen v. Randolph*, 93 U. S. 86, 87, 23 L. Ed. 810.

73. **Opportunity will be afforded appellant to give notice.**—*Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495.

And in *Chicago, etc.*, R. Co. v. *Blair*, 100 U. S. 661, 662, 25 L. Ed. 587, it was said: "Still, an appeal, otherwise regular, would not probably be dismissed absolutely for want of a citation, if it appeared, by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done." *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144.

Security is only for the due prosecution of the appeal. The citation, if security is taken out of court, or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144.

In *Dodge v. Knowles*, 114 U. S. 430, 436, 29 L. Ed. 144, it is said: "The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court, or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to

c. *In Admiralty and Prize Causes*.—In the removal of causes of admiralty and maritime jurisdiction, under the restrictions contained in the 22d and 23d sections of the judiciary act, a citation to the adverse party is necessary, except where the appeal is prayed at the same term when the decree or sentence is pronounced; in such case the citation is not necessary.⁷⁴

In prize cases, wherever it appears that notice of appeal or of intention to appeal to this court was filed with the clerk of the district court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it.⁷⁶

d. *Legal Equivalents of Citation*.—In General.—A citation, as has often been declared, is intended only for the purpose of notice; is not jurisdictional, and may be substituted by proof of other equivalent notice.⁷⁷ Thus no citation is necessary in a case where in point of fact, by agreement of parties, actual and full knowledge by the party appellee of the other side's intention to appeal appears on the record.⁷⁸ So also, an indorsement by the counsel for the appellees of his approval of the appeal bond is the equivalent of notice, and there is no necessity for a citation in form.⁷⁹ Likewise an order served on the appellee to appear and argue the cause, if he sees fit, is of itself the legal equivalent of a citation for all the purposes of an appeal.⁸⁰

dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished; and this, whether the motion was made after the expiration of two years from the rendition of the decree or before." Approved in *Richardson v. Green*, 130 U. S. 104, 114, 32 L. Ed. 872.

74. In admiralty and prize causes.—The *San Pedro*, 2 Wheat. 132, 4 L. Ed. 202, citing *Reily v. Lamar*, 2 Cranch 344, 2 L. Ed. 300.

Manner of giving the notice.—Every person may make himself a party, and appeal from the sentence of courts of admiralty; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. *The Mary*, 9 Cranch 126, 144, 3 L. Ed. 678.

76. Rule in prize causes.—The *Neustra Senora De Regla*, 17 Wall. 29, 21 L. Ed. 596.

77. Legal equivalents of citation sufficient.—*Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *Griesby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145; *Hewitt v. Filbert*, 116 U.

S. 142, 29 L. Ed. 581; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 36 L. Ed. 371; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Garrison v. Cass County*, 5 Wall. 823, 18 L. Ed. 491; *Henry v. Alabama, etc., R. Co.*, 164 U. S. 701.

78. Agreement of parties may supply it.—*United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677.

79. Indorsements by appellees counsel.—The entries on the stipulation of the parties of various orders extending the time for filing the appeal bond and certificate of evidence because the record in its then condition is complete and not ready for filing in this court, are equivalent to an order at the date of each respectively, renewing the allowance of the appeal in open court in the presence of both parties and give the original allowance of the appeal effect as of the new date. "Had the appeal bond been taken and approved by the court at the same term, no citation would have been necessary, because the allowance of the appeal was, under the operation of the stipulation, the same in its effect for the purpose of a citation as the allowance of an appeal in open court during the term at which the decree was rendered. But as the bond was not filed until after the term, a citation or something equivalent was necessary, as matter of procedure, to give the appellees notice that the appeal which had been allowed in term time had not been abandoned by the failure to furnish the security before the adjournment. *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145; *Hewitt v. Filbert*, 116 U. S. 142, 143, 29 L. Ed. 581; *Goodwin v. Fox*, 120 U. S. 775, 777, 30 L. Ed. 815.

80. Order on appellee to appear and argue cause.—*Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145.

Under the Act to Settle Private Land Claims in California.—By the act of congress which provides for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of the case decided by them to the district court of the United States for California by way of appeal, it is held that the filing of the transcript with the clerk of the district court amounts to a notice to the opposite party.⁸¹

But notice of a writ of error, given in open court at the same term the judgment is rendered, is not the equivalent of the citation required by § 999 of the Revised Statutes. In this respect writs of error differ from appeals taken in open court.⁸²

e. Effect of Want of Notice on Judgment or Decree.—Where the citation required by congress has not been served on the appellee, and he has no notice of the appeal, a decree rendered in the case is null and void.⁸³

f. Dismissal.—In the absence of any citation, with the exception already stated, the appeal or writ of error will be dismissed on motion.⁸⁴

Time of Making Motion.—But a motion to dismiss for want of a citation must be made at the first term at which the party appears, and is too late if made at a subsequent term.⁸⁵

Parties to Motion.—And the motion will be denied if made by the appellant.^{85a}

Notice of Motion.—Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance as we shall see is a waiver of the want of notice.⁸⁶

4. FORM AND REQUISITES—*a. In General.*—The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted. No special form is prescribed. The purpose is notice, so that the appellee may appear and be heard.⁸⁷

b. Date.—A mistake in the date of the citation is not important, when it is clear that such a mistake is a clerical one merely, and when, from the judgment described and the number given to it, the party cannot be misled.⁸⁸

81. Under act to settle private land claims in California.—United States v. Ritchie, 17 How. 525, 15 L. Ed. 236.

82. Notice of writ of error not an equivalent.—United States v. Phillips, 121 U. S. 254, 30 L. Ed. 914.

83. Effect of want of notice on judgment or decree.—Ex parte Crenshaw, 15 Pet. 119, 10 L. Ed. 682.

An appeal was prosecuted by the complainants in the circuit court of Alabama, to the supreme court, and the citation required by the act of congress had not been served on the appellee, and he had no notice of the appeal; in printing the copy of the record of the circuit court, the return of the marshal of the district, stating that the citation to the appellee had not been served, was accidentally omitted. The court, on motion by the counsel for the appellee, declared the decree in the case, made at January term 1840, null and void; revoked the mandate issued by the circuit court of Alabama, and dismissed the appeal. Ex parte Crenshaw, 15 Pet. 119, 10 L. Ed. 682.

84. Dismissal for want of citation.—Monger v. Shirley, 131 U. S. appx. cx, 20 L. Ed. 635; Brockett v. Brockett, 2

How. 238, 11 L. Ed. 251; Palmer v. Donner, 7 Wall. 541, 19 L. Ed. 99; Castro v. United States, 3 Wall. 46, 49, 18 L. Ed. 163; Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

Where the citation required by the act of congress has not been served on the appellee, and he has had no notice of the appeal, the appeal must be dismissed. Ex parte Crenshaw, 15 Pet. 119, 10 L. Ed. 682.

Where no citation had been issued or served upon the defendant in error, the cause must be dismissed on motion. Hogan v. Ross, 9 How. 602, 13 L. Ed. 276.

85. Time of making motion.—Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90; Carroll v. Dorsey, 20 How. 204, 15 L. Ed. 803.

85a. Motion by appellant.—Pierce v. Cox, 9 Wall. 786, 19 L. Ed. 786.

86. Notice of motion.—Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90, citing McDonough v. Millaudon, 3 How. 693, 707, 11 L. Ed. 787.

87. Form and requisites in general.—Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144, 145.

88. Date of citation not important.—Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377.

c. Statement of Names of Parties.—But the names of the parties must be correctly stated in the citation.⁸⁹

d. Signing of Citation.—**In General.**—To get an appeal after the term at which the decree is rendered a party must apply to the proper justice or judge to sign a citation. If he signs it, he furnishes the appellant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that, to give this court jurisdiction both of the subject matter of the appeal and of the parties, is to serve his citation and to docket the case here in time.⁹⁰

Compliance with Statute.—The provisions as to the signature of the citation must be strictly followed. The defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law.⁹¹

By Judge.—All that need be done to get an appeal is for the appellant to cite his adversary in the proper way to appear before this court, and for him to docket the case here at the proper time. Such a citation as is required may be signed by a judge of the circuit court from which the appeal is taken or by a justice of this court.⁹²

Signing in Vacation.—In ordinary cases, the signing of a citation by the proper justice or judge in vacation is sufficient.⁹³

The district judge is a judge of the circuit court of the United States, and as such has authority to sign the citation, even if the decree appealed from was rendered by the circuit judge.⁹⁴

Under Circuit Court of Appeals Act.—The rules of this court provide

89. Statement of names of parties.—Writs of error dismissed in two cases; in one of which were but three plaintiffs in error, while the citation presented four; and in the other where the names in the citation were different from those in the writ of error; bonds, moreover, in both cases reciting but one person as plaintiff in error, when there were in fact three. *Kail v. Whitmore*, 6 Wall. 451, 18 L. Ed. 862.

Effect of acceptance.—An error in a citation, calling Mary Rice the wife of Charles Bowers, whereas she was the wife of Charles Rice, is not fatal in a case coming from Louisiana. The practice there is for the husband to assent when the wife brings a suit, so that his name is merely a matter of form. The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension. *Peale v. Phipps*, 8 How. 256, 12 L. Ed. 1070.

90. Signing of citation.—*Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495.

91. Strict compliance with statute required.—*Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *United States v. Hodge*, 3 How. 534, 11 L. Ed. 714.

92. Citation must be signed by judge of lower or appellate court.—Rev. Stat., § 999; *Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495; *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352, 356; *United States v. Hodge*, 3 How. 534, 11 L. Ed. 714; *Aldrich v. Aetna Ins. Co.*, 8 Wall. 491, 19 L. Ed. 473; *Day v. Hayward*, 20 How. 208, 210, 15 L. Ed.

851; *Mussina v. Cavazos*, 20 How. 280, 15 L. Ed. 878, 879.

In the case of *Insurance Co. v. Mordecai*, 21 How. 195, 202, 16 L. Ed. 94, Chief Justice Taney, declared that the act of congress required the citation "to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court;" but the later cases indicate a more liberal construction of the statute, which provides, in terms (Rev. Stat., § 999), that the "citation shall be signed by a judge of such circuit court, or a justice of the supreme court;" and, while it is required by the next section that every judge or justice signing a citation on any writ of error shall take good and sufficient security for the prosecution of the writ or appeal, it does not follow, in our opinion that when, in a given instance, a bond has been approved by one of the judges of the circuit court, another judge of that court, who might have granted the appeal and approved the bond, may not sign the citation. His signing thereof without requiring security is equivalent to an express approval by him of the bond already approved by the other judge.

93. Citation may be signed in vacation.—*Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495, distinguishing *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

94. Signing by district judge.—*Huntington v. Tardley*, 176 U. S. 668, 41 L. Ed. 630, citing *Rodd v. Heartt*, 17 Wall. 354, 21 L. Ed. 627.

that upon an appeal or writ of error from the circuit court or a district court direct to this court under the circuit court appeals act, the citation may be signed by any circuit judge within his circuit, or by any district judge within his district, or by any justice of this court,⁹⁵ and the justice of this court signing the citation need not necessarily be the one assigned to the circuit in which the court is held.⁹⁶ Upon an appeal to this court from the supreme court of the District of Columbia, any justice of that court may sign the citation.⁹⁷ Where the allowance of the appeal is made by the court, it is quite regular for the chief justice to sign the citation.¹

As appeals from territorial courts are to be taken in the same manner and under the same regulations as from the circuit courts (Rev. Stat., § 703), it follows that citations on such appeals may be signed by a judge or justice of the territorial court or by a justice of this court.²

Signing by Clerk.—Where an appeal is entered in the clerk's office and not taken in open court, if the citation be signed by the clerk, and not by a judge of the circuit court, or a justice of the supreme court, the case will, on motion, be dismissed, because the defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law.³ But where an appeal is

95. Signing of citation under court of appeals act.—Rule 36, 139 U. S., appx., 706; *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424.

Where a writ of error is allowed from an existing circuit court direct to the supreme court of the United States under the circuit court of appeals act of March 3, 1891, the citation can, under § 999 be signed by a justice of this court, as an authority for the issuing of a writ under § 1004. *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

Convictions of infamous crimes.—By the act of 1891, upon a writ of error from this court to the circuit court in the case of a conviction of a crime infamous but not capital, the citation may be signed by a justice of this court under § 999 of the Revised Statutes. *Hudson v. Parker*, 156 U. S. 277, 283, 39 L. Ed. 424, citing *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

96. Any justice of supreme court may sign citation.—Under § 11 of the circuit court of appeals act which provides that "all provisions of law, now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error," any justice of this court, not necessarily the justice assigned to the circuit in which the court is held, may sign the citation. *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424; *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

97. Appeals from supreme court of District of Columbia.—Sections 999, 1012 and 705 of the Revised Statutes, taken together, provide in effect that, when there is an appeal from the supreme court of the District of Columbia to this court,

the citation may be signed by any justice of that court. Such an appeal is to be taken under the same regulations as appeals from the circuit court. Section 705. On appeals from the circuit court a judge of that court may sign the citation. Section 999. Clearly, therefore, when the appeal is from the supreme court of the district, a justice of that court may do the same thing. *Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132.

1. *Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132.

2. Appeals from territorial courts.—*Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495.

The act of 1838, providing that writs of error, and appeals from the final decision of the supreme court of the territory shall be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gives to a judge of the territorial court the power to sign the citation. *Sheppard v. Wilson*, 5 How. 210, 12 L. Ed. 120.

3. Signature by clerk insufficient.—*United States v. Hodge*, 3 How. 534, 11 L. Ed. 714; *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 356; *Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132; *Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495; *Day v. Hayward*, 20 How. 210, 15 L. Ed. 851. See post, "Waiver," IX, F, 8.

In the case of *McDonough v. Millaudon*, 3 How. 693, 707, 11 L. Ed. 787, a motion was made to dismiss the cause on the ground that the clerk of the supreme court of Louisiana issued the writ of error, and signed the citation; and the court said: "This case has been here for two terms; a writ of certiorari has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now

taken in open court, since no citation is necessary it might be signed by the clerk.⁴

Error to State Court.—Revised Statutes, § 999, provides that when a writ of error "is issued by the supreme court to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice."⁵ This provision was contained in the twenty-fifth section of the judiciary act of September 24, 1789, ch. 20, 1 Stat. 73, 86, and § 7 of the act of February 5, 1867, ch. 29, 14 Stat. 387.⁶

A district judge has no authority to sign the citation.⁷

Signing by Associate Judge.—If the state court is composed of a chief judge and several associate judges, the citation cannot be signed by an associate judge, who does not purport to act as chief judge, or chief judge pro tem of the court although there is an affidavit on the record stating that the chief judge is absent and will be for some time.⁸

Presumptions on Appeal.—Where the constitution of a state provides that when the chief justice is absent, the judge having the next shortest term shall preside in his stead, and it appears from the record that the chief justice was absent at the time the writ was allowed, and it is stated by counsel that the judge allowing it had the next shortest term to serve, it will be presumed by this court that the judge signing the citation was the presiding judge of the court in the absence of the chief justice.⁹

Mandamus.—The act of signing the citation being a ministerial and not a judicial act, it may be compelled by mandamus.¹⁰

5 **ISSUANCE**—a. *Whence Issued.*—In a proper case this court may issue a citation, where none was issued at the term at which the appeal was allowed.¹¹

moves to dismiss for the first time, and we think he comes too late." Cited in *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 90.

4. *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 356, citing *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664.

5. **Provisions of the statute.**—*Miller v. Texas*, 153 U. S. 535, 536, 38 L. Ed. 812, reaffirmed in *Weltmer v. Bishop*, 191 U. S. 560, 561, 48 L. Ed. 302.

6. *Havnor v. New York*, 170 U. S. 408, 42 L. Ed. 1087.

7. **Signing by district judge.**—*Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99.

8. **Authority of associate judge to sign.**—*Havnor v. New York*, 170 U. S. 408, 42 L. Ed. 1087, distinguishing *Butler v. Gage*, 138 U. S. 52, 34 L. Ed. 869.

9. **Presumption as to regularity of signing.**—*Butler v. Gage*, 138 U. S. 52, 34 L. Ed. 869, distinguished in *Havnor v. New York*, 170 U. S. 408, 42 L. Ed. 1087.

10. **Mandamus to compel signing of citation.**—On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial. *New York Life, etc., Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

11. **Power of supreme court to issue a citation.**—*Richardson v. Green*, 130 U. S. 104, 115, 32 L. Ed. 871.

In *Mendenhall v. Hall*, 134 U. S. 559,

33 L. Ed. 1012, the suit was brought by *Mendenhall* against *Clark N. Hall* and *Charles F. Hall*. *Charles F. Hall* demurred and filed a special plea to the bill. *Clark N. Hall* also demurred. The demurrer and plea of *Charles F. Hall* were both sustained, and by a decree entered May 13, 1885, the bill was dismissed as to him. The demurrer of *Clark N. Hall* was overruled, and he answered, and the cause went to decree against him April 14, 1886. An appeal was taken to this court by the plaintiff, who executed an appeal bond which ran "to the defendants." *Charles F. Hall* was not served with notice of the appeal, and when the case was reached on our docket and that fact appeared, a citation was directed to be served upon him, or, if he was dead, upon his representative. The citation was executed upon his widow, who was also administratrix of his estate. On the argument here, it was suggested that no appeal had been taken as to *Charles F. Hall*, and that this court was without jurisdiction over the case as to him, but we held that the appeal brought before us not only the final decree of 1886, but also that of 1885, sustaining the demurrer and plea of *Charles F. Hall* and dismissing the suit as to him, and that it was not necessary to take an appeal from the latter order until after the whole case was determined in the court below.

But it was held in another case that the supreme court could not issue a new citation in place of a defective one, because the citation must be made by the court issuing the writ of error.¹²

b. *To Whom Addressed*.—Citations should be addressed to the actual parties to the suit at the time the appeal is allowed and prosecuted.¹³ Where the citation issued is issued to a person who is not a party; the writ of error will be dismissed on motion.¹⁴ But leave will be given to counsel to move for its reinstatement during the present term.¹⁵

Addressing the citation to the husband of a party is not fatal, where the use of the husband's name is formal merely, and the misnomer alleged could not have misled the defendants in error.¹⁶

Addressing Citation to a Partnership.—Where there is an irregularity in addressing the citation to the firm in which the appellees are partners, when it should have been addressed to the appellees individually, this mistake if objected to may be cured by a new direction in proper form.¹⁷

c. *By Whom Issued*.—The act of congress requires the citation to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court.¹⁸

6. **SERVICE**—a. *Necessity*.—A service of the citation is necessary to bring the parties before the court where the appeal is taken out of term. The court cannot proceed to hear and determine the cause until the parties are here, either constructively by service, or in fact by their appearance.¹⁹ A citation not served is as no citation.²⁰

Effect of Nonservice.—But an appeal, although allowed out of term, is not avoided by the nonservice of a citation; but this court will impose such terms upon the appellant as, under the circumstances, may be legal and proper.²¹

b. *Constructive Service*.—**In General**.—No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where personal service was impossible in the

12. *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154.

13. **To whom addressed**.—*Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260.

It is not a fatal error when the citation was issued at the instance of E. Peale as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi. The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension. *Peale v. Phipps*, 8 How. 256, 12 L. Ed. 1070.

14. **Dismissal where citation improperly addressed**.—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879; *The Protector*, 11 Wall. 82, 86, 20 L. Ed. 47; *Simpson v. Greeley*, 20 Wall. 152, 158, 22 L. Ed. 338; *Smyth v. Strader*, 12 How. 327, 13 L. Ed. 1008.

15. **Reinstatement**.—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879.

16. **Addressing citation to husband**.—*Peale v. Phipps*, 8 How. 256, 12 L. Ed. 1070.

17. **Addressing citation to a partnership**.—*Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 590; *Estes v. Trabue*, 128 U. S. 225, 32 L. Ed. 437.

18. **By whom issued**.—*Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

19. **Necessity for service of citation**.—*Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33.

20. *Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137; *Bacon v. Hart*, 1 Black 38, 17 L. Ed. 52.

An appeal was prosecuted by the complainants in the circuit court of Alabama to the supreme court, and the citation required by the act of congress had not been served on the appellee, and he had no notice of the appeal. In printing the copy of the record of the circuit court, the return of the marshal of the district, stating that the citation to the appellee had not been served, was accidentally omitted. The court, on motion by the counsel for the appellee, declared the decree in the case made at January term, 1840, null and void; revoked the mandate issued to the circuit court of Alabama, and dismissed the appeal. *Ex parte Crenshaw*, 15 Pet. 119, 10 L. Ed. 682.

21. **Nonservice does not avoid citation**.—*Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, citing *Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377, distinguishing *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 112, 12 L. Ed. 363; *Washington v. Dennison*, 6 Wall. 495, 496, 18 L. Ed. 863; *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587; *Richards v. Mackall*, 113 U. S. 539, 542, 28 L. Ed. 1132, 1133.

appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. Constructive notice, says Mr. Justice Baldwin, in *Hollingsworth v. Barbour*, 4 Pet. 466, 475, 7 L. Ed. 922, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication, and providing that the publication, when made, shall authorize the courts to decree.²²

Service by publication, according to the law of the jurisdiction and the practice of the court, is free from objection, and is sufficient to support the judgment of the appellate court.²³

In construing the statutes which allow service by order of publication, it has been held, that the writ of error or appeal is rather a continuation of the original litigation than the commencement of a new action.²⁴

c. Time of Service—(1) *In General*.—The statute provides that "the adverse party shall have at least thirty days' notice."²⁵ And § 999 of the Revised Statutes is but the re-enactment of a similar provision in § 22 of the judiciary act of 1789.²⁶

Effect on Right to a Hearing.—But the meaning of § 999 of the Revised Statutes, which provides that the adverse party shall have at least 30 days' notice of a writ of error by citation, is not that the citation shall be served 30 days before the return day, but that the defendant in error shall have at least 30 days' notice before he can be compelled to go to a hearing.²⁷

22. Constructive service.—*Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628.

23. Service by publication.—*Nations v. Johnson*, 24 How. 195, 206, 16 L. Ed. 628, 631, citing *Mandeville v. Riggs*, 2 Pet. 482, 489, 7 L. Ed. 493; *Hunt v. Wickliffe*, 2 Pet. 201, 214, 7 L. Ed. 462.

Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628, 631.

Where personal service has been made upon the defendants by due process of law in the court of original jurisdiction, if parties duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, he cannot voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. "To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully pre-

vailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court." *Nations v. Johnson*, 24 How. 195, 204, 16 L. Ed. 628.

The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident and has no attorney of record within the state, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628.

24. Construction of statute.—*Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628, citing *Cohens v. Virginia*, 6 Pet. 264, 410, 5 L. Ed. 257; *Clark v. Mathewson*, 12 Pet. 164, 170, 9 L. Ed. 1041.

25. Thirty days' notice required.—Rev. Stat., § 999; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 128, 36 L. Ed. 371.

26. National Bank v. Bank of Commerce, 99 U. S. 608, 25 L. Ed. 362.

27. No hearing compelled until notice given.—*National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362, citing *Yeaton v. Lenox*, 7 Pet. 220, 5 L. Ed. 664.

Effect on right to a hearing.—Where the 30 days' notice is not given the adverse party as is prescribed by the 22nd section of the judiciary act, providing for the re-examination of cases on writ of error, as a matter of discretion, this court will not compel the hearing of the cause at the first term, unless such notice has been given. *Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500, approving

Dismissal.—But the failure to serve the citation in time will not work a dismissal of the appeal.²⁹ Thus, it is not sufficient cause for dismissing a writ of error that the citation was served and made returnable less than thirty days after the writ was granted.³⁰

(2) *Before Return Day.*—Where a citation is necessary it should be issued and served within the return day for the appeal, and certainly must be issued and served before the expiration of the period within which an appeal can be issued.³¹ But a citation served on the first of December, before the return of the writ, is

Welsh v. Mandeville, 5 Cranch 321, 3 L. Ed. 113.

By a rule entered as early as the February term, 1803, it was provided that if the writ of error issued within 30 days before the meeting of the court, the defendant in error was at liberty to enter his appearance and proceed to trial, or otherwise the case was continued. The reason for the adoption of this rule was that when the citation was not served 30 days before the term, the defendant in error would not be required to go to a hearing without his consent. *National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362, citing *Welsh v. Mandeville*, 5 Cranch 321, 3 L. Ed. 113; *Lloyd v. Alexander*, 1 Cranch 365, 2 L. Ed. 137.

The 22d section of the judiciary act, taken in connection with the act of 1803, provides for the re-examination of cases on writ of error, the adverse party having at least thirty days' notice. This provision does not necessarily require that the thirty days' notice shall be given prior to the first day of the term; but in the case of *Welsh v. Mandeville*, 5 Cranch 321, 3 L. Ed. 113, the court held as a matter of discretion, that they would not compel the hearing of the cause at the first term unless such notice had been given, and this decision was made the rule of the court. This decision was made in accordance with a rule of the court adopted February term, 1803, 1 Wheat. xvi, Rule XVI, that where the writ of error issued within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance and proceed to trial; otherwise, the cause must be continued. *Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500.

29. No dismissal for failure to serve in time.—*Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132, citing *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33.

30. *Segrist v. Crabtree*, 127 U. S. 775, 32 L. Ed. 323.

31. Must be issued and served before return day.—*Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641; *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Radford v. Folsom*, 123 U. S. 725, 31 L. Ed. 292; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 36 L. Ed. 371.

A citation must be served before the return day by serving it on the party, or

his attorney, or counsel. *Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863.

The defendant must be cited to appear on the same day that the writ is returnable. And the common-law process of a writ of error made returnable on one day, and a summons to the defendant to appear at another, would be without precedent, and would be as objectionable as the entire absence of a citation. *Insurance Co. v. Mordecai*, 21 How. 195, 201, 16 L. Ed. 94.

A citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative. *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917; *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127.

Where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered. *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664; *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352.

Illustrative cases.—Where it is assigned as reason for dismissing the writ, that the writ of error, the bond, the citation, and the copy of the writ of error for the defendants, were not seasonably certified or filed, but it appears from the record, that the judgment of the supreme court of the state to which the writ of error was issued, was rendered on the 31st of October, 1871, and on the 10th of November, 1871, the writ of error was issued returnable on the first Monday in December, and was served by filing in the clerk's office; that the writ is dated on the 16th of October, 1871, which date, however, was obviously a mistake as this was before the judgment was affirmed, that the case was removed by service on the 10th of November; that the citation was served on the 3rd of February, 1872, it was held that the motion to dismiss must be denied, because this was sufficient to advise the opposite party that the cause had been removed to this court, and was served and returned within the term. *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

served in time.³² At any rate, unless the citation is issued and served before the end of the return term, this court loses jurisdiction.³⁴

Limitations of General Rule.—But the failure to serve the citation in time will not work a dismissal of the appeal.³⁵ Where the citation is actually issued but not served before the first day of the term to which it is returnable, leave may be granted to make service during that term.³⁶ Much liberality is exercised in permitting service to be made during the return term, or a new citation to be issued, where the circumstances invoke the discretion of the court.³⁷

Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before.³⁹

32. *Waters v. Barrill*, 131 U. S., appx. lxxxiv, 18 L. Ed. 878, citing *Villabolos v. United States*, 6 How. 81, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

Likewise a motion to dismiss a case for want of jurisdiction, on the ground that the citation was not served in time, will be denied, where it appears that it was served on the 1st of December, before the return of the writ. *Waters v. Barrill*, 131 U. S., appx. lxxxiv, 18 L. Ed. 878, citing *Villabolos v. United States*, 6 How. 81, 89, 12 L. Ed. 352.

Under act for adjustment of land claims—Time of service of citation.—The opinion of the court in the case of *Villabolos v. The United States* (ante, p. 81) again asserted, viz, that the appellant must prosecute his appeal to the next succeeding term of this court, and whenever the appeal is taken by entering it in the clerk's office, the adverse party must be cited to appear at that time. Therefore, where an appeal was filed in the clerk's office in November, 1846, and there was no citation to the adverse party to appear on the 7th of December, 1846 (the commencement of the succeeding term of this court), the case was not removed upon that appeal. *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

34. **Must be served before end of return term.**—*Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *Villabolos v. United States*, 6 How. 81, 12 L. Ed. 352; *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587.

The omission to serve the citation before the return day of the writ is fatal. *Villabolos v. United States*, 6 How. 81, 89, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 112, 12 L. Ed. 363; *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94; *Washington v. Dennison*, 6 Wall. 495, 496, 18 L. Ed. 863.

35. **Failure to serve in time no ground for a dismissal.**—*Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *Segrist v. Crabtree*, 127 U. S. 775, 32 L. Ed. 323.

36. *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, overruling *Bacon v. Hart*, 1

Black 38, 17 L. Ed. 52.

37. *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 129, 36 L. Ed. 371.

Where the record shows that an appeal was allowed, and supersedeas bond approved, and the citation signed, the fact that the record omits to show that a proper service of the citation was ever in fact made, does not avoid the appeal. The court said: "None of the cases made it necessary to decide that a citation actually issued upon the allowance of an appeal must be served before the first day of the term, in order to preserve our jurisdiction." *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, citing *Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377, distinguishing *Villabolos v. United States*, 6 How. 81, 90, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 112, 12 L. Ed. 363; *Washington v. Dennison*, 6 Wall. 495, 496, 18 L. Ed. 863.

In *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33, it was held that, if a citation was actually issued but not served, before the first day of the term to which it was returnable, leave might be granted to make the service during that term. In this way the language of the court in *Villabolos v. United States*, and *United States v. Curry*, which seemed to require service as well as issue of the citation before the return day of the appeal or writ of error was to some extent qualified, but the authority of those cases as to the necessity of an actual issue of the citation and service before the end of the return term was in no way impaired. On the contrary, it was fully recognized.

So in *Chicago, etc., R. Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587, where an appeal was allowed in open court at a term subsequent to that in which the decree appealed from was rendered, but when the solicitors of the appellee were present and had actual notice of what was done, leave was granted to issue a citation and have it served during the return term of the appeal.

39. **Where appeal is allowed at subsequent term.**—*Jacobs v. George*, 150 U. S. 415, 417, 37 L. Ed. 1127.

d. *Manner and Place of Service.*—**Manner of Service.**—The service of the citation or the acknowledgment or waiver thereof must be personal on or by the party or his attorney.⁴¹

Place of Service.—An alleged irregularity in the service of the citation on the defendant in error in another state by the marshal of that district in such latter state, can only be taken advantage of by a motion to dismiss, made promptly on an appearance limited to that special purpose, and is cured by a general appearance. If the motion to dismiss is postponed until the hearing on the merits, although it is submitted to the court at that term, it comes too late.⁴²

e. *Upon Whom Served.*—**In General.**—A citation must be served on the party or his attorney or counsel. It is error to issue and serve the citation on persons, not parties to the record.⁴³

Service on Appellee's Attorney.—Service of the citation on the appellee's attorney is sufficient.⁴⁴

No attorney or solicitor can withdraw his name after he has once entered it upon the record, without the leave of the court; and while his name continues there the opposite party has a right to treat him as the authorized attorney or solicitor and the service of notice upon him is valid.⁴⁵

But where the attorney of record is dead, it will not do to serve it on his executrix or other personal representative.⁴⁶ Nor can the service be legally made on another member of the bar who had been a partner of the deceased counsel,⁴⁷ and this for the reason that the courts cannot notice law partnerships

41. **Service must be personal.**—Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371.

Service by mail not sufficient.—Where the only proof of the service of the citation is an affidavit that notice of citation was given to defendants' attorneys "by depositing in the post-office at San Francisco, Cal., a copy of said citation, postage paid, addressed to said attorneys at their respective places, to wit: (Here follow names of the attorneys as residing at Santa Rosa), all of the county of Sonoma, on the 29th day of September, A. D. 1888; that on the day of said service there was a regular communication by mail between San Francisco and Santa Rosa," such service is clearly insufficient, because none of the cases give color to the view that the service or acknowledgment or waiver can be other than personal on or by the party or his attorney. Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371.

42. **Place of service.**—Renaud v. Abbott, 116 U. S. 277, 29 L. Ed. 629.

43. **Upon whom served.**—Washington v. Dennison, 6 Wall. 495, 18 L. Ed. 863; McClane v. Boon, 6 Wall. 244, 18 L. Ed. 835; Davenport v. Fletcher, 16 How. 142, 20 L. Ed. 260.

44. **Service on appellee's attorney.**—Scruggs v. Memphis, etc., R. Co., 131 U. S., appx., 204, 26 L. Ed. 741, citing United States v. Curry, 6 How. 106, 111, 12 L. Ed. 363; Bacon v. Hart, 1 Black 38, 39, 17 L. Ed. 52; Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

A service of the citation on the attorney or counsel of the defendant in error is sufficient. Bacon v. Hart, 1 Black 38, 17 L. Ed. 52.

45. **Attorney cannot withdraw his name.**—United States v. Curry, 6 How. 106, 12 L. Ed. 363; Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371.

An attorney or solicitor cannot withdraw his name, after it has been entered upon the record, without leave of the court; and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself. United States v. Curry, 6 How. 106, 12 L. Ed. 363.

"It was held by this court in the case of United States v. Curry, 6 How. 106, 111, 12 L. Ed. 363, and Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371, that service of a citation on appeal upon the solicitor in the court below was good, upon the ground that no attorney or solicitor can withdraw his name after he has once entered it without the leave of the court; and while his name continues on the record the adverse party has the right to treat him as the authorized attorney or solicitor, and service of notice upon him is as valid as upon the party himself." Davis v. Wakelee, 156 U. S. 680, 684, 39 L. Ed. 578.

46. **Service on personal representative of attorney.**—Bacon v. Hart, 1 Black 38, 17 L. Ed. 52.

47. **Service on partner of deceased counsel.**—Bacon v. Hart, 1 Black 38, 17 L. Ed. 52.

Service of citation may be had upon his attorney or counsel with like effect as upon the party himself, but when counsel of record is dead, it cannot be served on his personal representative, nor even on his partner if not regularly appearing on the record as counsel in the

or other private arrangements, and counsel cannot be known as such, unless by their appearance on the record.⁴⁸

Death of Appellee Pending Appeal.—Where a party dies before the appeal is allowed and prosecuted the suit should be revived in the subordinate court, and the citation, as matter of course, should be addressed to the proper party in the record at that time.⁴⁹

Joint Defendants.—The service of citation on one of several joint defendants is good, even though one is dead, as the suit would survive against the party served.⁵⁰ But it has been held that where this court discovers after final judgment reversing the judgment below that the citation was directed to and served against only one of the plaintiffs below, a rule will be entered on the plaintiff in error to show cause why the judgment previously rendered should not be vacated and the writ of error dismissed; though in consideration of the special circumstances of the case we may allow a new citation to be issued to all the plaintiffs below to set aside any previous judgment and direct the cause to be restored to the docket for reargument.⁵¹

Husband and Wife.—Where the defendant (a woman) intermarries after the judgment and before the service of the writ of error, the service of the citation upon the husband is sufficient.⁵²

f. Proof of Service.—A citation is not necessarily a part of the record, and the fact of its having been issued and served may be proved aliunde.⁵³

7. RETURN.—Necessity for.—Rule 8 of this court provides that in cases when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day.⁵⁴ A citation, with due return, is indispensable to jurisdiction on appeal.⁵⁵

The citation is returnable at the same term at which the appeal or writ of error is returnable.⁵⁶ A citation, even if issued and served contemporaneously with the allowance of the appeal, is unavailing, where there is an omission to make the required return to the next term.⁵⁷

On What Day Returnable.—If a citation is sued out before the first day of the term, it must be made returnable on the first day of the next term; if sued out after, it must be made returnable to the first day of the succeeding term.⁵⁸

But an appeal will not be dismissed on the ground that the citation was not made returnable within sixty days from the signing of the same, under the rules of this court. As the purpose of the citation is notice so that the appellant may appear and be heard, any defect in that regard is not jurisdictional and a

cause. *Bacon v. Hart*, 1 Black 38, 17 L. Ed. 52; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 188, 36 L. Ed. 371.

48. *Bacon v. Hart*, 1 Black 38, 17 L. Ed. 52.

49. **Death of appellee pending appeal.**—*Bieler v. Waller*, 12 Wall. 142, 147, 20 L. Ed. 260.

50. **Service on one of several joint defendants.**—*Waters v. Barrill*, 131 U. S., appx. lxxxiv, 18 L. Ed. 878.

51. *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 432.

52. **Service on husband.**—*Fairfax v. Fairfax*, 5 Cranch 19, 3 L. Ed. 24; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 120, 36 L. Ed. 371. See *Marchand v. Livandais*, 127 U. S. 775, 32 L. Ed. 324.

53. **Proof of service.**—*Innerarity v. Byrne*, 5 How. 295, 12 L. Ed. 159; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

54. **Provisions of rule 8.**—*National Bank v. Bank of Commerce*, 99 U. S. 608, 25 L. Ed. 362.

55. **Return of citation necessary.**—*Bacon v. Hart*, 1 Black 38, 17 L. Ed. 52; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163; *Garrison v. Cass County*, 5 Wall. 823, 18 L. Ed. 491.

56. **Citation returnable at same term.**—*Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581; *Insurance Co. v. Mordecai*, 21 How. 195, 201, 16 L. Ed. 94; *Villablos v. United States*, 6 How. 81, 90, 12 L. Ed. 352.

57. *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

58. **On what day returnable.**—*Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863, citing *Villablos v. United States*, 6 How. 81, 89, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

new citation may be taken out if necessary. But it is not necessary where the parties have entered a general appearance.⁵⁹

Compelling Return.—A certiorari will be awarded upon a suggestion that the citation has been served, but not returned by the clerk below with the writ of error.⁶⁰

8. WAIVER—a. *In General.*—As neither the signing nor the service of the citation is jurisdictional, these may be waived. The only office of the citation is to give notice.⁶¹ And the defect may be waived in various ways, as by consent or appearance or the fraud of the other party.⁶²

Waiver by Whom.—Unquestionably the attorney of record may waive service, and acknowledge notice on the citation, as in that behalf he represents the party.⁶⁴

Manner of Waiving Service.—The waiver of service of the citation must be personal by the party or his attorney.⁶⁵

b. *By Appearance*—(1) *Defects and Irregularities.*—The decisions of this court have uniformly been, that a general appearance cures any defects in the form of process.⁶⁶ In other words, after a party has voluntarily appeared and

59. Dismissal.—Shute v. Keyser, 149 U. S. 649, 37 L. Ed. 884.

60. Compelling return by certiorari.—Field v. Milton, 3 Cranch 514, 2 L. Ed. 516.

61. The citation may be waived.—Mattingly v. Northwestern, etc., R. Co., 158 U. S. 53, 39 L. Ed. 894; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Merriehall v. Hall, 134 U. S. 559, 33 L. Ed. 1012; Sage v. Railroad Co., 96 U. S. 712, 24 L. Ed. 641; Dayton v. Lash, 94 U. S. 112, 24 L. Ed. 33; Grigsby v. Purcell, 99 U. S. 505, 25 L. Ed. 354; Chicago, etc., R. Co. v. Blair, 100 U. S. 661, 25 L. Ed. 587; Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144; Hewitt v. Filbert, 116 U. S. 142, 29 L. Ed. 581; Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371; Jacobs v. George, 150 U. S. 415, 37 L. Ed. 1127.

62. Bacon v. Hart, 1 Black 38, 17 L. Ed. 52; Bigler v. Waller, 12 Wall. 142, 147, 20 L. Ed. 260.

64. Attorney of record may waive the citation.—Bigler v. Waller, 12 Wall. 142, 147, 20 L. Ed. 260.

65. Waiver of service must be personal.—Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. Ed. 371.

66. Defects and irregularities cured by appearance.—Farrar v. United States, 3 Pet. 459, 7 L. Ed. 741; Penhallow v. Doane, 3 Dall. 53, 87, 1 L. Ed. 507; Amis v. Smith, 16 Pet. 303, 314, 10 L. Ed. 973; Wood v. Lide, 4 Cranch 180, 2 L. Ed. 588; Mussina v. Cavazos, 6 Wall. 355, 359, 18 L. Ed. 810; Pierce v. Cox, 9 Wall. 786, 787, 19 L. Ed. 786; Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90; Aldrich v. Aetna Ins. Co., 8 Wall. 491, 496, 19 L. Ed. 473; Johnson v. Waters, 111 U. S. 640, 673, 28 L. Ed. 547; Gracie v. Palmer, 8 Wheat. 699, 5 L. Ed. 719; Fitzgerald, etc., Co. v. Fitzgerald, 137 U. S. 98, 105, 34 L. Ed. 608.

A general appearance waives all de-

fects in a citation. Sage v. Central R. Co., 96 U. S. 712, 24 L. Ed. 641.

The appearance of the defendant in court without making a motion to dismiss, cures the defect in the citation. "The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may therefore waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of the United States v. Yates, 6 How. 606, 12 L. Ed. 575." Carroll v. Dorsey, 20 How. 204, 207, 15 L. Ed. 803.

"The court were unanimously of opinion, that the appearance by attorney cured all irregularity of process. The defendant, perhaps, might have appeared in propria persona, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity." Knox v. Summers, 3 Cranch 496, 498, 2 L. Ed. 510.

The appearance of the defendants without reservation "made their position just what it would have been if they had been brought in regularly by the service of process. In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete. Pollard v. Dwight, 4 Cranch 421, 2 L. Ed. 666; Knox v. Summers, 3 Cranch 496, 2 L. Ed. 510." Atkins v. Disintegrating Co., 18 Wall. 272, 298, 21 L. Ed. 841.

"Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows

filed an answer, setting up his claims, it is too late for him to object that there was error in the form of process.⁶⁷

Appearance cures all defects in service or nonservice of the citation.⁶⁸

Any irregularity in the service of the citation can only be taken advantage of by a motion to dismiss, made promptly on an appearance limited to that special purpose, and is cured by a general appearance.⁶⁹

Signing.—A defendant, who has waived the irregularity by an appearance, cannot object to jurisdiction, because the citation is not signed by the judge who allowed the writ of error.⁷⁰

Signing by Clerk.—The defect of an irregular citation (being signed by the clerk of the court, and not by the judge who allowed the writ of error) is cured by an appearance in this court; so that a motion to dismiss the writ, when made at the term succeeding that at which the appearance was entered, comes too late.⁷¹

Return.—Appearance is a waiver of an objection that the citation for the writ of error was returnable to a day out of term.⁷² So also, an objection that

that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may, therefore, waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of *The United States v. Yates*, 6 How. 606, 12 L. Ed. 575; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground." *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

67. *Hitchcock v. Carbondale Coal, etc., Co.*, 140 U. S. 25, 35 L. Ed. 332; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608.

68. **Service or nonservice cured by appearance.**—*Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741; *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666; *The Merino*, 9 Wheat. 391, 6 L. Ed. 118; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935.

"By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently, waived all objections to the nonservice of process." *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

Direction of citation.—A general appearance in the appellate court without taking any objection to irregularities in the direction, renders such irregularities immaterial. *Moore v. Simonds*, 100 U. S. 145, 25 L. Ed. 590.

69. *United States v. Yates*, 6 How. 606, 12 L. Ed. 575; *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 90; *Renard v. Abbott*, 116 U. S. 277, 29 L. Ed. 629.

70. **Irregularities in signing cured by appearance.**—*Aldrich v. Mtna Ins. Co.*, 8 Wall. 491, 19 L. Ed. 473.

71. **Signing by clerk cured.**—*Chaffee v. Hayward*, 20 How. 208, 15 L. Ed. 804.

Where a citation is signed by the clerk and not by the judge, it is undoubtedly irregular in this respect, and the defendant in error is not bound to appear under it. And if a motion is made at the last term, within a reasonable time, to dismiss the case upon this ground, it will be dismissed. But the appearance of the party in this court, without making a motion to dismiss during the first term, is a waiver of any irregularity in the citation, and is an admission that he has received notice to appear to the writ of error. "Indeed, any other rule would be unjust to a plaintiff in error, and is not required for the protection of the defendant. The latter is not bound to appear, unless he is legally cited, except for the purpose of moving to dismiss. He knows, or must be presumed to know, whether the notice which the law requires has been served on him or not. And if the objection is made at the first term, the plaintiff by a new writ and proper citation, might bring up the case to the succeeding term. But if the defendant does not, by motion, at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defendant's appearance, and if the motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is the interest of a defendant in error to delay and harass his adversary." *Day v. Hayward*, 20 How. 210, 15 L. Ed. 851.

72. **Irregularities in return cured.**—*Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741.

Where a citation for the writ of error is returnable to a day within the term, to wit: on the first Monday of January, 1898, instead of the second Monday of that year, an appearance cures this defect. *Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741.

the citation should have been returnable within sixty days from the signing of the same under the rules of court, is waived by the appellees appearing generally.⁷³

(2) *Want of Citation*—aa. *General Appearance*.—The issuing of a citation may be waived by the appellees; and a general appearance by them is a waiver of a citation.⁷⁴

bb. *Special Appearance*.—But a special appearance is not a waiver of a citation.⁷⁵ Hence the appearance of counsel for the appellee, to make a motion to dismiss for want of filing a transcript of record, is not a waiver of the citation.⁷⁶

cc. *Altering General to Special Appearance*.—Moreover, as a general appearance supplies the objection to the want of a citation, it is too late after the lapse of a term to alter a general to a special appearance, so as to affect the rights of the parties.⁷⁷

(3) *Withdrawing or Striking Out Appearance*.—Upon affidavits filed, the

73. *Shute v. Keyser*, 149 U. S. 649, 650, 37 L. Ed. 884.

74. *General appearance waives want of citation*.—*Alviso v. United States*, 5 Wall. 824, 18 L. Ed. 492; *Sage v. Central R. Co.*, 96 U. S. 712, 715, 24 L. Ed. 641; *Richardson v. Green*, 130 U. S. 104, 114, 32 L. Ed. 872; *Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 129, 36 L. Ed. 371; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *United States v. Armejo*, 131 U. S., appx. lxxxii, 18 L. Ed. 247.

Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice. *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 90.

The want of proof that the defendant was cited has always been held to be a fatal defect in the process prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record. *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

The object of a citation on a writ of error, or an appeal, is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it, should, at the first term he appears, give notice of the motion to dismiss and that his appearance is entered for that purpose. A delay to give this notice may throw the other party off his guard, until the limitation of the writ of error or the appeal may have expired. *Buckingham v. McLean*, 13 How. 150, 151, 14 L. Ed. 90.

A motion on the part of the appellant to dismiss the appeal on the ground that no citation was issued according to law, cannot be sustained, where the appellee is in court represented by counsel, and makes no objection to the want of citation. By this appearance the citation is waived so far as the appellee is concerned, and the appellant cannot be heard to object to the want of citation occasioned by his own negligence, and cured by voluntary appearance. *Pierce v. Cox*, 9 Wall. 786, 19 L. Ed. 786.

"Want of notice of the appeal comes too late after a general appearance, but the record shows that the appeal was duly claimed and that the appellant filed his appeal bond in open court and that the same was duly approved by the chief justice who presided at the hearing when the final decree was entered in the cause." *Smith v. Mason*, 14 Wall. 419, 433, 20 L. Ed. 748.

75. *Special appearance not a waiver*.—*Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

76. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. Ed. 287.

The appearance of counsel for the appellee after the term at which the appeal is returnable, and at the term at which a motion is made to dismiss the appeal on the ground that they had become null and void when the return term of this court passed, without a transcript of the record being filed in this court and being docketed herein, is not a waiver of the citation. "It would have been different if there had been a general appearance at the last term, that being the term to which the appeal if it had been properly taken would have been returnable. *United States v. Armejo*, decided April 3, 1866, and reported in Book 18, L. C. O. P. Co. Ed. U. S. Sup. Ct. Reports 247." *Radford v. Folsom*, 123 U. S. 725, 727, 31 L. Ed. 292.

77. *Altering general to special appearance*.—*United States v. Armejo*, 131 U. S., appx. lxxii, 18 L. Ed. 247.

court will permit the attorney who has appeared for the appellees to withdraw his appearance. But this leave will not authorize a motion to dismiss for want of a citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he cannot afterwards withdraw it.⁷⁸

c. *By Acceptance of Defective Service.*—The citation may be waived by the acceptance of service of a defective citation.⁷⁹

d. *By Acknowledgment of Notice.*—The citation may be waived by action equivalent to the acknowledgment of notice.⁸⁰

9. AMENDMENT.—A motion on behalf of the plaintiff in error to remand the cause to the court below, with leave to amend the citation, will be denied, where the writ of error has not been properly returned.⁸¹

10. PRESUMPTIONS ON APPEAL.—This court will not presume against the explicit statements in the record to the contrary, that the citation was filed or issued the day before the judgment sought to be reviewed was rendered.⁸²

G. Appeal Bond.⁸³—1. DEFINITION AND NATURE.—As an appeal bond, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in.⁸⁴

Review of Causes under Court of Appeals Act.—As to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the circuit court or the district court, congress made no provision in the court of appeals act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system.⁸⁵

2. NECESSITY FOR—a. *In General.*—It is well settled in this court that an appeal bond is not necessary to our jurisdiction.⁸⁶ And this for the reason that

78. Withdrawing or striking out appearance.—United States v. Yates, 6 How. 606, 608, 12 L. Ed. 575.

79. Waiver by acceptance of defective service.—Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260; Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 129, 36 L. Ed. 371.

On a bill filed in the circuit court for Virginia, against A. and B., the administrators of both were substituted on the record as defendants, A. and B. themselves having died after the bill was filed, and suggestion of their deaths being made. In this state the cause was heard and judgment given for the defendants. The complainant appealed to this court, the appeal bond and the citation referring, however, throughout, to A. and B. as defendants in the case, and not referring in any manner to their suggested deaths and the substitution of their administrators. J. A. I., signing himself "counsel for the defendants in this cause in the circuit court of the United States for Virginia," acknowledged service of the citation. On motion in this court to dismiss, the court acknowledging the obvious irregularity of both bond and citation, yet held, that the acceptance by the

counsel, J. A. I., in the circumstantial language above quoted, was a waiver of the irregularity in the citation. Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

80. Waiver by acknowledgment of notice.—Goodwin v. Fox, 120 U. S. 775, 30 L. Ed. 815; Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 129, 36 L. Ed. 371.

81. Amendment.—Porter v. Foley, 21 How. 393, 16 L. Ed. 154.

82. Presumptions on appeal.—Glenn v. Liggett, 135 U. S. 533, 34 L. Ed. 262.

83. As to the supersedeas bond, see the title SUPERSEDEAS.

84. Definition and nature of appeal bond.—Kountz v. Omaha Hotel, 107 U. S. 378, 395, 27 L. Ed. 600.

85. Review of causes under court of appeals act.—Hudson v. Parker, 156 U. S. 277, 282, 39 L. Ed. 424; Ballew v. United States, 160 U. S. 167, 202, 40 L. Ed. 388.

86. Appeal bond not necessary to court's jurisdiction.—Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Edmonson v. Bloomshire, 7 Wall. 306, 19 L. Ed. 91; Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872; Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97.

the giving of an appeal bond is not jurisdictional.⁸⁷ It is not therefore an indispensable part of an appeal that a bond should be filed.⁸⁸

The twenty-second section of the judiciary act of 1789 requires "that every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."⁸⁹

Section 1000 of the Revised Statutes declares that every justice or judge signing a citation or any writ of error shall, except in cases brought up by the United States, etc., take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.⁹⁰ The object and purpose of this section and the bond given in pursuance thereof is to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court.⁹¹

What is meant by prosecuting his appeal to effect? It is an expression substantially equivalent to prosecuting his appeal with success; to make substantial and prevailing his attempt to reverse the decree or judgment awarded against him.⁹²

The failure to take such security is merely an irregularity, and it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal, and if the case is docketed here in time, it will not ordinarily be dismissed because of the neglect or omission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. The taking of security is not jurisdictional in

87. *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145; *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328.

The giving and acceptance of an appeal bond is not jurisdictional. It is merely modal, and a defect in it is only an irregularity, and cannot prevent jurisdiction from attaching. *Brown v. McConnell*, 124 U. S. 489, 31 L. Ed. 495.

The giving of an appeal bond is not essential to the taking, though it is to the due prosecution of, the appeal. *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145, citing *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127.

The prayer for the appeal, and the order allowing it, constitute a valid appeal. The bond is not essential to it. *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, citing *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328.

In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. In order to make the appeal operate as a supersedeas, it is necessary for the appellant to give good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged against him. This security is usually given by bond, with one or more sureties, and the twenty-second section of the judiciary act requires that it be taken by the judge

who signs the citation on appeal. *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762.

88. *Edmonson v. Bloomshire*, 7 Wall. 306, 311, 19 L. Ed. 91.

89. **The statutory provisions.**—*Western Union Tel. Co. v. Eyser*, 19 Wall. 419, 426, 22 L. Ed. 43; *Jerome v. McCarter*, 21 Wall. 17, 28, 22 L. Ed. 515; *Bigler v. Waller*, 12 Wall. 142, 148, 20 L. Ed. 260.

90. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 381, 27 L. Ed. 609.

91. **Object of statute.**—*Crane v. Buckley*, 203 U. S. 441, 446, 51 L. Ed. 260.

The object of the statutory requirement (§ 1000, Rev. Stat.), which provides that securities be taken on a writ of error or an appeal, where the writ or the appeal is a supersedeas and stay of execution, must be "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs," undoubtedly is to secure to the opposite party his damages and costs, in case the judgment or decree shall not be reversed. If on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect. *Gay v. Parpart*, 101 U. S. 391, 25 L. Ed. 841.

92. **"Prosecuting appeal to effect" defined.**—*Crane v. Buckley*, 203 U. S. 441, 447, 51 L. Ed. 260.

its character, and its omission affects only the regularity of the proceedings. Such being the case, permission to supply it here may properly be given in furtherance of justice.⁹³

Where through mistake or accident no bond, or a defective bond, has been filed, this court will not dismiss the appeal, but will permit a bond to be given here.⁹⁴

Failure to Perfect Appeal.—An appeal bond is not essential to the jurisdiction either of the supreme court of Illinois or of the supreme court of the United States, when the appeal is allowed and a transcript of the record is filed in time. The mere failure to execute the bond within due time may be ground for dismissing an appeal, but does not deprive the court of the right to proceed to a determination of the appeal.⁹⁶ But although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal. Such vitality cannot be restored by an order of the circuit court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one.⁹⁷

Applicants for an appeal from the district to the circuit court must give bond as required under the act "to amend the judicial system," and the party claiming a writ of error must also give good and sufficient security to prosecute the writ to effect.⁹⁸

The rule that security must be given in order to supersede the execution of a decree pending an appeal therefrom, applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until heard and determined. It does not apply in a case where the decree is in favor of the parties appealing. And the rule is the same although the party in the case had entered a cross appeal.⁹⁹

The requirement of a bond does not obviate the necessity of the appeal and justify the remedy by prohibition, as giving bond is one of the ordinary incidents of litigation.¹

Dismissal.—Formerly it was held that where the appeal bond and security have not been given, the appeal will be dismissed.²

But the rule now is that where, through mistake or accident, no bond, or a defective bond, has been filed, this court will not dismiss the appeal—if it is in all other respects quite regular—except on failure to comply with an order to give the proper security within such reasonable time as it may prescribe.³

93. **Failure to take security merely an irregularity.**—*Brown v. McConnell*, 124 U. S. 489, 491, 31 L. Ed. 495.

94. *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Ex parte Milwaukee, etc., R. Co.*, 5 Wall. 188, 18 L. Ed. 676.

96. **Effect of failure to execute bond in time.**—*Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047, citing *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

97. *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91.

98. **Appeals from district to circuit courts.**—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 266, 21 L. Ed. 493.

99. *Bronson v. Lacsse, etc., R. Co.*, 1 Wall. 405, 17 L. Ed. 616.

1. *Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317.

2. **Formerly want of bond a ground for dismissal.**—*Veitch v. Farmers' Bank*, 6 Pet. 777, 8 L. Ed. 578; *Boyce v. Grundy*, 6 Pet. 777, 8 L. Ed. 579.

3. *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564, citing *Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 905.

Security for prosecution should be taken by the judge on signing the citation; but if this duty be omitted or defectively performed, a remedy can be applied here on motion. *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564.

Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants in which to file the bond. If they complied with the order,

Presumptions on Appeal.—It need not appear that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.⁵

Continuance.—And in one case where it did not appear on the record, that a bond had been given to the clerk of the circuit court to prosecute the writ of error, the court continued the case to a subsequent day of the term, to ascertain whether a bond had been given.⁶

Laches.—An appeal is not perfected until bond is given as required by Rev. Stat., §§ 1000, 1012; and while the omission of the bond does not necessarily avoid an appeal, and the appellate court may, in proper cases, permit the bond to be supplied, yet this permission could not properly be accorded after a lapse of nearly four years from the date of the decree; and, under such circumstances, where such permission is not even applied for, the appeal may properly be dismissed.⁷

b. *Appeals by United States.*—In all cases where the government is appellant, no bond is required.⁸ And this is affirmed by the statutes.⁹

c. *Appeals in Forma Pauperis.*—**In General.**—This court has no power to permit the prosecution of a writ of error in forma pauperis, unless derived from statute.¹¹ And an act giving the right to prosecute in forma pauperis cannot be extended by implication beyond its terms in conflict with existing provisions in relation to writs of error and appeals.¹² Accordingly it is held that the act of July 20, 1892, does not allow writs of error or appeals to be prosecuted in forma pauperis in the federal courts. The statute refers only to courts of original jurisdiction.¹³ And this for the reason that the words "suit" or "action," as used in the act of congress July 20, 1892, providing for the prosecution of suits or actions in forma pauperis, does not apply to appeals or writs of error to this court.¹⁴

A circuit court of appeals cannot permit the prosecution of a writ of error in forma pauperis, in the absence of such right conferred by act of congress.¹⁵

Error to State Court.—A writ of error cannot be prosecuted in forma pauperis to a state court.¹⁶

the appeal was to stand; otherwise, to be dismissed. *Anson v. Blue Ridge R. Co.*, 23 How. 1, 16 L. Ed. 517, following *The Dos Hermanos*, 10 Wheat. 306, 311, 6 L. Ed. 328; *Adams v. Law*, 16 How. 144, 148, 14 L. Ed. 880; *Catlett v. Brodie*, 9 Wheat. 553, 555, 6 L. Ed. 158.

5. **Presumptions on appeal.**—*Martin v. Hunter*, 1 Wheat. 305, 4 L. Ed. 97.

6. **Continuance.**—*Bank v. Swann*, 9 Pet. 33, 9 L. Ed. 40.

7. **Laches.**—*Beardsley v. Arkansas, etc.*, R. Co., 158 U. S. 123, 39 L. Ed. 919.

8. **Appeals by United States.**—*Edmondson v. Bloomshire*, 7 Wall. 306, 311, 19 L. Ed. 91.

9. Rev. Stats., § 1000.

Under § 1001 of the Revised Statutes no bond for the prosecution of the suit, or to answer in damages or costs, is required on writs of error or appeals issuing from or brought to this court by direction of the comptroller of the currency in suits by or against insolvent national banks, or the receivers thereof. *Pacific Nat. Bank v. Mixer*, 114 U. S. 463, 464, 29 L. Ed. 221.

11. **Appeals in forma pauperis.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 251, 49 L. Ed. 178.

12. *Bradford v. Southern R. Co.*, 195 U. S. 243, 251, 49 L. Ed. 178, opinion of Mr. Chief Justice Fuller.

13. **Construction of act of 1892.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 247, 49 L. Ed. 178.

14. *Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178, citing *Gallaway v. Fort Worth Bank*, 186 U. S. 177, 46 L. Ed. 1111; *Bristol v. United States*, 129 Fed. 87.

15. **Appeals to court of appeals in forma pauperis.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178.

16. **Error to state court in forma pauperis.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 247, 49 L. Ed. 178; *Gallaway v. Fort Worth Bank*, 186 U. S. 177, 46 L. Ed. 1111.

An application for leave to prosecute a writ of error to a state court, without giving security as required by § 1000 of the Revised Statutes, under an act of congress of July 20, 1892, 27 Stat. 252, must be denied. The ruling has uniformly been, and has been enforced in repeated instances that that act has no application to proceedings in the supreme court of the United States. *Gallaway v. Fort*

d. *Under Circuit Court of Appeals Act.*—By the act of 1891, a writ of error from this court to the circuit court, in the case of a conviction of a crime infamous but not capital, is a matter of right, without giving any security.¹⁷

e. *Waiver.*—Since the taking of an appeal bond is not essential to our jurisdiction, it may be waived,¹⁸ even by an infant's guardian ad litem and next friend.¹⁹

3. *DISCRETION OF COURT.*—The discretion of the court below as to the kind of bond to be accepted as security is final and not reviewable here,²¹ and the discretion extends not only to the amount of the security but to the number of sureties to be required.²²

4. *FORM AND SUFFICIENCY*—a. *In General.*—It is a matter of great doubt whether a bond that has failed to conform to the statutory requirements, will be sustained as a common-law bond.²³

b. *Signing.*—An appeal bond signed by only a portion of the joint appellees is good where duly approved by the trial judge,²⁴ as also is a bond not signed by all the appellants.²⁵

c. *Condition of Bond.*—*In General.*—If the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contains variations of language; and if further conditions be superadded, the bond is not therefore invalid, so far as it is supported by the statute, but only as to the superadded conditions.²⁶

Worth Bank, 186 U. S. 177, 46 L. Ed. 1111, approved in *Bradford v. Southern R. Co.*, 195 U. S. 243, 247, 49 L. Ed. 178.

17. *Under circuit court of appeals act.*—*Hudson v. Parker*, 156 U. S. 277, 283, 39 L. Ed. 424; *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

18. *Waiver.*—*Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047.

19. *Waiver by guardian.*—*Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047.

An infant's next friend and guardian ad litem may likewise waive the execution of an appeal bond by the opposite party. *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047.

21. *Discretion of court.*—*New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506, 38 L. Ed. 809.

This court will not interfere by mandamus with the discretion of the circuit judge in approving or rejecting a bond offered for his approval. *Ex parte Milwaukee, etc.*, R. Co., 5 Wall. 188, 18 L. Ed. 676.

22. *To what discretion extends.*—*Mexican Nat. Const. Co. v. Reusens*, 118 U. S. 49, 30 L. Ed. 77.

23. *Whether irregular statutory bond good as common-law bond.*—In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 396, 27 L. Ed. 609, the court refused to decide whether a bond which had not conformed to statutory requirements, would be sustained as contracts at common law. The court said: "Had the bond now under consideration so entirely departed and varied from the statute that it could not have been sustained with the effect of an ordinary appeal bond, the question would then more properly have arisen, whether, on the one hand, it might not be sustained as a bond at common law, or, on the other, declared utterly void."

24. *Signing.*—*Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 257; *Washington, etc., R. Co. v. Bradley*, 7 Wall. 575, 579, 19 L. Ed. 274.

25. *Bond not signed by all the appellants.*—An appeal bond is sufficient although it is not signed by all the appellants, if the appeal does not operate as a supersedeas and the security is for costs only. If it is approved by the judge, it stands as security for all the appellees. *Scruggs v. Memphis, etc., R. Co.*, 131 U. S., appx., 204, 26 L. Ed. 741, citing *Brockett v. Brockett*, 2 How. 238, 240, 11 L. Ed. 251.

26. *Condition of bond.*—*Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 396, 27 L. Ed. 609; *Gay v. Parpart*, 101 U. S. 391, 25 L. Ed. 841.

In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609, it is said: "As an appeal bond, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in. We think the rule followed in some of the states is a sound one, that if the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contain variations of language, and that if further conditions be superadded, the bond is not therefore invalid so far as it is supported by the statute, but only as to the superadded conditions."

Where Appeal Is to Operate as a Supersedeas.—Under § 1000, Rev. Stat., providing that the security to be taken on a writ of error or an appeal, where the writ or the appeal is a supersedeas and stays execution, must be "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs," it was held that the condition of a bond that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said supreme court," meets with the requirements of this statute.²⁷

Appeals in Foreclosure Proceedings.—The bond, on an appeal from a decree for the foreclosure of a mortgage, is intended as security only for such damages as may arise from the delay incident to the appeal,²⁸ such as its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or, the nonpayment of the costs of the appeal, which accrued in this court,²⁹ and not as security for the amount of the original decree or the interest which accrued pending the appeal, or for the balance of these amounts after applying the proceeds of the mortgaged property, or for the rents and profits, or the use and detention of the property pending appeal.³⁰

27. Condition where appeal is to operate as a supersedeas.—*Gay v. Parpart*, 101 U. S. 391, 25 L. Ed. 841.

28. Appeals in foreclosure proceedings.—*Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

When a bond is given for appeal in a bill of foreclosure of mortgage, the condition of the bond being simply that the appellant shall pay costs and damages, it does not operate to stay a sale of mortgaged premises already decreed. *Orchard v. Hughes*, 1 Wall. 73, 17 L. Ed. 560.

29. Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609.

An appeal bond in an ordinary foreclosure suit in a court of the United States does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or the use and detention of the property pending the appeal; but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by nonpayment of taxes, and loss by fire if it be not properly insured. *Quære*, is its mere depreciation in market value any cause of recovery on the bond? *Kountz v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

30. On an appeal from a decree for the foreclosure of a mortgage, the appeal bond is not intended as security for either the amount of the decree or the interest accruing pending the appeal, but for such damages as may arise from the delay incident to the appeal; and although it is intimated that this damage may depend upon the use and detention of the mortgaged property, yet that was not the point in judgment. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 390, 27 L. Ed. 609.

Use and detention of mortgaged property.—Where an appeal bond in a foreclosure suit in terms requires the defendant to respond for the "use and detention" of the property covered by the mortgage during the pendency of the appeal, it was held that as the judge had no authority to require such a condition to be inserted in the bond, and probably was not aware of its insertion, and as a party ought not to be deprived of his right of appeal upon the terms which the law prescribes, this court will not hold it to be a voluntary bond entered into beyond the requirements of the statute. "We should rather hold that it was drawn by attempting to copy the words of the 29th rule, instead of following the statute, and inadvertently omitting the connecting words." *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609. See *Crane v. Buckley*, 203 U. S. 441, 51 L. Ed. 260.

Rents and profits of mortgaged property.—In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 392, 27 L. Ed. 609, it was held that a bond given on appeal with supersedeas, from a final decree of foreclosure and sale, did not cover rents and profits, or the use and detention of the property, pending the appeal. The court said that "in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself—the specific thing—which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. * * * The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. * * * But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly." Approved in *Freedman's*

An appeal will be dismissed where the appeal bond is not conditioned according to law, and no application to file a sufficient bond in this respect is made.³¹

d. *Parties*—(1) *Obligors*.—Where there are many parties in the case below, it is not necessary for them all to join in the appeal bond.³²

How Objection Raised.—Where an appeal from the circuit court to this court is prayed by a number of the defendants, and one only executes the proper appeal bond, the objection to the proceeding ought to be taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond.³³

Description of Parties.—Where the bond misdescribes the parties to the judgment, ascertaining but one person as plaintiff in error, when there are three, the case must be dismissed.³⁴

(2) *Obligees*.—**Necessity for Obligee**.—An appeal will be dismissed where the alleged bond has no obligee, and no application to file a sufficient bond is made.³⁵

Who Are Proper Obligees.—Although the appeal bond should be given to the opposite party or parties to the suit, yet it does not follow, by any means, that the appeal must be dismissed, for irregularities in this respect. On the contrary, it is the constant practice of the court to allow such defects to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made.³⁶

Saving, etc., Co. v. Shepherd, 127 U. S. 494, 502, 32 L. Ed. 163.

The obligee in a bond which supercedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession; that is to say, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed. *Woodworth v. Northwestern Mut. Life Ins. Co.*, 185 U. S. 354, 357, 46 L. Ed. 945, distinguishing *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

"If depreciation in market value can ever be laid as cause of legal damages on a bond in error (which we greatly doubt), it cannot be done in this case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair." *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 392, 27 L. Ed. 609.

31. *Swan v. Hill*, 155 U. S. 394, 39 L. Ed. 197.

32. *Obligors*.—*Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Washington, etc., R. Co. v. Bradley*, 7 Wall. 575, 578, 19 L. Ed. 274.

Where all of several parties in the court below join in the petition for appeal, and

the appeal is granted by the court, this is sufficient to make them all parties to the appeal, although one does not join in executing the appeal bond. If the bond is executed by the coappellant, under order of the court, and is accepted by the court, this is sufficient to perfect the appeal. *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251.

33. *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493.

34. **Misdescription of plaintiffs in error**.—*Kail v. Whitmore*, 6 Wall. 451, 18 L. Ed. 862.

35. **Obligees necessary**.—*Swan v. Hill*, 155 U. S. 394, 39 L. Ed. 197.

36. **Who are proper obligees**.—*The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; *Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 905; *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260.

On a bill filed in the circuit court for Virginia, against A. and B., the administrators of both were substituted on the record as defendants; A. and B. themselves having died after the bill was filed, and suggestion of their deaths being made. In this state the cause was heard and judgment given for the defendants. The complainant appealed to this court, the appeal bond and the citation referring, however, throughout, to A. and B. as defendants in the case, and not referring in any way to their suggested deaths and the substitution of their administrators. J. A. I., signing himself "counsel for the defendants in this cause in the circuit court of the United States for Virginia," acknowledged service of the citation. On motion in this court to dismiss, the court acknowledging the obvious irregularity of both bond and citation, yet held,

But where the bond is given to a person who is not a party to the judgment, the writ of error will be dismissed on motion,³⁷ though in such case the court may grant leave to file a new bond,³⁸ or leave will be given to counsel to move for its reinstatement during the present term.³⁹

Several Plaintiffs Below.—Where this court discovers after final judgment reversing the judgment below that the preliminary appeal bond was made to only one of the plaintiffs below, this court may enter the rule on the plaintiff in error to show cause why the judgment previously rendered should not be vacated and the writ of error dismissed.⁴⁰

Unnecessary Obligees.—The validity of an appeal is not destroyed because the bond besides being given to the obligees as to whom the suit was dismissed below, is also given to a party against whom the decree was rendered below.⁴¹

An appeal bond given to the people or to the relator is good, and if forfeited may be sued upon by either.⁴²

(3) **Sureties.**—**In General.**—The omission of the names of the sureties in the introductory part of an appeal bond does not affect its validity, especially where it appears that each signed and sealed the instrument.⁴³

Nonresidents as Sureties.—It is doubtful whether the fact of the non-residence of the sureties within the district is a sufficient reason for rejecting a bond which is in all other respects unobjectionable.

Number of Sureties to Be Required.—The discretion which is reposed in the judge below as to the security to be taken on appeal, extends not only to the amount of the security but to the number of sureties to be required; and when a bond has been taken below with one surety, where the law provides that two shall be required, this court will not require a new bond to be furnished for that reason only, if the original bond is not invalidated thereby.⁴⁴

Mandamus.—Where the only question is as to what persons should be ac-

that the irregularity, as respected the bond, did not necessarily exact a dismissal, which was accordingly ordered, only unless the appellant filed a sufficient appeal bond, in the usual form, within ten days, in the same sum as that required on the allowance of the appeal. *Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260.

37. *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879, citing *Smyth v. Strader*, 12 How. 327, 13 L. Ed. 1008.

38. *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; *Brobst v. Brobst*, 2 Wall. 96, 97, 17 L. Ed. 905.

39. **Reinstatement.**—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879.

40. **Several plaintiffs below.**—*Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 432.

41. **Unnecessary obligees.**—*Hill v. Chicago, etc.*, R. Co., 129 U. S. 170, 32 L. Ed. 651.

Where the decree appealed from awarded a money decree against one defendant, and the plaintiff appealed, and the obligees named in the appeal bond included that defendant and other defendants, and that defendant and some of the others moved to dismiss the appeal, on the ground that that defendant should be the sole obligee, and that the only matter for review was as to the amount

awarded against that defendant, held, that the bond was in proper form, and that the motion must be denied. *Hill v. Chicago, etc.*, R. Co., 129 U. S. 170, 32 L. Ed. 651.

42. **State as obligee.**—*Spalding v. State*, 2 How. 66, 11 L. Ed. 181.

43. **Sureties.**—*Babbitt v. Shields*, 101 U. S. 7, 25 L. Ed. 820.

Nonresidents as sureties.—*Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676.

Where, after an appeal to this court, the judge below refused to approve a bond for a supersedeas, because all the sureties were nonresidents of the district, this court (though not agreeing with such judge in the opinion that mere non-residence within the district was a sufficient reason for rejecting a bond, if, in all other respects, it were unobjectionable) declined to issue a mandamus to compel the judge to approve the bond and allow a supersedeas, considering its right to do this doubtful; but ordered that on filing a bond to be approved by the clerk of this court, a supersedeas should issue from this court. *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676.

44. **Number of sureties.**—*Mexican Nat. Const. Co. v. Reusens*, 118 U. S. 49, 30 L. Ed. 77, following *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

cepted as sureties on the bond, or as to their sufficiency, this furnishes no ground for issuing a writ of mandamus.⁴⁵

e. *Description of Judgment*.—The better practice undoubtedly is to specify in the bond in describing the judgment the term at which it was rendered, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security.⁴⁶

f. *Must Contain Security for Costs*.—A bond is insufficient in form either for the purposes of a supersedeas or appeal, where it contains no security for costs. This, however, does not necessarily avoid the appeal; but this court may impose such terms on the appellants for the omission as, under the circumstances, shall seem to be proper.⁴⁸

g. *Dismissal*.—Irregularities in appeal bonds do not render the writs of error void, and if the cases are sent back for further proceedings no order need be entered here regarding them.⁴⁹ In other words this court will not dismiss a writ of error on account of the defective character of the bond, but may allow a proper bond to be filed, if necessary.⁵⁰

But where the bond taken is insufficient in law, this court, in the exercise of its inherent jurisdiction as a court of error, may direct that the writ be dismissed, unless the plaintiff in error gives security sufficient in this respect, to be taken and approved by any justice or judge who is authorized to allow the writ of error and citation.⁵¹

5. APPROVAL OF BOND—a. *Necessity for*.—Where an appeal bond is filed, but there is no approval of it by the court, the appeal must be dismissed.⁵² But this

45. *Mandamus*.—Ex parte Taylor, 14 How. 3, 14 L. Ed. 302; Ex parte Milwaukee, etc., R. Co., 5 Wall. 188, 18 L. Ed. 676; Hudson v. Parker, 156 U. S. 277, 289, 39 L. Ed. 424.

46. *Description of judgment*.—New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. Ed. 809.

It is no ground for dismissal of the appeal that the appeal bond fails to state the term at which the decree of the circuit court was rendered, where the bond is properly entitled in the cause, the name of the court is correctly given, and there is nothing to indicate that a decree had been rendered in any other cause between the same parties in that court. Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578, citing New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. Ed. 809.

Of a similar mistake it was said by the Chief Justice in New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 507, 28 L. Ed. 809: "The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security." Davis v. Wakelee, 156 U. S. 680, 685, 39 L. Ed. 578.

48. *Must contain security for costs*.—Seward v. Corneau, 102 U. S. 161, 26 L. Ed. 86, citing Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97; Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377.

It was held in Seward v. Corneau, 102 U. S. 161, 26 L. Ed. 86, in which the bond contained no security for costs, that an

appeal would be dismissed unless the appellants, on or before a certain time, gave bond, with good and sufficient security, in due form of law to prosecute their appeal to effect, and to answer all damages and costs if they failed to make their plea good.

49. *Dismissal*.—Amadeo v. Northern Assur. Co., 201 U. S. 194, 202, 50 L. Ed. 722.

50. *No dismissal where bond defective*.—Union Pac. R. Co. v. Callaghan, 161 U. S. 91, 95, 40 L. Ed. 628.

No security for costs.—Thus because a bond is insufficient for the reason that it contains no security for costs, does not necessarily avoid the appeal, but we may impose such terms on the appellant for the omission as, under the circumstances, shall seem to be proper. Seward v. Corneau, 102 U. S. 161, 26 L. Ed. 86, citing Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97; Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377.

51. *Where bond insufficient in law*.—Catlett v. Brodie, 9 Wheat. 553, 555, 6 L. Ed. 158; O'Reilly v. Edrington, 96 U. S. 724, 24 L. Ed. 659; Hudson v. Parker, 156 U. S. 277, 287, 39 L. Ed. 424.

52. *Necessity for approval of bond*.—Monger v. Skirley, 131 U. S., appx. cx, 20 L. Ed. 635, citing Brackett v. Brackett, 2 How. 238, 11 L. Ed. 251; Palmer v. Donner, 7 Wall. 541, 19 L. Ed. 99; Castro v. United States, 3 Wall. 46, 49, 18 L. Ed. 163.

Where the transcript of the record showed that no appeal bond was taken or approved by the judge who signed the

court will take care, on application, that the rights of the defendant in error be not prejudiced by the omission of the judge to approve the appeal bond, and will not dismiss the writ except on failure to comply with such terms as it may impose.⁵³

b. *Approval by Whom.*—**In General.**—Upon a writ of error in a civil case, the requisite security is ordinarily taken by the justice or judge who allows the writ and signs the citation.⁵⁴

And the statute declares that the security required upon writs of error and appeals must be taken by the judge or justice.⁵⁵ He cannot delegate this power to the clerk,⁵⁶ or to a commissioner.⁵⁷

Excuse for Failure to Approve Bond.—But where the omission of the judge to approve the appeal bond is caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals and writs of error except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings.⁵⁸

Approval of Bond Out of Court.—The approval of the appeal bond by the judge out of court is sufficient. It need not be approved by the court.⁵⁹

Territorial Courts.—The act of 1838 providing that writs of error and appeals from the final decision of the supreme court of the territory shall be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gives to the judge of the territorial court the power to approve the bond.⁶⁰

Under Circuit Court of Appeals Act.—The rules of this court provide that upon an appeal or writ of error from the circuit court or a district court direct to this court under the circuit court of appeals act, that the proper security may be taken by any circuit judge within his circuit, or by any district judge within his district, or by any justice of this court.⁶¹

Under § 11 of the circuit court of appeals act which provides that "all provisions of law, now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error," any justice of this court, not

citation in the cause, the appeal was dismissed. *Boyce v. Grundy*, 6 Pet. 777, 8 L. Ed. 579.

53. Generally no dismissal for lack of approval.—*Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377, citing *Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *Catlett v. Brodie*, 3 Wheat. 553, 6 L. Ed. 158.

54. Approval by whom.—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Hudson v. Parker*, 156 U. S. 277, 287, 39 L. Ed. 424.

The security may be approved by any judge or justice authorized to sign a citation upon an appeal in the cause. *O'Reilly v. Edrington*, 96 U. S. 724, 727, 24 L. Ed. 659, approved in *Omaha First Nat. Bank v. Omaha*, 96 U. S. 737, 738, 24 L. Ed. 881.

The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error. *Anson v. Blue Ridge R. Co.*, 23 How. 1, 15 L. Ed. 517.

55. Rev. Stat., § 1000.

56. Delegation of power to a clerk.—*O'Reilly v. Edrington*, 96 U. S. 724, 726,

24 L. Ed. 659, approved in *Omaha First Nat. Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881.

57. Delegation of power to commissioner.—"Section 1000 of the Revised Statutes requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or to a commissioner. *O'Reilly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659." *Haskins v. St. Louis, etc., R. Co.*, 109 U. S. 106, 107, 27 L. Ed. 873.

58. Excuse for failure to approve bond.—*O'Reilly v. Edrington*, 96 U. S. 724, 24 L. Ed. 659; *Omaha First Nat. Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881.

59. Bond may be approved in vacation.—*Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511, 512; *S. C.*, 15 L. Ed. 514.

60. Rule in territorial courts.—*Shepard v. Wilson*, 5 How. 210, 12 L. Ed. 120.

61. Rule under court of appeals act.—Rule 26, 139 U. S., appx., 706; *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424.

necessarily the justice assigned to the circuit in which the court is held, may take the requisite security for the prosecution of the writ of error.⁶²

c. *Form and Evidence of Approval.*—It is a fair inference, from the acts of the judge, in signing the citation, and in witnessing the appeal bond, that he approved of the security. The judiciary act does not in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given.⁶³

d. *Vacating Approval.*—Where the approval of the bond by a justice of this court, who allowed the appeal, was obtained by fraud and perjury, this court will set aside such approval.⁶⁵

6. *TIME OF FILING SECURITY.*—In General.—Unless the bond is seasonably served and filed, the writ of error will be dismissed.⁶⁶ It should be given within two years from the rendition of the judgment or decree.⁶⁷

But where the bond is not furnished and accepted before the cause is docketed in this court, leave will be given the appellants to supply the omission before dismissing the appeal.⁶⁸

Filing Nunc Pro Tunc.—Leave is sometimes granted to file a bond nunc pro tunc, where the party has failed to file it at the proper time.⁶⁹

To Operate as a Supersedeas.—A motion to dismiss the appeal will be granted, unless the appellant files a sufficient appeal bond in the usual form within 10 days from the date of the decree.⁷⁰

62. *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424; *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

63. *Form and evidence of approval.*—*Davidson v. Lanier*, 4 Wall. 447, 453, 18 L. Ed. 377.

Approval by the judge of a bond for prosecution of a writ of error may be inferred from the facts of the transaction. And where the record showed that the bond had been duly executed, that the sureties had been sworn to their sufficiency by the judge who signed the citation, and that all was done on the same day, it was held that it might be inferred that the bond was approved by the judge. *Silver v. Ladd*, 6 Wall. 440, 18 L. Ed. 828.

65. *Vacating approval.*—*Florida Cent. R. Co. v. Schulte*, 100 U. S. 644, 25 L. Ed. 605.

66. *Must be seasonably filed.*—*O'Dowd v. Russell*, 14 Wall. 402, 405, 20 L. Ed. 857.

67. *Must be given within two years.*—*Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

In *Stewart v. Masterson*, 124 U. S. 493, 31 L. Ed. 507, the decree from which the appeal was taken was rendered November 7th, 1884, and contained on its face the allowance of an appeal to this court. That appeal was returnable to October term 1885, which began October 12th of that year. It does not appear that any bond was approved during the term in which the decree was rendered, but one was approved October 10th, which was before the beginning of the return term. The citation was signed Novem-

ber 2, 1885, after that term began, requiring the appellee to appear in this court on the second Monday in October, 1886. This citation was served February 17th, 1886, but the case was not docketed in this court until June 11th, 1886, which was after our term of 1885 ended, but before that of 1886 began. Held, as the bond which was executed October 10, 1885, became inoperative by the failure to docket the first appeal in time, the appeal will be dismissed unless the appellant shall on or before the 19th day of March next file with the clerk of this court a bond in the penal sum of \$500, conditioned according to law, for the purpose of the appeal, the sureties to the satisfaction of the justice in this court.

68. *Leave given to furnish bond.*—*Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 145, citing *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127.

69. *Filing bond nunc pro tunc.*—*Shepherd v. Pepper*, 133 U. S. 626, 33 L. Ed. 706.

A party has been allowed to enter an appeal bond nunc pro tunc, in a case where the court supposed it probable that his solicitors had been misled by a peculiar state of the record, and mode of bringing up the questions from the court below. *Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 905, followed in *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564.

70. *Supersedeas bond.*—*Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564. See the title SUPERSEDEAS.

Where the record does not show that the bond was approved and filed within ten days in the clerk's office, the writ cannot be made to operate as a super-

Extension of Time.—Upon a motion to dismiss the appeal, upon the grounds that no appeal bond was given at the time of granting the appeal, either as a security for costs or supersedeas of execution, the court may give appellant sixty days to give the bond and file it with the clerk, upon complying with which order, the motion to be dismissed; otherwise, to be granted.⁷¹ And the time may be extended by agreement of the parties.⁷²

Doctrine of Relation.—The mode of taking the security, and the time for perfecting it, are matters of discretion, to be regulated by the court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed.⁷³

Waiver.—An appeal bond is not essential to the jurisdiction where an appeal has been allowed and transcript duly filed. A mere failure to execute the bond within due time may be grounds for the dismissal of the appeal, but the court may proceed to a determination of the appeal where the defect is waived.⁷⁵

Presumptions on Appeal.—This court will not presume that the bond was filed the day before the judgment sought to be reviewed was rendered.⁷⁶

7. ADDITIONAL SECURITY.—In General.—The motion by a defendant in error to compel a plaintiff in error to furnish additional security, is addressed to the sound judicial discretion of the court.⁷⁷ Hence where the circumstances of the parties do not appear to have changed since the security was taken originally, a motion for additional security will be denied,⁷⁸ as where “the circumstances of

seedeas. *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

“What is necessary is that the security be sufficient, and when it is desired to make the appeal a supersedeas, the security must be given within ten days from the rendering of the decree.” *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762; *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158. Unless taken within the ten days an appeal cannot be made to operate as a supersedeas, but a party appealing within that time may not desire that the appeal shall have that effect, and in that event all that can be required of him is that he shall give good and sufficient security for costs, including “just damages for delay.” Rule 32; 1 Stat. at Large 404. *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260.

71. Extension of time allowed to file.—*Anson v. Blue Ridge R. Co.*, 23 How. 1, 16 L. Ed. 517, citing *The Dos Hermanos*, 10 Wheat. 306, 311, 6 L. Ed. 328; *Adams v. Law*, 16 How. 144, 148, 14 L. Ed. 880, and *Catlett v. Brodie*, 9 Wheat. 553, 555, 6 L. Ed. 158.

72. Extension of time by agreement.—The entry, on the stipulation of the parties, in a suit in equity, in which an appeal has been allowed but the record is incomplete, of an order extending the time for filing the appeal bond and the certificate of evidence, is equivalent to an order as of that date renewing the allowance of appeal in open court in the presence of both parties, and the appeal is returnable at this court as if allowed at the date of the entry of the order; but if the appeal bond in such case is not filed until after the term in which the appeal was allowed by the court, citation or its equivalent is necessary to notify

the appellee that the appeal allowed in term time has not been abandoned by failure to furnish the security, and the endorsement by counsel for appellees of his approval of the appeal bond is the equivalent of such notice. *Goodwin v. Fox*, 120 U. S. 775, 30 L. Ed. 815.

73. Relation.—*The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328.

Thus, an appeal under the judiciary acts of 1789, c. 20, § 22, and of 1803, c. 353 (XCIII), prayed for, and allowed within five years, is valid, although the security was not given until after the lapse of five years. *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328.

75. Waiver.—*Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

76. Presumptions on appeal.—*Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

77. Additional security.—*Mexican Nat. Const. Co. v. Reusens*, 118 U. S. 49, 30 L. Ed. 77.

78. Motion denied when circumstances of parties remain unchanged.—*Johnson v. Waters*, 108 U. S. 4, 27 L. Ed. 630.

Death of one appellant.—In a suit to subject lands to the payment of the debts of one of the appellants, a motion to increase the amount of the appeal bond will be denied although one of the appellants has died since the date of the decree, where the affidavits do not satisfy us that the property is depreciating in value by reason of any neglect of the surviving appellants in its care or management. *Harwood v. Dickerhoff*, 117 U. S. 200, 29 L. Ed. 887, following *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

the case, or of the parties," have not been so changed by the death of one of the appellants, as to make "the security, which, at the time it was taken, was 'good and sufficient,' " now insufficient.⁷⁹

But it is equally well settled that if, after security on appeal which operated as a supersedeas has been accepted, the circumstances of the case, or of the parties, or of the sureties on the bond, have changed, so that the security, which at the time it was taken was sufficient, does not continue to be so, this court, on proper application, may adjudge and order as justice requires.⁸⁰

Where a judgment has been had in ejectment for only nominal damages, and a writ of error has been sued out by defendant and security given, this court cannot interfere to require additional security to cover damages which the plaintiff may recover in an action for mesne profits, or for other losses which he will sustain by being kept out of his land.⁸¹

The Motion.—Where there is a motion in behalf of the defendant in error for an order that the plaintiff in error who is also plaintiff below give additional security for costs and damages which may be sustained by the defendant by reason of his wrongful complaint, the motion being founded on affidavits of the insolvency of the sureties in the original bond, if no notice appears to have been given to the plaintiff in error, and he has had no opportunity to put in counter affidavits, the hearing of the motion will be postponed until the next motion day, in order that proper notice may be given.⁸²

8. OBVIATING DEFECTS IN BONDS AND NEW BONDS.—It is a constant practice of the court to allow defects in the bond to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made.⁸³

But the motion for leave to file a new bond is addressed to the sound judicial discretion of this court, and will usually be denied when one originally given was set aside because the approval was obtained by fraud and perjury, and the appellant has knowledge of such fraud and perjury.⁸⁵

This court has power to allow a new bond to be filed at any time so long as the appeal survives.⁸⁶ But where the appeal has lapsed by failure to file a transcript within the time required, it cannot be revived by thereafter filing an appeal bond.⁸⁷

79. Effect of death of one appellant.—*Harwood v. Dickerhoff*, 117 U. S. 200, 29 L. Ed. 887, following *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Mexican Nat. Const. Co. v. Reusens*, 118 U. S. 49, 30 L. Ed. 77.

The doctrine announced in *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515, that if "after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond, have changed, so that security which, at the time it was taken, was good and sufficient, does not continue to be so, we might upon a proper application, so adjudge and order as justice might require. But upon facts existing at the time the security was accepted, the action of the justice, within the statute and the rules of practice adopted for his guidance, is final." Affirmed and applied to *Martin v. Hazard Powder Co.*, 93 U. S. 302, 23 L. Ed. 885; *Williams v. Clafin*, 103 U. S. 753, 26 L. Ed. 606.

80. When additional security required.—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Williams v. Clafin*, 103 U. S. 753, 26 L. Ed. 606.

81. Ejectment.—*Roberts v. Cooper*, 19 How. 373, 15 L. Ed. 687.

82. The motion.—*Wood v. Richards*, 131 U. S., appx. xcvi. 19 L. Ed. 831.

83. Obviating defects in bonds and new bonds.—*Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260.

Where, through mistake or accident, no bond, or a defective bond, has been filed, this court will not dismiss the appeal—if it is in all other respects quite regular—except on failure to comply with an order to give the proper security within such reasonable time as it may prescribe. *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564, citing *Brobst v. Brobst*, 2 Wall. 96, 17 L. Ed. 905.

85. Discretion of court.—*Florida Cent. R. Co. v. Schulte*, 100 U. S. 644, 25 L. Ed. 605.

86. Time in which new bond may be filed.—*Ex parte Milwaukee, etc., R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Edmondson v. Bloomshire*, 7 Wall. 306, 311, 19 L. Ed. 91.

87. The Dos Hermanos. 10 Wheat. 306, 6 L. Ed. 328; *Edmondson v. Bloomshire*, 7 Wall. 306, 311, 19 L. Ed. 91.

9. **AMOUNT OF BOND.—Discretion of Court.**—Under the judiciary act of 1789 which provides that every justice or judge signing a citation shall take good and sufficient security that the plaintiff shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, the amount of security to be taken is left to the discretion of the judge or justice accepting it. The statute is satisfied if in his opinion the security is "good and sufficient."⁸⁸

Where Judgment Is Unsecured.—Where the judgment or decree is for the recovery of money not otherwise secured, the amount of the appeal bond must be for the whole amount of the judgment or decree. Accordingly, in cases where there is no security by way of mortgage for the defendant, and no fund in court to stand as security, the bond should be for the payment of the judgment or decree. So well has the principle been established that it is embodied in rule 29 of this court.⁹⁰ In other words, where the amount may be fixed by the judge or must be given to secure the amount of the decree, the appeal bond must be for the entire amount of the unsecured judgment rendered.⁹¹

88. Amount of bond discretionary.—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

The amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below, under the provisions of the twenty-ninth rule. The discretion thus exercised by him will not be interfered with by this court. If, however, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond have changed, so that security which at the time it was taken was "good and sufficient" does not continue to be so, this court, on proper application, may so adjudge and order as justice may require. *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

What is necessary is that the bond to prosecute the writ be sufficient, and when it is desired to make the appeal a supersedeas, that it be filed within ten days from the rendering of the decree, and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal that question as well as every other in the cause becomes cognizable here. It is therefore matter of discretion with the court to increase or diminish the amount of the bond and to require additional sureties or otherwise as justice may require. *Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *Rule 32*; *Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915; 1 Stat. at Large 404. *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

The question of sufficiency of an appeal bond is to be determined in the first instance by the judge who signs the citation; but after the allowance of the appeal it becomes cognizable here. It is not required that the security be in any fixed proportion to the amount of the decree; but only that it be sufficient. Where a decree had been for a large sum (\$310,752), security in less than double the amount was accepted by this court, and the appellants allowed to withdraw

a bond given in such double sum. *Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. Ed. 762.

90. Amount of bond where judgment unsecured.—*Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Roberts v. Cooper*, 19 How. 373, 15 L. Ed. 687; *Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270; *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529; *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 381, 27 L. Ed. 609.

Where the judgment or decree is for the recovery of money, not otherwise secured, the indemnity must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal. *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876; *S. C.*, 17 How. 275, 15 L. Ed. 101; *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

Where the judgment or decree is for money, not otherwise secured, the bond "must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal." Rule 29 of this court. And such bond must be approved and filed within the ten days prescribed for the service of the writ of error. *Adams v. Law*, 16 How. 144, 14 L. Ed. 880; *Hudgins v. Kemp*, 18 How. 530, 533, 15 L. Ed. 511; *Western Union Tel. Co. v. Eyser*, 19 Wall. 419, 426, 22 L. Ed. 43.

91. *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Roberts v. Cooper*, 19 How. 373, 15 L. Ed. 687; *Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270; *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529; *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 381, 27 L. Ed. 609.

Where Property Follows Event of Suit.—Rule 29 provides that in all cases where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal.⁹²

Under the 29th rule, in a suit on a mortgage, it is left to the discretion of the judge who signs the citation to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal.⁹³

If the bond taken in an ejectment case is amply sufficient to cover the damages or mesne profits, recovered in the court below, the bond will be held sufficient in amount and form.⁹⁵ Even in ejectment it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ.⁹⁶

Where Appeal Is or Is Not to Operate as Supersedeas.—All that is required in a case where the writ of error is not a supersedeas is that the bond shall be in an amount sufficient to answer the costs in case the judgment or decree is affirmed.⁹⁷ But in appeals from judgments or decrees for the recovery of money not otherwise secured, where the appeal or writ of error is to operate as a supersedeas, the security ought to be sufficient to secure the whole amount of the judgment or decree.⁹⁸ This rule continued until the case of *Rubber Co. v. Good-*

92. Amount where property follows event of suit.—*Jerome v. McCarter*, 21 Wall. 17, 30, 22 L. Ed. 515; *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876, opinion of Mr. Justice Catron; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 387, 27 L. Ed. 609; *French v. Shoemaker*, 12 Wall. 86, 99, 20 L. Ed. 270.

93. Amount of bond in suit on mortgage.—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515, citing *Black v. Zacharie*, 3 How. 483, 495, 11 L. Ed. 690, and explaining *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762; *French v. Shoemaker*, 12 How. 86, 99, 20 L. Ed. 270; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 390, 27 L. Ed. 609; *Supervisors v. Kennicott*, 103 U. S. 554, 557, 26 L. Ed. 486.

95. Bond in ejectment cases.—*Ex parte French*, 100 U. S. 1, 25 L. Ed. 529, following *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

96. Kountze v. Omaha Hotel Co., 107 U. S. 378, 392, 27 L. Ed. 609.

In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 390, 27 L. Ed. 609, the court did look to see whether the bond was sufficient to cover the mesne profits or damages recovered below; but declined to examine into its sufficiency to secure the mesne profits accruing pending the proceedings in error, leaving that to the discretion of the judge. The case decides nothing as to whether such mesne profits would be recoverable under the bond or not. By the English statute of 16 & 17

Car. II, c. 8, as we have seen, they would be so recoverable; but in *Roberts v. Cooper*, 19 How. 373, 15 L. Ed. 687, it was held that our statute does not provide for the case.

97. Amount as dependent on whether judgment is to operate as a supersedeas.

—*French v. Shoemaker*, 12 Wall. 86, 99, 20 L. Ed. 270; *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

Where there is no supersedeas or stay of execution, the statute provided that in such cases the amount of the security should be such as in the opinion of the judge would be sufficient to answer all such costs as upon the affirmation of the judgment or decree might be adjudged or decreed to the respondent in error. *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515, citing 1 Stat. at L. 404.

98. Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158.

The words of the act, "sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good," do not refer to "the nature of the claim upon which the original judgment is founded, but that they are descriptive of the indemnity which the defendant is entitled to, if the judgment be affirmed." And the court further say, "whatever losses he, the defendant in error, may sustain by the judgment not being satisfied and paid after the affirmation, these are the damages which he has sustained, and for which the bond ought to

year, 6 Wall. 153, 156, 18 L. Ed. 762, decided in 1867, and the adoption at the same time by the court of the present rule 29,¹ and is not to be confined to such damages as the appellate court may adjudge for the delay.²

Mandamus.—Where the security is insufficient, this court will, upon motion of the appellee, lay a rule upon the judge below, to show cause why a mandamus should not issue, commanding him to carry into execution the decree of the court below. Upon cause shown by the judge that, having taken what he considered to be good and sufficient security, the cause was appealed to this court, which removed it from his jurisdiction, and that he had no power to make an order in the case, this court will order a peremptory mandamus.³

Presumptions on Appeal.—Where there is nothing on the record to show to the court that the indemnity given by an appeal bond is insufficient, the presumption is that it is sufficient.⁴

10. **APPEALS IN ADMIRALTY.—In General.**—The rules, regulations and restrictions contained in the 22nd section of the judiciary act respecting the security to be given by the plaintiff in error for prosecuting his suit, are applicable to appeals in admiralty and maritime jurisdiction under the act of 1803.⁵

11. **APPEALS IN BANKRUPTCY.**⁶—Under an early statute it was held that applicants for an appeal from a district to the circuit courts under the jurisdiction created by the bankrupt act, must give bond as required under the act "to amend the judicial system," and the party claiming a writ of error must also give good and sufficient security to prosecute the writ to effect.¹⁰

12. **ACTIONS ON BONDS—*a. Liability of Sureties on Appeal Bonds***—(1) *Discharge of Sureties.*—**Alterations.**—The sureties are discharged if material interlineations be made in the bond after it is executed by the surety.¹¹

(2) *Extent of Liability of Sureties.*—It is elementary that the obligation of sureties upon bonds is strictissimi juris, and is not to be extended by implication or enlarged construction of the terms of the contract entered into.¹²

give good and sufficient security." *Catlett v. Brodie*, 9 Wheat. 523, 6 L. Ed. 158; *Stafford v. Union Bank*, 16 How. 135, 139, 14 L. Ed. 876; *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

1. Where the appeal is intended to operate as a supersedeas the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law. The two facts, namely, first, that the receiver appointed by the court below had given bond to a large amount and second, that the persons to whom the property had been hired had given security for its safe keeping and delivery, do not affect the above result. *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

2. *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876, 878.

3. **Mandamus.**—*Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

4. **Presumptions on appeal.**—*French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

5. **Appeals in admiralty.**—*The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202. See the title ADMIRALTY, vol. 1, p. 172.

The court declines to hear an argument whether mandamus shall issue to the circuit court directing it to order stipulators for value and sureties on an appeal bond in an admiralty suit to appear for examination concerning their property: whether it has the power to

issue the writ in such case quære. In re Phillips, 131 U. S., appx. clxvii.

9. See the title BANKRUPTCY.

10. **Appeals in bankruptcy.**—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 266, 21 L. Ed. 493.

11. **Discharge of sureties by material alterations.**—If a bond be executed by O. as a surety for S. to obtain an appeal from the judgment of a justice of peace in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O. the name of W. be interlined as an obligor who executes the bond, and the justice then accepts it, it is void as to O. *Oneale v. Long*, 3 Cranch 60, 2 L. Ed. 550. See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 261.

12. **Extent of liability of sureties.**—*Crane v. Buckley*, 203 U. S. 441, 447, 51 L. Ed. 260.

Where an appeal bond is given in a suit to foreclose a contract for the sale of certain land and for the recovery of the possession thereof, the sureties are liable upon the bond for the value of the use and occupation of the premises in question during the period for which the circuit court of appeals, upon the application for rehearing, modified the decree so far as to extend the right of one of the defendants in error and the principal in the bond, to remain in possession of

Joint and Several Liability.—A writ of error will not be dismissed because the sureties in the security bond are not jointly or severally bound for the full amount of the obligation, but each severally for a specified part only.¹³

Sureties in an admiralty appeal bond or stipulation may become liable for the whole amount specified, as the condition of the instrument is that the principal shall prosecute his appeal with effect, and pay all damages awarded against the appellant, if he fail to make good his appeal. Hence, the surety in such a bond is liable for the entire amount of damages and costs, to the extent of the penalty, and interest thereon from the date of the institution of the suit, when the property attached produces less than the judgment or decree.¹⁴

Under the decisions in Louisiana where bonds are given for appeal from an order directing a writ of seizure and sale of land, in a proceeding to enforce payment of the purchase money for the land, on which the vendor has retained a lien, the surety on the appeal bond becomes bound for the debt. That such is the effect of a bond for appeal in cases of this class has been repeatedly decided by the supreme court of Louisiana.¹⁵

Appeal from Decree Secured on Realty.—The sureties upon an appeal bond, the appeal being from a decree, for which land was held as security, are liable for the amount of the decree appealed from, deducting therefrom the proceeds of the land when sold.¹⁶ Nor are they entitled to a credit on the judgment on their bond, of the proceeds of such sale, to lessen their liability.¹⁷

Liability for Costs—Appeals from Intermediate Courts.—Unless the bond contains some special provisions to that effect, the sureties in such a bond given in a common-law action do not become liable for the costs incurred in consequence of a new appeal to a still higher court; or, in other words, the sureties in a bond given in the district court to indemnify the opposite party on an appeal to the circuit court are not liable for the costs incurred by a subse-

under the premises, postponing the foreclosure of his rights therein until the end of the period named in the extension. *Crane v. Buckley*, 203 U. S. 441, 51 L. Ed. 260.

13. Joint or several liability of sureties.—"The bond is certainly unusual in form, but we cannot say that it is not within the legal discretion of a justice or judge, under some circumstances, to take it. Cases may arise in which it will be impossible to obtain security if this mode is not adopted. It being within the discretion of the judge to accept such a bond as security, his action in that particular is final, and, under the rule laid down in *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515, not reviewable here." *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506, 507, 28 L. Ed. 809.

14. Sureties in admiralty bonds.—*Ives v. Merchants' Bank*, 12 How. 159, 13 L. Ed. 936; *The Wanata*, 95 U. S. 600, 617, 24 L. Ed. 461.

The surety for the appellants from a decree in admiralty gave bond to pay all costs and damages which might be adjudged by this court. This court having affirmed the decree of the circuit court with costs and six per cent. damages, judgment was entered upon the receipt of the mandate by the circuit court, for the amount of the original judgment together with the amount of costs and damages calculated up to that day; and execution was awarded. Under this execution, the vessel which had been attached

under the libel, was sold for less than this aggregate amount. The surety is not entitled to have a relative proportion of the proceeds of sale applied to the reduction of his bond, but is responsible upon it to the entire amount. *Ives v. Merchants' Bank*, 12 How. 159, 13 L. Ed. 936.

15. Liability of sureties in Louisiana.—*Marchand v. Frellsen*, 105 U. S. 423, 26 L. Ed. 1057, citing *Whann v. Irwin*, 27 La. Ann. 706; *Landry v. Victor*, 30 La. Ann. 1041.

According to the rule in Louisiana, where an appeal is taken from an order of the court directing a writ of seizure and sale to satisfy promissory notes given for the deferred payments of the purchase money for land, and an appeal bond is given, the appeal bond in such cases is a security for the payment of the notes on which the application for the order of seizure and sale is based. Therefore it is plain that the satisfaction of a bond for an appeal on one note cannot be a satisfaction of another bond for another appeal on a different note. Each note is a separate cause of action, and the satisfaction of one does not necessarily imply the satisfaction of another. *Marchand v. Frellsen*, 105 U. S. 423, 26 L. Ed. 1057.

16. Appeal from decree secured on realty.—*Sessions v. Pintard*, 18 How. 106, 15 L. Ed. 298.

17. Sessions v. Pintard, 18 How. 106, 15 L. Ed. 298.

quent removal of the cause from the circuit court to the supreme court, the rule being that in that court the plaintiff in error or appellant must give a new bond; but it is equally well settled that such new appeal will not diminish or discharge the liability of his sureties on the bond given in the district court, unless the judgment rendered in the district court is wholly reversed.¹⁸

Appeals from Special to General Term.—Sureties in a bond for an appeal from the special term to the general term are fixed in their liability when the judgment rendered in the special term is affirmed at the general term, but such sureties are not liable for costs in the appeal from the general term to the court of appeals, as the costs of such an appeal are not within the undertaking of the sureties in a bond given to prosecute the appeal from the special term to the general term, from which it follows that the sureties in the bond to prosecute the appeal from the general term to the court of appeals are alone responsible for such costs, without any claim for contribution from the sureties in the bond given to prosecute the appeal from the court of original jurisdiction to the general term.¹⁹

(3) *Pleas and Defenses.*—**Garnishment.**—It is no defense in an action against the sureties on an appeal bond that the defendant in the original judgment has been garnished, or the judgment sold at the instance of creditors of the plaintiff, where the sureties have not been made parties to the proceedings to appropriate such judgment.²⁰

But an accord and satisfaction may be set up in an action against the surety on an appeal bond.²¹

(4) *Liability Fixed by Affirmance of Judgment.*—The rule is universal that the affirmance of the judgment in the appellate court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect.²²

b. *Pleas.*—The plea is insufficient unless it contains the proper averments.²³

18. Liability of sureties for costs.—*Babbitt v. Shields*, 101 U. S. 7, 15, 25 L. Ed. 820.

19. *Babbitt v. Shields*, 101 U. S. 7, 13, 25 L. Ed. 820.

20. Plea of garnishment.—*Smith v. Gaines*, 93 U. S. 341, 23 L. Ed. 901.

21. Plea of accord and satisfaction.—The payment, after an adverse decree in the appellate court, of an agreed sum in compromise and settlement of his liability, by a surety on an appeal bond to the attorney of record in the suit, fully authorized by his principal to make the settlement and compromise, and a written receipt, signed by the attorney as attorney of record, stating that the money is paid "in full satisfaction of the decree rendered against" the surety, constitute an accord and satisfaction which can be set up in an action against the surety on the appeal bond; and proof that the proposition for compromise was made by defendant and accepted by plaintiff in the original suit, with the expectation that the litigation would be terminated, and that, notwithstanding this, other parties had taken a further appeal to this court to which the surety was not a party, is not admissible to vary the force of the satisfaction. *Bofinger v. Tuyes*, 120 U. S. 198, 30 L. Ed. 649.

22. Liability fixed by affirmance of judgment.—*Babbitt v. Shields*, 101 U. S. 7, 13, 25 L. Ed. 820.

Where the bond is given in a subor-

dinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. *Babbitt v. Shields*, 101 U. S. 7, 13, 25 L. Ed. 820.

The sureties in a bond given to prosecute the removal of the cause in this case from the district court to the circuit court become fixed when the judgment rendered in the district court is affirmed; nor does the removal of the judgment of affirmance rendered in the circuit court into the supreme court have any effect whatever to diminish the liability of those sureties. Certainly not, where the judgment rendered in the circuit court is affirmed in the supreme court. *Babbitt v. Shields*, 101 U. S. 7, 14, 25 L. Ed. 820.

24. Sufficiency of plea.—In an action on the bond given on appeal from the district court to the supreme court of the territory of Montana, a plea that the defendant had prosecuted a writ of error from the judgment of the territorial court to the supreme court of the United

c. *Damages.—Measure of Damages in General.*—The principal and sureties in a bond given on an appeal in foreclosure proceedings is limited to such only as follow from the delay in the sale of the property.²⁵

Rents and Profits.—But recovery may be had upon a supersedeas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property.²⁶

Usurpation of Office.—The measure of damages on an appeal bond for the usurpation of a public office is the amount of salary during the time the rightful incumbent was kept out of office.²⁷

States, and had executed his bond which operated as a supersedeas of that judgment, and that no remittitur or mandate had issued from the latter court, and that the judgment of the supreme court of the territory still remained in the court so stayed by the supersedeas bond and the order thereon, is insufficient in that it does not aver that at the commencement of this action the appeal was then pending in this court or had ever been perfected. Nor is the case altered by the practice act of Montana, which enacts, in its seventy-eighth section, that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice." *Gillette v. Bulard*, 20 Wall. 571, 22 L. Ed. 387.

25. *Measure of damages.*—An appeal was taken by a county from a decree of foreclosure rendered against it upon a mortgage of its lands, to secure the bonds of a railroad company. The decree was affirmed, and the costs of the appeal were paid. Held, that the liability of the county and its sureties upon the supersedeas bond is limited to such damages as resulted from a delay in the sale of the lands, and does not include the balance remaining unpaid of the decree after applying thereto the proceeds of the sale, nor the interest thereon which accrued pending the appeal. *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486.

26. *Woodworth v. Northwestern Mut. Life Ins. Co.*, 185 U. S. 354, 362, 46 L. Ed. 945, distinguishing *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

The obligee in a bond which supersedes an order of a circuit court of the United States confirming a sale of real estate on foreclosure in the state of Nebraska and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed. *Woodworth v. Northwestern Mut. Life Ins. Co.*, 185 U. S. 354, 357, 46 L. Ed. 945.

Following the reasoning in *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609, the appropriation by the mortgagor, during the pendency of a wrongful appeal by such mortgagor from an order confirming the sale on foreclosure, of the rents, issues and profits of the land, which equitably belonged to the purchaser, is "damage" within the meaning of the statute and the condition of the bond. In the *Kountze* case the mortgagee purchaser was denied the right to recover the rents and profits which had been collected by the mortgagor intermediate the decree of sale and the actual sale of the property. But this was, because the appeal was from a decree ordering a sale, and it was held the mortgagor was not divested of the right to collect and retain the rents and profits of the land before a final determination of a right to sell and a sale made accordingly. The taking by the mortgagor of that which belonged to him and not to the mortgagee it was decided did not constitute an injury to the latter. *Woodworth v. Northwestern Mut. Life Ins. Co.*, 185 U. S. 354, 362, 363, 46 L. Ed. 945.

In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609, the court in its reasoning, made plain the fact that where the real owner of the rents and profits of real estate, in whom the legal as well as equitable title had become vested before action brought upon the bond, was the party for whose benefit the bond on appeal was given, and the effect of the giving of such bond was to enable the mortgagor, the principal in such bond, to appropriate rents, issues and profits of the land during the pendency of the appeal, which equitably belonged to the purchaser, that appropriation constituted "damage" to the obligee in the bond, within the meaning of the condition for payment of "all damages and costs which it may incur by reason or on account of said appeal." *Woodworth v. Northwestern Mut. Life Ins. Co.*, 185 U. S. 354, 363, 46 L. Ed. 945.

27. *Quo warranto to try title to office.*—Where an intruder, ousted by judgment on quo warranto from an office having a fixed salary—and of personal confidence, as distinguished from one ministerial—takes a writ of error, giving a bond to prosecute the same with effect and to an-

Assessment of Damages.—By the 26th section of the judiciary act, the courts have power to assess damages upon bonds, etc., and to render judgment for so much as is due according to equity, in cases of default or confession or demurrer. This section does not apply to a case heard on agreed facts. But when the case heard on agreed facts is the case of an appeal bond, it is proper for the court to give judgment for the penalty of the bond (being less than the judgment under the mandate) and allow interest from the date of the institution of the suit, although the amount to be paid in this way would exceed the penalty of the bond.²⁸

d. *Interest.*—The party is as well entitled to interest, in an action on an appeal bond, as if he were to proceed on the judgment; if the judgment be on a contract for the payment of money he is entitled to interest from the rendition of the original judgment.²⁹

e. *Joint Judgment against Principal and Sureties.*—A statute authorizing judgment against the sureties on an appeal bond, as well as against the appellants, in case of affirmance, is not unconstitutional. "As the legislative power of the territory, by the organic act, extends to all rightful subjects of legislation consistent with the constitution of the United States, it would seem to extend to such a case as this. A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred."³⁰

The statutes of the territory of New Mexico enact that, on an appeal from the judgment of a district court, execution shall be stayed upon the appellant's giving bond, with sureties "conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the supreme court, and that if the judgment or decision appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, and that he will also pay the costs and damages that may be adjudged against him upon his appeal."³¹ They also contain a general provision that "in case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond;" and this court has adjudged that provision to be valid.³² Therefore, the judgment of the supreme court of the territory, affirming the judgment of the district court as to the principal sum

swear all costs and damages if he shall fail to make his plea good—thus, by the force of a supersedeas, remaining in office and enjoying its salary—does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond, by the party who had the judgment of ouster in his favor—the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the supersedeas. *United States v. Addison*, 6 Wall. 291, 292, 18 L. Ed. 919.

28. **Assessment of damages.**—*Ives v. Merchants' Bank*, 12 How. 159, 13 L. Ed. 936, distinguishing *Farrar v. United States*, 5 Pet. 373, 385, 8 L. Ed. 159; *McGill v. Bank*, 12 Wheat. 511, 514, 6 L. Ed. 711.

29. **Interest.**—*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

30. **Joint judgment against principal and sureties.**—*Beall v. New Mexico*, 16 Wall. 535, 21 L. Ed. 292; *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642, cited and followed in *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 401, 30 L. Ed. 447; *Hopkins v. Orr*, 124 U. S. 510, 515, 31 L. Ed. 523.

It is not error in an appellate state

court giving judgment against an appellant to include in the judgment sureties in the appeal and writ of error bond. By signing the bond they become voluntary parties to the bond and subject themselves to the decree. "The decree was rendered in the supreme court jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter. But there is no error in this. It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit and subject themselves thereby to the decree of the court." *Moore v. Huntington*, 17 Wall. 417, 422, 21 L. Ed. 642.

31. **Statute of New Mexico.**—*Prince's Laws*, c. 16, § 4; *Comp. Stat.*, § 2194.

32. *Prince's Laws*, c. 45, § 5; *Comp. Stat.*, § 2206; *Beall v. New Mexico*, 16 Wall. 535, 21 L. Ed. 292; *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642.

due, and also as to interest to the extent of six per cent. upon the plaintiffs' remitting the excess of four per cent. interest, is rightly rendered for the plaintiffs against the sureties in the bond as well as against the principal defendant.³³

f. *Summary Judgment*.—Under the conformity act, § 914, of the Revised Statutes of 1878, a summary judgment may be entered against sureties on appeal bonds given in proceedings in federal courts, if authorized by a statute of the state in which the cause is heard.³⁴ "Sureties, signing appeal bonds, stay bonds, delivery bonds, and receptors under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognition."³⁵

Under the laws of Louisiana, and § 570 of the Revised Statutes, sureties in an appeal bond, which operates as a supersedeas, are liable, by a summary proceeding, to judgment, after execution on the original judgment has been issued, and a return of nulla bona made by the proper officer. The officer who made this return cannot be compelled to amend or modify it, nor can its truth be questioned in the subsequent proceeding against the sureties.³⁶

33. *Hopkins v. Orr*, 124 U. S. 510, 514, 31 L. Ed. 523, distinguished in *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287, 299, 34 L. Ed. 670.

34. *Summary judgment*.—*Hiriart v. Ballon*, 9 Pet. 156, 9 L. Ed. 85; *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642; *Smith v. Gaines*, 93 U. S. 341, 23 L. Ed. 901.

35. *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673, opinion of Mr. Justice Miller.

Liability of sureties under mandate.—

A decree of the circuit court, affirming, on appeal, a decree of the district court, which had charged a respondent in admiralty with the payment of a sum of money specified, and decreeing that the appellee in the circuit court should recover it; and decreeing further, that unless an appeal should be taken from the said decree of the circuit court to the supreme court within the time limited by law, a summary judgment should be entered therefor against the stipulators on their stipulations given on appeal from the district court, is, as to the stipulators, a provisional decree only, and one which on appeal to the supreme court becomes inoperative. Accordingly, though such an appeal be taken from the decree of the circuit court, and the decree of that court be affirmed, and the cause remanded with instructions to the effect "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had," etc., the circuit court does not lose its power over its previous order as to summary judgment against the stipulators. And if, on a review of that order, the circuit court, from any reason, think proper to refuse to order execution against the stipulators, this court will not compel it by mandamus to order it. Under such a mandate as that above described the circuit court must itself decide whether ex-

ecution shall issue against the sureties. *Ex parte Sawyer*, 21 Wall. 235, 22 L. Ed. 617, explained in *Perrian v. Pacific Coast Co.*, 133 Fed. 143.

36. **Summary proceedings in Louisiana.**—*Smith v. Gaines*, 93 U. S. 341, 23 L. Ed. 901.

The district court of the United States for the eastern district of Louisiana, in conformity with the provisions of the act of congress of the 26th of May, 1824, adopted, as a rule of practice in that court, the regulations established by a law of Louisiana, by which, on appeal bonds, when the appellants failed in their appeal, on the coming in of the decree or judgment of the appellate court a summary judgment on motion should be entered against principal and securities in the appeal bonds. Under this rule, after the affirmance of a decree of the district court by the supreme court of the United States, and the filing of the mandate of the supreme court, the district court, on a motion for a rule on the security in an appeal bond to show cause why judgment should not be entered against him on the first day of the next term, and no cause being shown, entered a judgment against the security. The party against whom the judgment was entered afterwards came into court and prayed a trial by jury, which was refused; and he prosecuted this writ of error to reverse the judgment of the district court refusing the said trial. By the court: The rule of the district court of Louisiana follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof. The summary judgment is therefore strictly authorized, and the party had no right to a trial by jury. In becoming a security he submitted himself to be governed by the fixed rules which regulate the practice of the court. *Hiriart v. Ballon*, 9 Pet. 156, 9 L. Ed. 85.

g. Necessity for Execution.—At common law, the sureties on an appeal bond would be liable to a suit without issuing an execution against the principal. The fact that the judgment appealed from was affirmed and was unpaid would be sufficient. Their undertaking is to pay in that event, and they must do it.³⁷ In other words, it is not necessary in order to charge the sureties in an appeal bond that an execution on the judgment recovered in the appellate court should be issued against the principal. When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor.³⁸

But in Louisiana the issue of an execution and the return on it of the proper officer of *nulla bona* is what is required, and all that is required, to render perfect the obligation of the sureties to pay.³⁹

H. The Record or Transcript—1. DEFINITION.—The transcript is a copy of the proceedings in the court below.⁴⁰

A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly matter of record can be made such by inserting it therein. In several of the states the matters properly incorporated in judgment rolls are enumerated by statute.⁴¹

Record in Criminal Case.—Mr. Chitty, in his work upon Criminal Law, says (1 Chitty Cr. Law 720), that “the record in case of felony, states the session of oyer and terminer—the commission of the judges—the presentment by the oath of the grand jurymen by name—the indictment—the award of the *capias* or process to bring in the offender—the delivery of the indictment into court—the arraignment—the plea—the issue—the award of the jury process—the verdict—the asking the prisoner why sentence should not be passed on him—and judgment of death passed by the judges.”⁴²

2. ORIGINAL RECORD OR TRANSCRIPT.—**In General.**—A writ of error from this court does not bring up the original record, but only a transcript, as in the case of error to the House of Lords.⁴³ Papers properly belonging to the files of a court should not be removed therefrom, except in cases of positive necessity. When, therefore, an appeal is taken, no order for transmitting such papers ought to be made, unless the actual inspection of them as originals is required to enable the appellate court to give them their just and full effect in the determination of the suit.⁴⁴

History of Statutes.—In the act of 1803 (2 Stat. 244), which first authorized appeals to this court in “cases of equity, of admiralty and maritime jurisdic-

37. **Necessity for execution.**—*Smith v. Gaines*, 93 U. S. 341, 342, 23 L. Ed. 901.

38. *Babbitt v. Shields*, 101 U. S. 7, 15, 25 L. Ed. 820.

39. **Necessity for execution in Louisiana.**—*Smith v. Gaines*, 93 U. S. 341, 343, 23 L. Ed. 901.

40. **Definition of transcript.**—*Atherton v. Fowler*, 91 U. S. 143, 149, 23 L. Ed. 265.

41. *United States v. Taylor*, 147 U. S. 695, 698, 37 L. Ed. 335.

42. **The record in criminal cases.**—Quoted in *United States v. Taylor*, 147 U. S. 695, 698, 37 L. Ed. 335.

Perhaps the most satisfactory definition of a common law record in a criminal case under the American practice is found in *McKinney v. People*, 7 Illinois 540, 551, wherein it is said: “In a criminal case, after the caption stating the time

and place of holding the court, the record should consist of the indictment properly endorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. This in general is all that the record need state.” Quoted in *United States v. Taylor*, 147 U. S. 695, 698, 37 L. Ed. 335.

43. **Original record or transcript.**—*Bank v. Ashley*, 2 Pet. 327, 7 L. Ed. 440.

44. **Original record not to be removed.**—*Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577; *The Elsinour*, 1 Wheat. 439, 4 L. Ed. 130.

Original affidavits.—It was held in *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577 that original affidavits sent up by the clerk below are no part of the transcript in the cause, and the clerk of this court need not have them printed.

tion, and of prize or no prize," it was provided "that, upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said supreme court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes." Under this statute it was held that, where an inspection of original documents was material to the decision of a prize cause, this court would order the original paper to be sent up from the court below.⁴⁵

Rules of Court.—This decision was made in 1816, and the next year the following rule was promulgated (2 Wheat. VII): "Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the supreme court on appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings." This rule, with some slight modifications, is still in force as par. 4, Rule 8.⁴⁶

Act of 1864.—The statute law regulating this subject remained unchanged until 1864, when the "act to regulate prize proceedings and the distribution of prize money, and for other purposes" (13 Stat. 306), was passed. Section 13 of that act provided for appeals in prize causes direct from the district courts, and for the transfer, on proper application, of causes then pending in the circuit courts to the supreme court. Then followed this language: "All appeals to the supreme court from the circuit court, in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the district court to the supreme court. In any case of appeal or transfer from the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof." From this it is clear that it was the intention of congress to confine its legislation on this subject to prize causes, leaving the rules of court alone in force as to other cases.⁴⁷

The Present Statutory Provision.—But in the revision of this statute this special provision of the act of 1864 was reproduced in § 698, which is as follows: "Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the supreme court; provided, that either the court below or the supreme court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the supreme court, except in admiralty and prize causes." Construing this statute in the light of those from which it was taken, and the practice that had prevailed in the courts, which it was undoubtedly intended to confirm, the power of the courts below, and of this court, over the transmission of original papers to this court on appeal, is, and should be, confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit. This court will not undertake to control the discretion of the courts below in sending up papers which, in their judgment, require inspection; but where papers come up that ought not to be sent, we will look closely to the language of the order below to see whether they are included within its provisions.⁴⁸

45. *The Elsinour*, 1 Wheat. 439, 4 L. Ed. 130.

46. **Rule of court as to removing original record.**—*Craig v. Smith*, 100 U. S. 226, 230, 25 L. Ed. 577.

47. **Removal of original record in prize causes.**—*Craig v. Smith*, 100 U. S. 226, 231, 25 L. Ed. 577.

48. **Construction of § 698.**—*Craig v. Smith*, 100 U. S. 226, 231, 25 L. Ed. 577.

3. WHAT CONSTITUTES THE RECORD PROPER—*a. In General.*—An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it.⁴⁹ On the other hand, it may be said, in general, that anything which is not necessary to support the validity of the judgment is, presumptively at least, no part of the record, however material it may have been in the progress of the case. It is entirely clear that it is unnecessary to set forth matters merely incidental to the charge, and which had no immediate bearing upon the result of the case, or of the validity of the judgment.⁵⁰

Matters Which Are Not Part of Record.—Mr. Freeman, in his work upon Judgments, § 79, thus summarizes from the authorities "the matters which are not (unless made so by bill of exceptions or by consent, or by order of the court) matters of record," namely: "Matters of evidence, written or oral, including note, bond or mortgage filed in the case, and upon which suit is brought; an agreed statement of facts not in nature of special verdict; all motions, including motions to quash the writ, to amend the pleadings, for extensions of time, for continuances; for bonds, for prosecution, for bills of particulars; pleas stricken from the files, notices of motions, affidavits of claimants; bonds for trial of rights of property, affidavits in relation to conduct of jurors; all affidavits taken during the progress of the cause, memorandum of costs; power of attorney to confess the judgment, and affidavit in relation to the death of the maker thereof; report of judge of proceedings at the trial, reasons for his opinion in rendering judgment or in deciding application for a new trial; rulings of the court upon the admission of evidence; the instructions to the jury; statement of facts made by the judge for the purpose of taking the advice of the appellate court; and the ruling of the court upon an application to strike out a portion of the pleadings."⁵¹

Consent or Agreement of Parties.—An agreement of the parties, entered on the transcript, stating the amount of damages to be adjudged to one of the parties, upon several alternatives (the verdict stating no alternative), is not

49. What constitutes the record proper.—*Clune v. United States*, 159 U. S. 590, 593, 40 L. Ed. 269; *Metropolitan R. Co. v. MacFarland*, 195 U. S. 322, 49 L. Ed. 219; *Reed v. Gardner*, 17 Wall. 409, 21 L. Ed. 665.

From time immemorial the record has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it. *Metropolitan R. Co. v. MacFarland*, 195 U. S. 322, 332, 49 L. Ed. 219, citing *Clune v. United States*, 159 U. S. 593, 40 L. Ed. 269.

In *Mandeville v. Perry*, 6 Call 78, the court of appeals of Virginia, in answering the question "what this court will consider as constituting the record of which it is to take notice in cases of common law," says: "I answer, the writ for the purpose of amending by, if necessary, the whole pleadings between the parties. Papers of which a profert is made, or oyer demanded. And such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These,

with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in any common-law suits, and are to be noticed by the court, and no others." *United States v. Taylor*, 147 U. S. 695, 698, 37 L. Ed. 335.

All the papers which accompany the record, should be considered a part of it. *Bingham v. Cabbot*, 3 Dall. 19, 32, 1 L. Ed. 491.

On a bill of review in equity nothing can be examined but the pleadings, proceedings and decree, which, in this country, constitute what is called the record in the cause. The proofs cannot be looked into as they can on an appeal. *Putnam v. Day*, 22 Wall. 60, 22 L. Ed. 764.

50. United States v. Taylor, 147 U. S. 695, 700, 37 L. Ed. 335.

Thus, in *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261, it was held by this court that the report of the judge who tried the case at nisi prius, containing a statement of the facts, is not to be considered a part of the record.

51. Matters not included in the record.—*United States v. Taylor*, 147 U. S. 695, 699, 37 L. Ed. 335.

regarded by this court as a part of the record brought up by the writ of error.⁵²

b. *Assignment of Errors.*—A mere assignment of errors in an appellate court cannot be considered as a part of the record, unless it be made so by a legislative act.⁵³

c. *Certificates and Statements of Clerk.*—An unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record so as to bring it to the cognizance of this court.⁵⁴ Therefore, even if the facts occurred as certified by the clerk, his statement that they occurred does not bring them upon the record so as to make them the subject of review. There is but one mode of bringing upon the record and making a part of it the rulings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions allowed and sealed or signed by the judge.⁵⁵

Motion for New Trial.—Hence, the certificate of the clerk of the court that a motion was made for a new trial, and reasons and certain papers filed on which

52. Agreement of parties.—*Lanusse v. Barker*, 3 Wheat. 101, 4 L. Ed. 513.

53. Assignment of errors.—*Fisher v. Cockerell*, 5 Pet. 248, 259, 8 L. Ed. 114, 118.

54. Certificates and statements of clerk.—*Reed v. Mash*, 13 Pet. 153, 10 L. Ed. 103; *Fisher v. Cockerell*, 5 Pet. 248, 254, 8 L. Ed. 114.

Where the record transmitted to this court, certified by the clerk of the circuit court, states that an appeal from a decree in chancery was taken in open court, upon a motion made on behalf of the appellee to dismiss the appeal, upon the ground that it has not been removed in the manner that the law requires, and therefore we have no jurisdiction over it, the certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted to this court, cannot be filed as evidence of the irregularity of the removal. "Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the circuit court, can be received here to impeach its verity, or to show that the certificate ought not to have been given." "And if from inadvertence or mistake of the clerk of the court below, or from any other cause, the record transmitted is defective or incorrect, the errors or omissions should have been suggested in this court, and a certiorari moved to bring up a correct and true transcript of the proceedings." *Hudgins v. Kemp*, 18 How. 530, 534, 15 L. Ed. 511.

It is no part of the duty of the clerk, nor has he authority as such, to state upon the record what was offered in evidence on the trial, or what opinions were expressed by the court in relation to the evidence, otherwise than as stated in the bill of exceptions itself. The statements of the clerk, so far as they are contrary to the statements verified by the seal of the judge, must be wholly disregarded. *De La Croix v. Chamberlain*, 12 Wheat. 599, 6 L. Ed. 741.

Entries by clerk in his minutes.—In

Young v. Martin, 8 Wall. 354, 19 L. Ed. 418, where entries had been made by the clerk in his minutes, stating the filing of a demurrer, argument thereon, and overruling of the demurrer, and that exception had been taken by plaintiff, it was held that the exception was not available. The court said (p. 356, L. Ed. p. 419): "These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders of judgment of the court." *Metropolitan R. Co. v. MacFarland*, 195 U. S. 322, 49 L. Ed. 219.

Denial of motion to remand.—In determining a question whether a circuit court had erred in denying a motion to remand a case removed to it from the state court, and giving judgment as if the case had been rightly removed to it, this court cannot pay any attention to a certificate of the clerk of such circuit court, certifying that on the hearing of the motion in the circuit court certain things "appeared," "were proved," or "were admitted," or "agreed to" by the parties respectively; such facts not appearing by bill of exceptions nor by any case stated. Neither party can gain any advantage by such a statement. "It is true, the clerk makes a recital, running through nearly three pages of the transcript, of the various matters which, he says, were proved on the hearing of this motion, and of certain stipulations and admissions. These recitals form no part of the record and cannot be considered by us. They are not even authenticated by the signature of the judge, nor could they be, to be made available here, except through the mode of a bill of exceptions." *Knapp v. Boston R. Co.*, 20 Wall. 117, 22 L. Ed. 328.

55. Statement of clerk of no avail.—*Insurance Co. v. Lanier*, 95 U. S. 171, 24 L. Ed. 383.

the motion was founded, which are on the files of the court, is not a part of the record; nor do the reasons on the files of the court become a part of the record by such certificate.⁵⁶

Error to State Court.—But the certificate of the clerk of a state court, appended to an order remanding a prisoner to custody upon habeas corpus, makes that order part of the record upon error to the state court.⁵⁷

d. *Citation.*—The citation is not a part of the record, it forming no part of the proceedings of the court below.⁵⁸

e. *Depositions, Affidavits and Exhibits.*—The pleadings, and the statements of the bill of exceptions, the verdict, and the judgment, are the only matters that are properly before the court. Depositions, exhibits, affidavits or certificates not contained in the bill, cannot be regarded as part of the record,⁵⁹ unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions.⁶⁰

56. Certificate that motion for new trial was made.—*Reed v. Marsh*, 13 Pet. 153, 10 L. Ed. 103, citing *Fisher v. Cockerell*, 5 Pet. 248, 254, 8 L. Ed. 114.

57. Error to state court in habeas corpus.—Where upon a motion to dismiss the writ of error to a state court, it appears that the suit in the state court was by writ of habeas corpus, issued out of the supreme court, upon return of which the petition appears to have been discharged; but on the same day this order seems to have been reconsidered, and the petitioner remanded to custody, it was held that the certificate of the clerk appended to the order remanding the petitioner, made that order part of the record. The usual certificate, that the transcript contained all the orders and proceedings in the cause precedes the certificate just referred to. *Crandall v. Nevada*, 131 U. S., appx. lxxxiii.

58. Citation not part of record.—*Innerarity v. Byrne*, 5 How. 295, 12 L. Ed. 159; *Hudgins v. Kemp*, 18 How. 530, 537, 15 L. Ed. 511, 514.

The presumption is, that one was issued when the writ of error was allowed, and it may be proved aliunde. *Innerarity v. Byrne*, 5 How. 295, 12 L. Ed. 159.

59. Depositions, affidavits and exhibits.—*Reed v. Gardner*, 17 Wall. 409, 411, 21 L. Ed. 665.

Depositions, and exhibits of every description, are papers in the cause, and in one sense of the word, form a part of the record. In some states, they are recorded, by direction of law. But in a jury cause, they constitute no part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by bill of exceptions, or in some other manner recognized by law. *Williams v. Norris*, 12 Wheat. 117, 6 L. Ed. 571.

As a common-law proceeding, the affidavit constitutes no part of the record. *United States v. 422 Casks of Wine*, 1 Pet. 547, 550, 7 L. Ed. 257.

An affidavit, copies of which appear in the transcript, form no part of the

record proper, unless it is put into the record by some action of the court as by bill of exceptions, or something which is equivalent. *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811, distinguishing *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *United States v. Taylor*, 147 U. S. 695, 37 L. Ed. 335; *Nelson v. Flint*, 166 U. S. 276, 279, 41 L. Ed. 1002.

"And in *Williams v. Norris*, 12 Wheat. 117, 6 L. Ed. 571, it was determined that neither depositions nor exhibits of any description, constitute 'any part of the record on which the judgment of appellate court is to be exercised, unless made a part of it by a bill of exceptions, or in some other manner recognized by law.' These cases, we think, have a strong tendency to support the proposition, that the paper in the transcript denominated the 'case,' cannot be regarded as a part of the record, and if not, then it is clear that it cannot be considered on the present occasion, irrespective of the fact that it was not filed more than a year after the writ of error issued, which of itself is decisive of the point that it cannot be considered. *Williams v. Norris*, 12 Wheat. 117, 120, 6 L. Ed. 571." *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978, 983.

Affidavit for use on motion.—Only errors apparent on the record can be considered, and an affidavit filed for the use on a motion is not a part of the record, any more than the deposition of a witness used on the trial, and only becomes a part of the record by being incorporated in a bill of exceptions. *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. Ed. 439; *Evans v. Stettinisch*, 149 U. S. 605, 607, 37 L. Ed. 866.

Upon a writ of error upon an exchequer information, which has been tried by a jury, the evidence given at the trial is not, in a strict sense, before this court. *United States v. 422 Casks of Wine*, 1 Pet. 547, 7 L. Ed. 257.

60. Must be shown by record.—*Metro-politan R. Co. v. MacFarland*, 195 U. S. 322, 49 L. Ed. 219, Baltimore, etc., R. Co. v. Sixth Presbyterian Church, 91 U. S.

Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions.⁶¹

An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties.⁶²

Depositions taken under a commission from a circuit court in an admiralty case, after an appeal to this court, will not be made a part of the record, unless a sufficient excuse be shown for not taking the evidence in the usual way before the courts below.⁶³

Affidavits presented to the master, as ground of the respective applications to reopen the proofs, cannot be looked into on the hearing in this court. They form no part of the evidence taken before the master on the writ.⁶⁴

f. *Findings of Court*.—See ante, "Review of Findings of Court," IV, E. 12, b.

Under the act of congress authorizing trials by court, no bill of exceptions is needed to bring up anything upon the record. The finding, whether general or special, belongs to the record as fully as do the verdicts of the jury.⁶⁵ But additional findings of fact by a court, made after the entry of the judgment, and at the request of either party without notice to the other, forms no part of the record.⁶⁶

g. *Minutes*.—Docket entries in the courts of the District of Columbia, as in Maryland, stand in the place of, and perhaps are, the record, and receive all the consideration that is yielded to the formal record in other states.⁶⁷

h. *Opinions of Court*.⁶⁸—**In General**.—The opinion of the court below is no part of the record any more than the judge's minutes,⁶⁹ unless made a part of

127, 23 L. Ed. 260; *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577.

A party cannot by merely filing with the clerk an affidavit not incorporated in any bill of exceptions, bring into the record evidence of what took place on the trial. *Nelson v. Flint*, 166 U. S. 276, 279, 41 L. Ed. 1002.

Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions. Matters of parol evidence in such a case can never be made a part of the record so as to become re-examinable in a court of errors, unless it be in one of four ways: (1) By an agreed statement of facts. (2) By a bill of exceptions. (3) By a special verdict. (4) By a demurrer to the evidence; which latter mode is seldom or never adopted in modern practice. *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260.

61. Affidavits to support motion for new trial.—*Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 390, 32 L. Ed. 439; *Evans v. Stettinisch*, 149 U. S. 605, 37 L. Ed. 866.

62. Affidavit for continuance.—*Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435.

63. Depositions taken under a commission.—*The Juniata*, 91 U. S. 366, 23 L. Ed. 208, citing *The Mabey*, 10 Wall. 419, 19 L. Ed. 963.

64. Affidavits to reopen proofs.—*Thom-*

son v. Wooster, 114 U. S. 104, 117, 29 L. Ed. 105.

65. Findings of court.—*Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395.

66. Additional findings.—*Kahn v. Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266.

67. Minutes.—*Washington, etc., Steam Packet Co. v. Sickles*, 24 How. 333, 16 L. Ed. 650.

Mere waste docket minutes.—According to the practice in Pennsylvania, where the defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according to their mode of keeping records this result is entered by way of note; e. g., "new trial refused and judgment on the verdict." Although this may be good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

68. See ante, "Over State Courts," III, D, 7.

69. Opinion of court no part of record.—*Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395.

The opinion of the court is not a part of the record. Our rule 8, § 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below. *England v. Gebhardt*, 112 U. S. 502, 506, 28 L. Ed. 811, criticised in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. Ed. 280.

England v. Gebhardt (1884), 112 U. S.

it by bill of exceptions.⁷⁰

Error to State Court.—And this was formerly the well-settled rule upon error to a state court under the 25th section of the judiciary act.⁷¹

The Rule of Court.—Our Rule 8, § 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below.⁷² It has been held in construing this rule that the opinion

502, 505, 506, 28 L. Ed. 811, was a writ of error to review a judgment of a circuit court remanding to the state court a case removed therefrom under § 5 of the act of March 3, 1875, ch. 137, 18 Stat. 472. In the petition for removal in that case it was averred that the parties to the suit were citizens of different states, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was, of course, based upon facts brought to the attention of the court in the proper form. But the facts bearing upon the question of divers citizenship did not appear in a bill of exceptions, nor in an agreed statement of facts, nor in a special finding in the nature of a special verdict, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court held that the affidavits formed no part of the record. Distinguished in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 481, 45 L. Ed. 280.

Construction of act of 1809.—An opinion, not given to the jury, pronounced after a verdict was rendered, and, consequently, having no influence on that verdict, which states merely the course of reasoning which conducted the court to its judgment, may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record. An act passed in the year 1809, "to establish circuit courts, and a supreme court of errors and appeals," enacts, "that the judges of the court of errors and appeals, as well as the circuit court judges, shall, as to the decisions of all material points, file their opinions in writing among the papers of the cause in which such opinion may be given, within ten days from the delivering of the same." This sentence amounts to no more than a provision that the opinion of the judges shall appear, and shall be preserved with the other papers; but does not make that opinion a part of what is technically denominated "the record," more than the other papers in the cause among which it is filed. *Williams v. Norris*, 12 Wheat. 117, 6 L. Ed. 571.

70. The opinions of the court, given incidentally in the progress of the trial, are no part of the record, unless made a part of it by bill of exceptions. *De La*

Croix v. Chamberlain, 12 Wheat. 599, 6 L. Ed. 741.

71. **Error to state court.**—*Gordon v. Longest*, 16 Pet. 97, 103, 10 L. Ed. 960; *Mobile v. Eslava*, 16 Pet. 234, 246, 10 L. Ed. 960. But see the title APPEAL AND ERROR, vol. 1, p. 766.

72. **Construction of rule of court.**—*England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 482, 45 L. Ed. 280.

The opinion of the court cannot, under our rule, be referred to for the purpose of ascertaining the evidence or the facts found below upon which the judgment was based; but this court is not precluded from looking into the opinion of the trial court for any purpose whatever, as for instance, for the purpose of ascertaining whether either party claimed, in proper form, that a state law, upon which some of the issues depended, was in contravention of the constitution of the United States. The principal if not the only object of requiring the opinion to be annexed to and transmitted to this court was that we might be informed of the grounds upon which the court below proceeded. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 482, 45 L. Ed. 280, citing *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811.

"In *United States v. Taylor*, 147 U. S. 695, 700, 37 L. Ed. 335, which came from a circuit court of the United States, this court said: 'It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record, *Williams v. Norris*, 12 Wheat. 117, 119, 6 L. Ed. 571; *Rector v. Ashley*, 6 Wall. 142, 18 L. Ed. 733; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. Ed. 317; but the inconvenience of this rule became so great that it was subsequently changed, *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429, and, finally, the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript.' In *Sayward v. Denny*, 158 U. S. 180, 181, 39 L. Ed. 941, in which the question was whether it sufficiently appeared from the record that the state court had denied any federal right or immunity specially set up or claimed by the party who invoked our jurisdiction, the chief justice observed that certain propositions must be regarded as settled—one of which was that the arguments of counsel formed no part of the

of the court is not a part of the record. But that language is not to be taken too broadly or without reference to the particular case then before the court.⁷³

The constitution of Louisiana requires the state judges to give reasons for their decisions; but this is not operative upon the judges of the circuit court of the United States. On the contrary, their reasons form no part of the record when the case is brought up to this court.⁷⁴

Stenographic Report of Opinion.—Where it is assigned for error that the court below, in general term, refused to consider one of the grounds for a new trial which stated that the verdict is against the weight of evidence, this assignment cannot be supported by referring to the stenographic report of the oral opinion of the justice speaking for the general term. This report cannot control the record of the case as certified to it.⁷⁵

Stipulations between Parties.—Where the counsel for both parties in this court agree to certain parts of the opinion of the court below as containing the material facts of the case, and to treat them here as facts found by that court, this court will act upon the agreement here as if it had been made in the court below.⁷⁶

Direct Appeals under Circuit Court of Appeals Act.—This court will look to the opinion of the circuit court for the purpose of ascertaining whether it was claimed that the state law contravened the constitution of the United States, upon a writ of error to this court under the fifth section of the circuit court of appeals act of March 3, 1891, allowing appeals or writs of error to be prosecuted to this court from the circuit courts "in any case in which the Constitution or a law of a state is claimed to be in contravention of the Constitution of the United States."⁷⁷

record, 'though the opinions of the state courts are now made such by rule'—citing, among other cases, *United States v. Taylor*, above referred to. The rule of our court referred to does not apply alone to cases brought here from the highest court of a state. It applies, in terms, to all cases brought to this court by writ of error or appeal. What therefore was said in the above cases as to the object and effect of the rule applies to records from a circuit court of the United States." *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 483, 45 L. Ed. 280, opinion of Mr. Justice Harlan.

73. *Loeb v. Columbia Township*, 179 U. S. 472, 45 L. Ed. 280, criticising *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811. The opinion of the circuit court, although, as required by a rule of this court, annexed to and transmitted with the record, is no part of it. *The Elizabeth Jones*, 112 U. S. 514, 519, 28 L. Ed. 812.

74. *Louisiana practice.*—*Parks v. Turner*, 12 How. 39, 13 L. Ed. 883.

On account of the peculiarity in practice in that state, it has been decided in several cases coming from the state courts of Louisiana to this court by writ of error, that we would regard the statements of the fact found in the opinions of the court as part of the record, where they were in themselves sufficient and otherwise unobjectionable. And perhaps this may in practice have been extended to cases from the federal courts of that district. But in regard to the latter, we are not now at liberty to do so. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 50, 19 L. Ed. 65.

75. *Stenographic report of opinion.*—*District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472, citing *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 561, 30 L. Ed. 1022.

76. *Stipulations.*—"We are asked in the present case to accept the opinion of the court below, as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence. Besides, it does not profess to be a statement of the facts, but is very correctly called in the transcript, 'reasons for judgment.' But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made." *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 51, 19 L. Ed. 65.

77. *Direct appeals under court of appeals act.* *Loeb v. Columbia Township*, 179 U. S. 472, 45 L. Ed. 280, distinguishing *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811. See the title APPEAL AND ERROR, vol. 1, p. 469.

In a case brought here from a circuit

i. *Matters Resting in Parol*.—Matters resting in parol, like the opinion of the court, are not a part of the record, and nothing therein contained can be assigned for error.⁷⁸

j. *Pleadings*.—Rulings on the pleadings necessarily appear on the record without a bill of exceptions.⁷⁹

A plea in abatement to the jurisdiction of the court and the judgment of the court upon it, are part of the record in the court below, and are to be considered by this court, because a writ of error always brings up to the superior court the whole record of the proceedings in the court below.⁸⁰

Demurrer.—When parties, after a demurrer interposed by them to an answer is overruled, instead of relying upon its sufficiency, file a replication, they thereby abandon the demurrer, and it ceases henceforth to be a part of the record.⁸¹

k. *Petition for Rehearing*.—See ante, "Over State Courts," III, D, 7.

A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment.⁸²

1. *Petition for Appeal or Removal of Causes*.—See ante, "Over State Courts," III, D, 7.

The petition for a writ of error forms no part of the record of the court below.⁸³ On the other hand, petitions for removal and motions to remand are matters of record proper.⁸⁴

m. *Proceedings before Commissioners*.—In the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record.⁸⁵

court the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the constitution of the United States. By this, however, it must not be understood that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, 45 L. Ed. 280.

78. Matters resting in parol.—*Williams v. Norris*, 12 Wheat. 117, 118, 6 L. Ed. 571; *Davis v. Packard*, 6 Pet. 41, 8 L. Ed. 312; *Medbury v. State*, 24 How. 413, 414, 16 L. Ed. 739.

Errors of the circuit court resting in parol cannot be re-examined in this court by writ of error. Instead of that, the writ of error addresses itself to the record; and the rule is, that, whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of facts, or by demurrer, the error is open to re-examination and correction. *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42.

79. Pleadings.—*Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47, citing *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608.

This court can notice a material incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although

such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here. *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907.

80. Plea in abatement.—*Scott v. Sandford*, 19 How. 393, 403, 15 L. Ed. 691, citing *United States v. Smith*, 11 Wheat. 172, 6 L. Ed. 443.

81. Demurrer.—*Young v. Martin*, 8 Wall. 354, 19 L. Ed. 418, citing *Aurora City v. West*, 7 Wall. 82, 92, 19 L. Ed. 42; *Ferguson v. Meredith*, 1 Wall. 25, 42, 17 L. Ed. 604.

82. Petition for rehearing.—*Grame v. Mutual Assur. Society*, 154 U. S. 676, 26 L. Ed. 740, citing *Steines v. Franklin County*, 14 Wall. 15, 21, 20 L. Ed. 846.

A petition for rehearing forms no part of the record and cannot be noticed. The jurisdiction of this court depends on the matter disclosed in the bill of exceptions. *La Grange v. Chouteau*, 4 Pet. 287, 7 L. Ed. 861.

83. Petition for appeal.—*Clark v. Pennsylvania*, 128 U. S. 395, 32 L. Ed. 487, citing *Warfield v. Chaffe*, 91 U. S. 690, 23 L. Ed. 383; *Susquehanna Boom Co. v. West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69; *Manning v. French*, 133 U. S. 186, 193, 33 L. Ed. 582.

The petition for the allowance of a writ of error forms no part of the record in the court below. *Warfield v. Chaffe*, 91 U. S. 690, 23 L. Ed. 383.

84. Petition for removal no part of record.—*McDonnell v. Jordan*, 178 U. S. 229, 234, 44 L. Ed. 1048.

85. Proceedings before commissioners.—*United States v. Taylor*, 147 U. S. 695,

n. *Process*.—Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions—as where proper testimony is rejected or where improper testimony is admitted—but there may be error in the proceedings of a subordinate court apparent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict, as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law, and they have been adopted and applied in this court in repeated cases.⁸⁶

o. *Report of Judge*.—The report of the judge, who tries the cause at nisi prius, containing a statement of the facts, is not to be considered as a part of the record. The judgment being rendered upon a general verdict, and the report being mere matter in pais to regulate the discretion of the court as to the propriety of granting a new trial, the writ of error, in such a case, will be dismissed.⁸⁷ Nor is the case settled by the judge presiding at the trial, pursuant to a rule of the circuit court, for the single purpose of a hearing in banc in that court, as upon a motion for a new trial, part of the record on error.⁸⁸

p. *Verdict and Judgment*.—(1) *In General*.—A judgment of a court appealed from is never incorporated into a bill of exceptions. It is always a part of the record of the case, and like the plea and the verdict, it needs no bill of exceptions, but is simply to be transcribed as a part of the record.⁸⁹

Thus the judgment of the court upon a question of the dismissal of an appeal, need not be presented by any bill of exceptions, because a judgment of a court appealed from is never incorporated into a bill of exceptions; it is always a part of the record of the case like the plea and the verdict.⁹⁰

So, also, confession of judgment is a part of the record when made out, and it may be copied from the papers in the case.⁹¹

But a judgment by consent entered on the transcript or on the merits of the court below, forms no part of the record brought up to this court by writ of error.⁹²

Sufficiency of Judgment Record.—The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used. If it is designed for use in the review by the appel-

700, 37 L. Ed. 335; *United States v. King*, 147 U. S. 676, 37 L. Ed. 328.

86. *Process*.—*Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Cohens v. Virginia*, 6 Wheat. 264, 433, 5 L. Ed. 257; *Snydam v. Williamson*, 20 How. 427, 433, 15 L. Ed. 978; *New Orleans R. Co. v. Morgan*, 10 Wall. 256, 261, 19 L. Ed. 892.

87. *Report of judge*.—*Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *Snydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

88. *Case settled by judge*.—*Claasen v. United States*, 142 U. S. 140, 147, 35 L. Ed. 966.

89. *Verdict and judgment always part of record*.—*Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 474, 30 L. Ed. 1214.

It is too plain for argument that the verdict and judgment are part of the record; therefore where the error is apparent both on verdict and on the judgment, it is a matter which is re-examinable in

this court on a writ of error. *New Orleans Ins. Ass'n Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

Judgments by default.—"In reviewing the decision of the circuit court, it should be borne in mind, as a rule to guide and control our examination, that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding indeed, from the writ and indorsements thereon, down to the judgment itself, inclusive, is a part of the record, and is open to examination." *Harris v. Hardeman*, 14 How. 333, 338, 14 L. Ed. 444.

90. *Judgment of dismissal*.—*Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 30 L. Ed. 1214.

91. *Confession of judgment*.—*Slicer v. Pittsburg Bank*, 16 How. 571, 14 L. Ed. 1063.

92. *Judgment by consent*.—*Lanusse v. Barker*, 3 Wheat. 101, 4 L. Ed. 343.

late court of the rulings of the court below, upon the introduction of testimony, or of the validity of the charge to the jury, it must contain in a bill of exceptions so much of the testimony or charge as is necessary to a clear understanding of the questions involved. But if, upon the other hand, it be designed only for the purpose of preserving a record of the conviction in perpetuum rei memoriam, little more is necessary than to set forth the process and return thereto, the pleadings, journal entries, verdict and judgment.⁹³

(2) *Issues to the Jury*.—The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court, and the party submitting it must procure, for the use of the chancellor, notes of the proceedings at the trial, and of the evidence there given. The evidence and proceedings become then a part of the record, and are subject to review by the appellate court should an appeal from the decree be taken. These rules are not affected by the second section of the act of Feb. 16, 1875 (18 Stat., part 3, p. 315), which provides that in a patent case the circuit court, when sitting in equity, may impanel a jury and submit to them such questions of fact as it may deem expedient.⁹⁴

q. *Papers Filed after Issuance of Writ*.—A paper filed after the writ of error issues, cannot be considered a part of the record.⁹⁵

r. *Record in Another Suit*.—The record of another court cannot be presented and invoked to supply defects in a transcript of the proceedings of the court when the judgment is sought to be reviewed.⁹⁶ Nor can reference properly be had to a transcript of the record in a case pending in another court to supply defects in the record of a case in this court.⁹⁷

93. Sufficiency of judgment record.—United States *v. Taylor*, 147 U. S. 695, 699, 37 L. Ed. 335.

94. Issues to the jury.—*Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826, reaffirming *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271. See *Brockett v. Brockett*, 3 How. 691, 692, 11 L. Ed. 786. See the title ISSUES TO THE JURY.

Where a court of chancery suspends proceedings in a cause in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court of law, and a motion for new trial must be made to that court but when it directs an issue to be tried at law, a motion for a new trial must be made to the court of chancery; and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the chancellor. This is done either by having the proceedings and evidence reported with the verdict, or by moving the chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken. See *Graham*, *New Trials*, by *Waterman*, vol.

III, p. 1551. *Watt v. Starke*, 101 U. S. 247, 250, 25 L. Ed. 826.

95. Papers filed after issuance of writ.—*Williams v. Norris*, 12 Wheat. 117, 120, 6 L. Ed. 571; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

A writ of error operates only upon the record and brings it into this court. Therefore, where a paper was filed in the court below after the writ of error was issued, which paper, purporting to contain all the evidence, both admitted and rejected, was signed by the judge and certified to be correct by the counsel of the appellee, and concluded as follows: "A verdict was then, by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to turn this case into a special verdict or bill of exceptions," this paper cannot be considered a part of the record. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

96. Record in another court.—*Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. Ed. 441, distinguishing *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660.

97. Record in another proceeding.—*South Carolina v. Wesley*, 155 U. S. 542, 544, 39 L. Ed. 254.

The record in another suit is not before this court on appeal, where there is not in the record any stipulation that such other record be considered as a part of the bill, nor identified in any way. And the statement in the bill in equity which was brought to impeach a decree

4. **ERRORS NOT APPARENT ON FACE OF RECORD AND MATTERS TO BE SHOWN BY RECORD**—*a. In General.*—When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequence of his neglect or oversight.⁹⁸ In short, upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record.⁹⁹ If the facts upon which the court below pronounced their

for fraud, that the plaintiff prays liberty to refer to the files and records of the circuit court in the suit the record of which is admitted to be introduced, to show such and such things, can be of no force or effect to allow either party to claim in this court the right to produce or to refer to anything, as answering the description of such files and records, which it may assert to be such, or as being what the circuit court considered as before it. *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498.

Case distinguished.—In *Pennsylvania Co. v. Bender*, 148 U. S. 255, 261, 37 L. Ed. 441; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660, is distinguished as follows: "But all that that case decided was that when the statute of the state fails to make certain proceedings had in the trial court a part of the record for review in the appellate court, a law of congress which gives a specific effect to those proceedings, if sufficient in form, compels an examination of them in the appellate court, in order that it may be there determined whether the trial court improperly refused, to give the due effect to them. Or, to state it in other words, the act of congress broadens the technical rule of the state statute so as to include in the record other proceedings actually had in the trial court. But that case does not decide that an appellate and reviewing court must examine other than the proceedings of the court whose judgment is sought to be reviewed. See upon this question the case of *Good-enough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co.*, 131 U. S. appx. ccxxviii, decided by this court in 1877, and reported in 24 L. C. P. R. Co. Rep. 368.

98. **Errors not apparent on face of record and matters to be shown by record in general.**—*Pomeroy v. State Bank*, 1 Wall. 592, 600, 17 L. Ed. 638; *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60, 61, 34 L. Ed. 585; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260; *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *Graham v. Bayne*, 18 How. 50, 60, 15 L. Ed. 265; *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517, citing *Pugh v. McCormick*, 14 Wall. 361, 375, 20 L. Ed. 789; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

"Parties dissatisfied with the ruling of a subordinate court, and intending to seek a revision of the same in the appellate court, must take care to raise the questions to be re-examined, and must see to it that the questions are made to appear in the record; for nothing is error in law except what is apparent on the face of the record by bill of exceptions, or an agreed statement of facts, or in some one of the methods known to the practice of courts of error for the accomplishment of that object. *Suydam v. Williamson*, 20 How. 427, 433, 15 L. Ed. 978; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Steph. on Plead.* 121; *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Strother v. Hutchinson*, 4 Bing. N. C. 83." *Storm v. United States*, 94 U. S. 76, 81, 24 L. Ed. 42.

Courts sitting in error will not discuss questions not raised by the record before them. *Gardner v. Babcock*, 3 Wall. 240, 18 L. Ed. 31.

Allowance of excessive fees.—Where objection is made in this court that a court below allowed a clerk and marshal there excessive fees, but the record, while showing what fees were allowed, furnishes no means of ascertaining what services were rendered by the clerk or marshal, nor any means of determining whether the fees were or were not in excess of what is authorized by law, the objection cannot be sustained. *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 202.

Review of decision of commissioner of patents.—This court will not review the decision of the commissioner of patents upon the question of inadvertence, accident or mistake, unless the matter is manifest from the record. *Topliff v. Topliff*, 145 U. S. 156, 171, 36 L. Ed. 658.

Disqualification of judges.—While the courts cannot too carefully guard against the attempt of any interested judge to force himself upon litigant parties and should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for determination of his rights, this court must be able to find in the record something establishing or offering to establish such fact. *McGuire v. Blount*, 199 U. S. 142, 50 L. Ed. 125.

99. *Claasen v. United States*, 142 U. S. 140, 147, 35 L. Ed. 966.

This court looks only at the technical

judgment do not appear on the record, it is impossible for this court to say that their judgment is erroneous in law.²

And it is also laid down by the best writers on pleading that nothing will be error in law that does not appear on the face of the record, for matters not so appearing are not supposed to have entered into the consideration of the judges.⁴

Neither the assignment of errors, nor the plea of *in nullo est erratum*, can give this court jurisdiction of errors not appearing on the face of the record.⁵

Limitation of General Rule.—But this is only one of the rules of evidence for the exercise of its jurisdiction as a court of error; it prescribes what shall and what shall not be received as evidence of what was done in the court below; and when an act of congress cannot be executed without disregarding this general rule, it becomes the duty of this court to disregard it. The plaintiff in error, having a right to have the erroneous judgment reversed, must also have the right to have the only legal proceedings, which could be had consistently with the act of congress, examined to show that error.⁶

record, and affirms or reverses the judgment according to what may appear thereon. *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *Fisher v. Cockerell*, 5 Pet. 248, 8 L. Ed. 114; *Reed v. Marsh*, 13 Pet. 153, 10 L. Ed. 103; *Suydam v. Williamson*, 20 How. 427, 439, 15 L. Ed. 978; *Pomeroy v. State Bank*, 1 Wall. 592, 603, 17 L. Ed. 638; *Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684.

Where a question was passed *sub-silentio* in the court below, but it does not appear from anything on the record that the point was waived, it cannot be considered, because this court is not at liberty to look beyond the record. *Kerr v. Watts*, 6 Wheat. 550, 5 L. Ed. 328.

Where a case is brought here by a writ of error, we can reverse the judgment only for errors of law apparent in the record. *Wadsworth v. Warren*, 12 Wall. 307, 313, 20 L. Ed. 402.

Where the question whether opera glasses should be regarded as falling within the description of paragraph 216, as a manufacture composed wholly or in part of metal, and, therefore, dutiable at 45 per cent. *ad valorem*, is not raised by the record, and no instruction was asked of the court based upon this interpretation, we do not find it necessary to express an opinion upon the subject. See *Berger v. Hardy*, 150 U. S. 420, 424, 37 L. Ed. 1129.

Taking notes by jury.—An assignment of error to the action of the court in allowing the jurors to take notes, will not be noticed, where the record does not show that any notes were taken, and there is nothing for the exception to rest on. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624.

2. *Prentice v. Zane*, 8 How. 470, 485, 12 L. Ed. 1160.

In accordance with the well settled rule that the inquiry by this court into the jurisdiction of the court below, is limited to the facts appearing on the record in the first instance, reference cannot be

made to the entire pleadings, the evidence, or the rulings of the court below. *Colorado, etc., Min. Co. v. Turck*, 150 U. S. 138, 37 L. Ed. 1030.

4. **Opinions of text writers.**—*Suydam v. Williamson*, 20 How. 427, 437, 15 L. Ed. 978, citing *Steph. on Plea.*, 121.

5. *In re Claassen*, 140 U. S. 200, 35 L. Ed. 409; *Claassen v. United States*, 142 U. S. 140, 148, 35 L. Ed. 966.

6. **Limitations of general rule.**—*Kanouse v. Martin*, 15 How. 198, 210, 14 L. Ed. 660, 665.

But it is objected that this is a writ of error to the supreme court, and that by the local law of New York, that court could not consider this error in proceedings of the court of common pleas, because it did not appear upon the record, which, according to the law of the state, consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and judgment for the want of a plea, and the assessment of damages; and that these proceedings, under the act of congress, not being part of this technical record, no error could be assigned upon them in the superior court. This appears to have been the ground upon which the superior court rested its decision. That it was correct, according to the common and statute law of the state of New York, may be conceded. But the act of congress, which conferred on the defendant the privilege of removal, and pointed out the mode in which it was to be claimed, is a law binding upon all the courts of that state, and if that act both rendered the judgment of the court of common pleas erroneous, and in effect gave the defendant a right to assign that error, though the proceeding did not appear on the technical record then, by force of that act of congress, the superior court was bound to disregard the technical objection, and inspect these proceedings, unless, which we shall presently consider, there was some defect in its

b. *Record in Criminal Case.—In General.*—Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken,⁷ but a deficiency in one part may be supplied by what appears elsewhere in the record.⁸

Illustrative Cases.—For example, the record must show what the prisoner is charged with,⁹ that the court had jurisdiction of the case,¹⁰ that it was demanded of the accused to plead to the indictment, or that he did so plead,¹¹ the presence of the accused,¹² and that the defendant was duly convicted and sentenced.¹³

c. *Review of Order of Remand.*—As a writ of error brings up for review only such errors as are apparent on the face of the record, it follows that nothing can be considered here on a writ of error to review an order remanding a cause to a state court, any more than in others, that is not presented in some appropriate form by the record.¹⁵

jurisdiction which disabled it from doing so. *Kanouse v. Martin*, 15 How. 198, 208, 14 L. Ed. 660, 664.

7. What record in criminal case must show.—*Crain v. United States*, 162 U. S. 625, 645, 40 L. Ed. 1097.

Where in a criminal case, the record is so meagre as to give us little information as to the merits of the case, and presents but few questions for our consideration, if the verdict is sustained by the trial judge, this court will assume that the testimony, only a small portion of which being before us, was sufficient to establish the guilt of the defendant, and unless error is disclosed in the special matters presented for our consideration, the judgment must be affirmed. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91.

8. Supplying deficiencies.—While the record of a criminal case must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted together, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. *St. Clair v. United States*, 154 U. S. 134, 154, 38 L. Ed. 936, citing *Pointer v. United States*, 151 U. S. 396, 38 L. Ed. 208.

9. Charge against accused.—*United States v. Taylor*, 147 U. S. 695, 37 L. Ed. 335.

10. Jurisdiction of court.—*United States v. Taylor*, 147 U. S. 695, 37 L. Ed. 335.

11. Arraignment and Plea.—The rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by § 1025 of the Revised Statutes, but involves the substantial rights of the accused. *Crain v. United States*, 162 U. S. 625, 645, 40 L. Ed. 1097.

12. The record must show the presence of the accused, and in all capital cases it is essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced. *Ball v. United States*, 140 U. S. 118, 35 L. Ed. 377.

The presence of the defendants in a criminal case is not essential when the judgments are affirmed against them by an appellate court. *Schwab v. Berggren*, 143 U. S. 442, 36 L. Ed. 218; *Cross v. United States*, 145 U. S. 571, 36 L. Ed. 821.

13. Conviction and sentence.—*United States v. Taylor*, 147 U. S. 695, 700, 37 L. Ed. 335.

Sentence and punishment.—But the common-law rule that in capital cases the record must show that inquiry was made of the defendant before judgment was passed, whether he had anything to say why the sentence of death should not be pronounced upon him; thus giving him an opportunity to allege any ground of arrest, or to plead a pardon, if he obtained one, or to urge any legal objection to further proceedings against him, does not apply to an appellate court which, upon review of proceedings in the trial court, merely affirms the final judgment, without rendering a new one. *Schwab v. Berggren*, 143 U. S. 442, 36 L. Ed. 218.

15. Review of order of remand.—*England v. Gebhardt*, 112 U. S. 502, 505, 38 L. Ed. 811. See the title REMOVAL OF CAUSES.

The transcript from the state court becomes a part of the record in the federal court, in cases removed from state to federal courts. Accordingly as it is already a record of another court transcribed and certified to this court, and in any writ of error from the supreme court of the United States, that transcript from the state court necessarily becomes a part of the record. *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 30 L. Ed. 1214.

d. *Amendments*.—An order of the court below refusing the complainant leave to amend his bill after demurrer thereto has been sustained cannot be reviewed here, if the record does not show what amendment he desired to make.¹⁶

e. *Laws and Statutes*.—**Statutes of the States**.—In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof.¹⁷

But the private laws of a state, and special proceedings of the legislature of a state, in regard to the sale of the estate of a deceased person for his debts, could not be considered, unless they were found in the record.¹⁸

On a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up.¹⁹

And foreign laws must appear in the record.²⁰

16. **Amendments**.—*Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815.

17. **Laws and statutes**.—*Course v. Stead*, 4 Dall. 22, 27, 1 L. Ed. 724; *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168; *Owings v. Hull*, 9 Pet. 607, 625, 9 L. Ed. 246; *United States v. Turner*, 11 How. 663, 668, 13 L. Ed. 857; *Pennington v. Gibson*, 16 How. 65, 14 L. Ed. 847; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 230, 15 L. Ed. 896; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604; *Junction R. Co. v. Bank*, 12 Wall. 226, 230, 20 L. Ed. 385; *Lamar v. Micou*, 114 U. S. 218, 29 L. Ed. 94; *Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535.

"The settled rule that the circuit court of the United States, as well as this court on appeal or error from that court, takes judicial notice of the laws of every state of the union. *Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, and cases there collected." *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751, 30 L. Ed. 823.

This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another. *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 622, 30 L. Ed. 519.

18. **Private laws**.—The public laws of a state may, without question, be read in

this court, and the exercise of any authority which they contain may be derived historically from them. But private laws, and special proceedings of this character, are governed by a different rule. They are matters of fact, to be proved as such in the ordinary manner. This court cannot go into an inquiry as to the existence of such facts upon a writ of error, if they are not found in the record. *Leland v. Wilkinson*, 6 Pet. 317, 8 L. Ed. 412.

19. **Error to state court**.—*Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, citing *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109.

20. **Foreign laws**.—Where a Canadian statute was introduced and treated as evidence by consent of counsel upon a motion for a rehearing in the district court, though it did not appear of record, and, in obedience to a writ of certiorari from the court of appeals, was certified up to the court of appeals by the clerk of the district court as a true copy of the original act as published, it was held that the court of appeals should have treated the act as properly before it, notwithstanding the clerk did not formally certify it to be a part of the record, but only certifies that he had "carefully compared the same with the original act as published and find the same to be a true copy of such original and of the whole thereof." "It thus appears that the Canadian statute had been used in the district court by consent of counsel, had been treated as part of the record, and that the copy sent up was a true copy of the statute as published. It is true that the clerk did not formally certify it to be a part of the record, but the fact that it had been so treated was established by the affidavit; and the writ of certiorari upon its face recited the fact that a copy of the statute had been introduced in evidence, as al-

f. Jurisdiction of Court Below.—(1) *In General.*—It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rests must, in some form, appear on the face of the record of all suits prosecuted before them.²¹ Thus, the facts upon which an objection to jurisdiction in the court below was based must appear of record.²² And it is error for a court to proceed without its jurisdiction is shown.²³

Reversal.—Where the record in this court in error or on appeal fails to show jurisdiction, the judgment will be reversed and the cause remanded by this court

leged, and required the court below to 'send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said district court.' In view of these proceedings, we think the circuit court of appeals should have accepted the certified copy of the statute as properly in evidence before it." *The New York*, 175 U. S. 187, 198, 44 L. Ed. 126.

21. Jurisdiction of court below in general.—*Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Hornthall v. Keary*, 9 Wall. 560, 19 L. Ed. 560; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Bors v. Preston*, 111 U. S. 252, 255, 28 L. Ed. 419; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714.

The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 100, 40 L. Ed. 630.

In the circuit courts of the United States, the record must show that the case is one in which, by the constitution and laws of the United States, the court had jurisdiction—and if this does not appear, and the court gives judgment either for plaintiff or defendant, it is error, and the judgment must be reversed by this court—and the parties cannot by consent waive the objection to the jurisdiction of the circuit court. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

"Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear, upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act. *Mansfield, etc., R. Co. v. Swan*, 111 U. S.

379, 382, 28 L. Ed. 462; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226, 30 L. Ed. 623; *Cameron v. Hodges*, 127 U. S. 322, 325, 32 L. Ed. 132." *Parker v. Ormsby*, 141 U. S. 81, 83, 35 L. Ed. 654.

22. Objections to jurisdiction.—*Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601.

Motion for judgment.—Where an exception is taken to the overruling of a motion judgment on the pleadings, it must appear from the record upon what grounds the decision of the lower court rested. *Young v. Martin*, 8 Wall. 357, 19 L. Ed. 418.

Diversity of citizenship.—A suit was brought in a circuit court; properly as regarded the citizenship of the parties. The defendant died, and his representatives were made defendants; nothing being said as to their citizenship. On motion to dismiss because the plaintiff and defendants were citizens of the same state, the circuit court refused the motion, but on what ground did not appear; the record not showing whether any evidence had been taken on the matter, and recording only that the defendants "reserved their exception to the decision of the court." Held, "in order to bring the facts properly before us a bill of exception, setting forth what was proved and the decision of the court, should have been taken. As the record stands we cannot examine the subject. * * * The court overruled the motion, but upon what ground does not appear. It is noted on the record that the plaintiffs in error 'reserve their exception to the decision of the court.' This is all that the record contains touching the motion. For aught that appears to the contrary, the court may have overruled it, because the facts of the residence of the defendants as stated in the motion were not proved, or because it was proved that they resided in a state or states other than Maryland." *Kearney v. Denn*, 15 Wall. 51, 56, 21 L. Ed. 41.

23. Grace v. American Cent. Ins. Co., 109 U. S. 278, 27 L. Ed. 932; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 239, 30 L. Ed. 380, followed in *Halstead v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Colorado, etc., Min. Co. v. Turck*, 150 U. S. 133, 142, 37 L. Ed. 1030.

on its own motion, and the party in default will be adjudged to pay costs here.²⁴ But such decree of reversal on the ground that the record contained no evidence of the jurisdiction of the circuit court may be vacated, where the record shows that the suit was brought to restrain the enforcement of a judgment in ejectment recovered in the same circuit court.²⁵

(2) *In Summary Proceedings.*—In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record. Otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice*.²⁶

(3) *Citizenship of Parties.*—In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this court has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears from the record.²⁷

24. Reversal for want of jurisdiction.—*Everhart v. Huntsville College*, 120 U. S. 223, 30 L. Ed. 623; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Halstead v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714; *Johnson v. Christian*, 125 U. S. 642, 31 L. Ed. 820. See post, "Reversal," XVII, Q.

Unless it appears upon the face of the record, when brought here by writ of error, that the circuit court had jurisdiction, the judgment must be reversed. The case of *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229, examined, and the principles thereby decided reaffirmed. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

The first objection now made to the decree is, that the circuit court had no jurisdiction, either of the suit originally begun in that court, or of that removed from the state court. If the jurisdiction does not appear on the face of the record in some form, the decree is erroneous and must be reversed. That was decided at the present term in *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380, to which reference is made for the authorities. *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435.

When it does not appear, affirmatively, from the record that the circuit court had jurisdiction, the judgment below will be reversed and the cause remanded for further proceedings in accordance with law. *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905, citing *Mercalf v. Watertown*, 128 U. S. 586, 588, 32 L. Ed. 543.

25. Vacating judgment of reversal.—*Johnson v. Christian*, 125 U. S. 642, 31 L. Ed. 820.

26. Jurisdiction in summary proceedings.—*Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221.

27. Citizenship of parties.—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Bors v. Preston*, 111 U. S. 252, 255, 28 L. Ed. 419. See the title COURTS.

A circuit court, though not an inferior court in the language of the common law, yet it is one of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace, and therefore the fair presumption is that a cause is without its jurisdiction, until the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid, further than its jurisdiction appears, or can be presumed, to set forth upon the record of a circuit court, the facts or circumstances which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if the suit be upon a promissory note, by an assignee, to show that the original promisee is so: for by a special provision of the statute, it is his description, as well as that of the assignee, which effectuates jurisdiction. *Turner v. Bank*, 4 Dall. 8, 11, 1 L. Ed. 718.

Diversity of citizenship.—A suit was brought in a circuit court; properly as regarded the citizenship of the parties. The defendant died, and his representatives were made defendants; nothing being said as to their citizenship. On motion to dismiss because the plaintiff and defendants were citizens of the same state, the circuit court refused the motion, but on what ground did not appear; the record not showing whether any evidence had been taken on the matter, and recording only that the defendants "re-

But while the facts upon which the jurisdiction rests must somewhere appear in the record, they need not necessarily be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record.²⁸

Reversal.—Where the transcript of the record does not show that the circuit court had jurisdiction of the suit, which depended upon the citizenship of the parties, and counsel, upon having their attention called to the matter, furnish nothing of record which would supply the defect, the judgment must be reversed at the costs of the plaintiff in error, and the cause remanded to the circuit court for further proceedings.²⁹

(4) *Service of Process.*—While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on nonresidents are necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute expressly or by implication requires it. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction.³⁰

served their exception to the decision of the court." Held, that as the record stood, there was no case that this court could examine. "Error must be shown. It is never presumed. We cannot take cognizance of the exception reserved upon the record, any more than we could of an exception noted in like manner to the admission of improper testimony or misdirection by the judge to the jury, in the trial of a cause." *Kearney v. Denn*, 15 Wall. 51, 21 L. Ed. 41.

Averment of citizenship in joinder in demurrer.—The demandant, a subject of the King of Great Britain, instituted an action by writ of right, in the district court for the northern district of New York against the defendant, a citizen of New York. In the declaration there was no averment that the defendant was a citizen of New York. The defendant pleaded to the first count in the declaration, and demurred to the second and third counts; the demandant joined in the demurrer, and averred that the defendant was a citizen of New York. In the subsequent proceedings in the case in the district court, and afterwards in the supreme court, no exception was taken by the defendant that there was no averment in the declaration that the defendant was a citizen of the United States; and not until the case came a second time before the supreme court, to which it was now brought by a writ of error, prosecuted by the demandant in the writ of right. The defendant moved to dismiss the writ of error, for the want of an averment of the citizenship of the defendant in the declaration. The court overruled the motion. The district court was not bound to receive the averment of the citizenship of the defendant in the joinder in the demurrer, and clearly ought not to have received it if it had been objected to by the tenant. But he has waived the objection by failing to make it at an earlier stage of the cause; and after the proceedings which have taken

place in the district court and in this court, and when the cause has been so long continued and allowed to proceed in the same condition of the pleadings and averments, it would be unjust to the demandant to dismiss it upon this mere technical informality. The pleadings, in fact, contain all the averments required by the decisions of this court to give jurisdiction to the courts of the United States, and as they appear to have been acquiesced in by the tenant, and regarded as sufficient in the district court, and were not objected to in this court when the case was here on the application for a mandamus, the informality cannot be relied on now to dismiss the suit. *Bradstreet v. Thomas*, 12 Pet. 59, 9 L. Ed. 999, cited in *Smith v. Clapp*, 15 Pet. 125, 128, 684, 10 L. Ed. 684.

28. Jurisdictional facts need not be averred.—*Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. 322, 326, 22 L. Ed. 823; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 449, 5 L. Ed. 302.

According to the uniform decisions of this court, on petitions for removal of causes from state to federal court, the jurisdiction of the circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462.

29. Reversal.—*Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Cooper v. Newell*, 155 U. S. 532, 39 L. Ed. 249.

30. Service of process.—*Kempe v. Kennedy*, 5 Cranch 173, 3 L. Ed. 10; *Voorbees v. United States*, 10 Pet. 443, 9 L. Ed. 490; *Grignon v. Astor*, 2 How 319,

(5) *Validity of Judgment Where Jurisdiction Not Shown*.—If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity.³¹

g. *Jurisdiction of Appellate Court*.—(1) *Steps Necessary to Give Jurisdiction to Appellate Court*.—It is not necessary that all of the steps required to give this court jurisdiction should even be on file in the court below, and certainly need not appear to be of record in that court.³²

aa. *Prayer for and Allowance of Appeal*.—The petition for a writ of error forms no part of the record upon which action here is taken.³³ Hence it is usually a sufficient ground for dismissal that the record shows no allowance of appeal in the court below.³⁴

bb. *Issuance and Service of Citation*.—It is held that since the issuance and service of the citation is not jurisdictional, where the record transmitted to this court does not show that the citation has been issued and served, this is no ground for dismissing the case, and the fact may be proved aliunde.³⁵ But where the record does not show that there was any citation, the appeal must be dismissed.³⁶

Service of Citation.—It has been held, however, where the transcript of the record fails to show any service of the citation, the cause will be dismissed with costs, but leave may be granted to the plaintiff in error to move within sixty days from the date of the judgment for the restoration of the cause to the docket.³⁷ But though the record sued upon does show that defendant was not served with process, yet if it also shows his voluntary appearance by an attorney, this is sufficient. If this appearance was authorized, it is as effective for the purposes of jurisdiction as an actual service of summons.³⁸

cc. *Taking of Security or Appeal Bond*.—Where the transcript of the record

11 L. Ed. 283; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 269, 29 L. Ed. 892.

31. Validity of judgment where jurisdiction not shown.—Therefore, where a party interested consented to the sale of property, afterwards took the benefit of the insolvent law, and at a subsequent period counsel representing him filed a consent decree to complete the sale, the trustee having taken no steps for two years to connect himself with the proceedings in court, and then having suffered fifteen years more to elapse without moving in the business, it is too late for such trustee to object to the consent decree. *Kennedy v. State Bank*, 8 How. 586, 12 L. Ed. 1209.

The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the circuit courts of the United States. In *Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70, this court say: "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." *Kennedy v. State Bank*, 8 How. 586, 611, 12 L. Ed. 1209.

32. Jurisdiction of appellate court.—*Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed.

97; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

33. Prayer for and allowance of appeal.—*Clark v. Pennsylvania*, 128 U. S. 395, 32 L. Ed. 487; *Warfield v. Chaffe*, 91 U. S. 690, 23 L. Ed. 383; *Manning v. French*, 133 U. S. 186, 192, 33 L. Ed. 582.

34. Chicago v. Bigelow, 131 U. S., appx. xciii, 19 L. Ed. 257.

Where the record does not show that an appeal was asked for or rendered, the the appeal must be dismissed. *Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 635, citing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163.

35. Issuance and service of citation.—*Innerarity v. Byrne*, 5 How. 295, 12 L. Ed. 159.

That the record does not show that a citation has been issued and served, is no ground for dismissing the case. It need not appear of record. It may be shown aliunde. *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511, 512; S. C., p. 514.

36. Entire absence of citation.—*Monger v. Shirley*, 131 U. S., appx. cx, 20 L. Ed. 635, citing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Palmer v. Donner*, 7 Wall. 541, 19 L. Ed. 99; *Castro v. United States*, 3 Wall. 46, 49, 18 L. Ed. 163.

37. Service of citation.—*Callender v. Bates*, 127 U. S., appx., 781.

38. Hill v. Mendenhall, 21 Wall. 453, 454, 22 L. Ed. 616.

shows that no appeal bond was taken or approved by the judge who signed the citation in the cause, the appeal will be dismissed.³⁹

(2) *Amount in Controversy*.—See "Showing and Determination of Amount, III, F, 16, vol. 1, p. 877.

h. *Evidence*—(1) *In General*.—Evidence, whether written or oral, and whether given to the court or the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial, and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law.⁴⁰ In other words, before the finding of a fact upon evidence submitted upon a hearing by the court can be re-examined on a writ of error, they must be brought into the record by a bill of exceptions, or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose.⁴²

39. *Taking of security or appeal bond*.—*Boyce v. Grundy*, 6 Pet. 777, 8 L. Ed. 579.

40. *Putting the evidence on the record*.—*Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260; *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 329, 13 L. Ed. 441; *Corinne Mill, etc., Co. v. Johnson*, 156 U. S. 574, 39 L. Ed. 537; *Nelson v. Flint*, 166 U. S. 276, 41 L. Ed. 1002; *Cohn v. Daley*, 174 U. S. 539, 43 L. Ed. 1077; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. Ed. 682; *Clune v. United States*, 159 U. S. 590, 40 L. Ed. 269; *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 261, 43 L. Ed. 689.

The evidence given on the trial of an issue at common law, is no part of the record, unless made a part of it by bill of exceptions, demurrer to evidence, or case agreed by parties, and entered of record. *De La Croix v. Chamberlain*, 12 Wheat. 599, 6 L. Ed. 741.

This court has also held, in *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978, that the evidence and the exceptions thereto constitute no part of the record, unless incorporated in a bill of exceptions signed and sealed by the presiding judge. *United States v. Taylor*, 147 U. S. 695, 700, 37 L. Ed. 335. See, also, *Pomeroy v. State Bank*, 1 Wall. 592, 17 L. Ed. 638.

Evidence or statements of fact not contained in the bill of exceptions, nor made a part thereof, though appended thereto, will not be regarded by the court. *National Bank v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554.

Where the facts to prove an award unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award. *Thornton v. Carson*, 7 Cranch 596, 661, 3 L. Ed. 451, 452.

Where the record on an appeal by a purchaser at a foreclosure sale from a decree declaring the claim of an intervenor to be a lien on the property, does not contain the testimony taken before the masters, or their final report upon which the decree is entered, or the answer of the defendant from the contract involved, the record is too meagre for the court to determine whether there was error in the decree. *Kneeland v. Luce*, 141 U. S. 437, 35 L. Ed. 808.

Election between counts in indictment.—Where the court overrules defendant's motion on the evidence to compel the district attorney to elect on which of several counts in an indictment he will ask conviction, but the bill of exceptions does not contain the evidence, it is impossible for this court to know the ground on which the circuit court proceeded. Therefore an exception in that regard will not be considered. *Barrett v. United States*, 169 U. S. 218, 42 L. Ed. 723.

Written proof to sustain plea of prescription.—The circuit court having instructed the jury that, in its opinion, under the written proofs and law of the case, the plea of prescription must prevail, and the written proofs not being in the record, this court cannot test the accuracy of its conclusion. *Anderson v. Bock*, 15 How. 323, 14 L. Ed. 714.

42. *Storm v. United States*, 94 U. S. 76, 81, 24 L. Ed. 42; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260; *England v. Gebhardt*, 112 U. S. 502, 503, 28 L. Ed. 811.

If either party, in an action at law, is desirous of preserving the evidence, either at the trial or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose to make an agreed statement of facts. *Knapp v.*

The parties may certainly waive testimony by consent, but if this consent does not appear, it cannot be presumed.⁴⁴

Sufficiency of Bill of Exceptions.—But the bill of exceptions need not state in so many words that it contains all the evidence, where it sufficiently appears that it does contain all.⁴⁵ The rule in both civil and criminal cases is that although there is no affirmative statement in the bill of exceptions that it contains all the testimony, yet such omission is not fatal, where the recitals in such bill sufficiently show that it does contain all the evidence. In other words, although the bill of exceptions does not state, in words, that it contains all the evidence, it is sufficient if it is shown that it does in fact contain all the evidence.⁴⁶

Boston R. Co., 20 Wall. 117, 121, 22 L. Ed. 328.

Where there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, the supreme court of the United States cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did. *United States v. Copper, etc.*, Min. Co., 185 U. S. 495, 498, 46 L. Ed. 1008; *Corrine Mill, etc., Co. v. Johnson*, 156 U. S. 574, 39 L. Ed. 537.

Error to territorial court.—On writ of error from the supreme court of the United States to the supreme court of a territory, the question in the case was whether the defendant R. was a bona fide resident of the territory and also a citizen of the United States. The bill of exceptions did not state that it contained all the evidence given upon the trial; but there was printed together with the bill of exceptions, the statement that a motion for a new trial was made, and the remarks of the court are set forth upon his denial of the motion, which inferentially, admitted that there was not sufficient evidence to show that R. was such citizen. It was held, that the supreme court of the United States cannot say that there was no evidence of the residence and of the citizenship of R. upon which the verdict of the jury might be sustained. *United States v. Copper, etc.*, Min. Co., 185 U. S. 495, 46 L. Ed. 1008.

44. Waiver of testimony.—*Conn v. Penn.*, 5 Wheat. 424, 426, 5 L. Ed. 125.

45. Sufficiency of statement in bill of exceptions.—*Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 43 L. Ed. 689; *Crowe v. Trickey*, 204 U. S. 223, 51 L. Ed. 454, followed in *Crowe v. Harmon*, 204 U. S. 241, 51 L. Ed. 461.

Where it is assigned as error that the supreme court of the territory erred in considering or determining the case upon questions of fact, because the bill of exceptions failed to state that it contained all the evidence given in the case, and that the record failed "to show that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision" of the court, yet

if the supreme court proceeded upon the record as containing all the evidence, this court cannot hold that the contention that it should not have done so is open to our consideration under the limitations of the statute. *Crowe v. Trickey*, 204 U. S. 223, 51 L. Ed. 454, followed in *Crowe v. Harmon*, 204 U. S. 241, 51 L. Ed. 461.

"All the testimony" synonymous with "all the evidence."—"Whether the concluding words in the bill of exceptions, 'which was all the testimony offered on the trial of the cause,' would be treated as meaning all the evidence, if unexplained by the context of the bill, need not be considered, as all the recitals in the bill, from the caption to the end thereof, taken together, we think, conclusively show that the words, 'all the testimony,' were used as synonymous with 'all the evidence.' This conclusion is strengthened by the fact that the bill was settled contradictorily, and no reservation as to its incompleteness was made." *Waldron v. Waldron*, 156 U. S. 361, 378, 39 L. Ed. 453.

Evidence at preliminary examination.—An exception to the action of a trial court in permitting to be read in evidence the evidence of a witness which had been taken in the presence of the accused in open court at a preliminary hearing, and read to and signed by the witness, the reason given by the district attorney for the use of the deposition being that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court, is of no avail, where no error was assigned in the court below to the admission of this evidence, nor is it made the subject of assignment in this court. And where the record does not disclose the nature or effect of the testimony so admitted. "In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant." *Murray v. Louisiana*, 163 U. S. 101, 108, 41 L. Ed. 87.

46. *Clyatt v. United States*, 197 U. S. 207, 49 L. Ed. 726, citing *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 43 L. Ed. 689.

"If, in a civil case, such recitals in the bill of exceptions are sufficient to show

Statements by Court.—This court must regard the evidence in the record as supplemented by the statement of the evidence by the court to which no exception was taken.⁴⁷

Motion to Direct Verdict.—This court cannot review a ruling upon a motion on behalf of the defendant at the close of the whole evidence for an instruction in his favor, when the bill of exceptions does not purport to contain all the evidence.⁴⁹ In other words, when the supreme court of the United States is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial so that the record shall affirmatively show the fact.⁵⁰

Hearing of Petition for Removal of Cause.—Before the finding of facts upon evidence presented and decided at the hearing of the petition for removal of a cause from a state to a federal court can be re-examined on a writ of error, they must be brought into the record by a bill of exceptions, or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose.⁵¹

that it contains all the testimony, a fortiori should this be the rule in a criminal case, and the defendant therein should not be deprived of a full consideration of the question of his guilt by an omission from the bill of the technical recital that it contains all the evidence." *Clyatt v. United States*, 197 U. S. 207, 49 L. Ed. 726, citing *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 43 L. Ed. 689.

47. Where the evidence returned in the bill of exceptions, which does not purport to contain all the evidence given on the trial, does not show very clearly the exact conditions of the matter in controversy, but the judge, in his charge to the jury, evidently referred to evidence on this subject which does not appear in the bill of exceptions, and was not corrected by counsel, and no exception was taken to the statement; the supreme court of the United States may properly regard his reference to the testimony actually given, but part of which does not appear, as correct recitals of the same. That court is not only permitted but bound to regard the evidence in the record as supplemented by the statement of the evidence by the trial court. *Sharp v. United States*, 191 U. S. 341, 48 L. Ed. 211.

49. **Direction of verdict.**—*Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746.

In *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 829, which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that "the bill of exceptions does not purport to contain all the evidence, and it would be im-

proper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

50. *Russell v. Ely*, 2 Black 575, 580, 17 L. Ed. 258; *United States v. Copper, etc.*, Min. Co., 185 U. S. 495, 497, 498, 46 L. Ed. 1008.

In *Russell v. Ely*, 2 Black 575, 580, 17 L. Ed. 258, the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that, according to a well-known rule, the court, under such a condition of the record, was bound to presume that there was that in the witness' testimony which justified the instruction. It was then added by the court: "What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties." The court thus refused to look at the deposition which purported to be the entire deposition of the witness because it was not made a part of the bill of exceptions. *United States v. Copper, etc.*, Min. Co., 185 U. S. 495, 498, 46 L. Ed. 1008.

51. **Removal of causes.**—*Storm v. United States*, 94 U. S. 76, 81, 24 L. Ed. 42; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 130, 23 L. Ed. 260; *Kearney v. Denn*, 15 Wall. 51, 56, 21 L. Ed. 41; *England v. Gebhardt*, 112 U. S. 502, 505, 28 L. Ed. 811.

The sufficiency of the evidence cannot be considered on appeal where the record does not affirmatively show that it contains all the evidence.⁵²

Errors in the admission of evidence which do not appear in the bill of exceptions at all will not be considered.⁵³

A party who complains of the rejection of evidence must make it appear by his bill of exceptions that if the evidence had been admitted it might have led the jury to a different result, and that accordingly he has been injured by the rejection. He must, therefore, have properly before this court the evidence rejected, or some statement of what it tended to prove. "By the twenty-first rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict."⁵⁴

Customs and Usages in Evidence.—The action of the court below in rejecting or disregarding a custom offered in evidence, must in some proper way be made a part of the record.⁵⁵

Exceptions to Rules Making Evidence Inadmissible.—If, in the appellate court, a party introducing evidence which as a general rule is inadmissible, relies on any special circumstances as an exception to the rule, that circumstance must appear in the bill of exceptions or by the record in some other manner. The admission will be held to be erroneous unless this appears.⁵⁶

Presumptions on Appeal.—The bill of exceptions is conclusive upon this court. We cannot presume or suspect that any material part of the evidence is omitted.⁵⁷

(2) *In Chancery Cases.*—While this court does not say, that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, it does say that they are not now by law required to do so; and that, if such practice is adopted in any case, the testimony

52. Sufficiency of evidence.—Texas, etc., *R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Cohn v. Daley*, 174 U. S. 539, 43 L. Ed. 1077.

Sufficiency of evidence to support instructions.—An assignment of error that the evidence does not support the charge, is without merit, where the evidence is not shown to be contained in the record. *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746.

53. Admission of evidence.—*Bannon v. United States*, 156 U. S. 464, 39 L. Ed. 494; *Murray v. Louisiana*, 163 U. S. 101, 41 L. Ed. 87.

54. Rejection of testimony.—Northwestern, etc., *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Florida R. Co. v. Smith*, 21 Wall. 262, 22 L. Ed. 513; *Thompson v. First Nat. Bank*, 111 U. S. 529, 536, 28 L. Ed. 507; *Shauer v. Albertson*, 151 U. S. 607, 38 L. Ed. 286. But see *Buckstaff v. Russell*, 151 U. S. 626, 38 L. Ed. 292. See post, "Assignment of Errors," X.

If testimony is objected to and ruled out, it must still be sent here with the record, subject to objection, or the ruling will not be considered. A case will not be sent back to have the rejected testimony taken, even though this court

might, on examination, be of opinion that the objection ought not to have been sustained. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

55. Custom and usages.—*The Gazelle and Cargo*, 128 U. S. 474, 32 L. Ed. 496, citing *The Francis Wright*, 105 U. S. 381, 26 L. Ed. 1100; *Thompson v. Riggs*, 5 Wall. 663, 674, 18 L. Ed. 704.

A paper certified by the secretary of state of Rhode Island, and by the governor, under the seal of the state, stating that certain laws were passed by the legislature of that state, and that certain matters were cognizable by the general assembly of Rhode Island, and of the practice of the assembly of Rhode Island, in cases of a particular description, is not evidence on the argument of a cause before this court. Usage and custom should be proved in the circuit court, on the trial of the case in which it may be referred to; and evidence of the same is not admissible in this court, if not found in the record. *Leland v. Wilkinson*, 6 Pet. 317, 8 L. Ed. 412.

56. Exceptions to rules making evidence inadmissible.—*Smiths v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717.

57. Presumptions on appeal.—*Bingham v. Cabbot*, 3 Dall. 19, 37, 1 L. Ed. 491.

presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal.⁵⁸

Parol Evidence.—In appeals to this court, from the circuit courts, in chancery cases, the parol testimony which is heard at the trial, in the court below, ought to appear in the record.⁵⁹

(3) *Modes of Putting Evidence on the Record.*—A bill of exceptions, undoubtedly, is the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, oftentimes it becomes the only effectual mode by which all the rights of the complaining party can be preserved.⁶⁰

Special Verdict or Agreed Statement of Facts.—(On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in this court, by an agreed statement of facts.⁶¹

But the rulings of the court in admitting or rejecting evidence can only be brought to this court for revision by bill of exceptions. Such rulings are never properly included in a special verdict, any more than in an agreed statement of facts.⁶²

Other modes are known to the practice of this court, by which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance.⁶³

Demurrer to Evidence.—Formerly it was considered that a party might always demur to the evidence produced against him, as a matter of right; and while that was so, a demurrer to evidence was equally effectual with a bill of exceptions to the extent of its operation. The bill of exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the court by which it was received; and as a necessary consequence, where the error of the court consists in having admitted improper evidence, the effect of a demurrer to it would be to waive the objection to the ruling, instead of laying the foundation to correct the error.⁶⁴

58. In chancery cases.—*Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

59. Parol evidence.—*Conn v. Penn*, 5 Wheat. 424, 5 L. Ed. 125; *New Orleans v. United States*, 5 Pet. 449, 8 L. Ed. 187, 188.

The parol evidence given on the hearing of a petition in the district court of the United States for the eastern district of Louisiana, in the nature of an equity proceeding, should have been reduced to writing and appear in the record, otherwise the court will order the decree to be dismissed. *New Orleans v. United States*, 5 Pet. 449, 8 L. Ed. 187, citing *Conn v. Penn*, 5 Wheat. 424, 5 L. Ed. 125.

60. Modes of putting evidence on the record.—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

61. Special verdict or agreed statement.—*United States v. Eliason*, 16 Pet. 291, 40 L. Ed. 968; *Stimpson v. Baltimore*, etc., R. Co., 10 How. 329, 13 L. Ed. 441; *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Graham v. Bayne*, 18 How. 50, 60, 15 L. Ed. 265. See the title APPEAL AND ERROR, vol. 1, pp. 1056, 1058.

62. Admission or exclusion of evidence.—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

63. Other methods considered.—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

64. Demurrer to the evidence.—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978, 981. See the title DEMURRER TO THE EVIDENCE.

Oyer.—Another method by which certain evidence may be incorporated into the record at the nisi prius trial is by oyer, which occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make a profert of a deed, probate, letters of administration, or other instrument under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied by the court; and the effect of the proceeding, in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding that the questions of law arising upon it become a proper subject of revision on the writ of error.⁶⁵

Demurrer.—And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends.^{65a}

Summary.—We have now adverted to the several methods acknowledged by courts of error, by which matters resting in parol at the trial in the subordinate tribunal may be put on the record, so as to lay a proper foundation for a revision of the legal questions arising out of them in the appellate court, and there are no others which can be recognized in this court in cases where the proceedings are required to be according to the course of the common law.⁶⁶ Whenever the parties to a pending suit desire to place the facts of the case upon the record, so as to secure the right to have the law arising on the facts, revised on a writ of error, they must adopt some one of the methods already suggested to effectuate that purpose, as there are no other effectual methods by which it can be accomplished.⁶⁷

A party cannot by merely filing with the clerk an affidavit, not incorporated in any bill of exceptions, bring into the record evidence of what took place on the trial.⁶⁸

(4) *Witnesses.*—**In General.**—Where the testimony of a witness is not satisfactory, it should be placed upon the record.⁶⁹ Where the bill of exceptions does

65. Oyer.—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978, 981.

And so it must have been understood by this court in *Gorman v. Lenox*, 15 Pet. 115, 10 L. Ed. 680, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict. *Suydam v. Williamson*, 20 How. 427, 436, 15 L. Ed. 978.

65a. Demurrer.—*Suydam v. Williamson*, 20 How. 427, 436, 15 L. Ed. 978.

66. Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978, 982, citing *Dougherty v. Campbell*, 1 Blackf. 39; *Cole v. Driskell*, 1 Blackf. 16.

67. Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978, 981.

68. Nelson v. Flint, 166 U. S. 276, 279, 41 L. Ed. 1002.

69. Witnesses.—Where a witness in a

suit against an insurance company for the value of goods lost in the burning of a store, when examined in chief, testifies apparently to the correctness of an abstract made from papers burnt in the fire, and is cross-examined upon the subject of that correctness, the party cross-examining cannot, where he has not caused the cross-examination to be brought up on the bill of exceptions, object, on a question, on error as to the admissibility of the abstract, that the witness has not testified sufficiently to the correctness. He should have caused the cross-examination to appear on the bill if he wished to show this. "The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record." *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 681, 19 L. Ed. 810.

A bill of exceptions which alleges that the instructions of the court laid too large a stress upon the testimony of a particular witness, should embody the testimony, at length, or so refer to it as to make it part of the record; otherwise a court of error must presume that it justified the instruction. *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258.

not show what answer was made to a question put to a witness, error cannot be assigned upon the question.⁷⁰

Where a bill of exceptions shows objections and exceptions by the defendant to questions put by the plaintiff to one of its witnesses, but fails to show what the character of the evidence was which previously had been put in, it is impossible to intelligently pass upon the propriety of the questions admitted.⁷¹

Deposition.—Refusal of the court below to allow an answer given in the deposition to be read, cannot be assigned as error, where the bill of exceptions does not show what answer was made to the question in the deposition of the witness. Where it does not even state the facts the answer tended to establish, this court cannot say that the exclusion of the answer was prejudicial to the plaintiff. For it often appears in the record, the witness may have made an answer that was injurious to the plaintiff, or one that was of no value to either party.⁷²

The action of the court below in deciding that a party's deposition cannot be received except for the purpose of impeaching him, and further that his evidence in the former action is not admissible, he being present in court and orally testifying in the suit, cannot be assigned for error, where the deposition is not made a part of and is not in the record, because in such case this court cannot say that its exclusion was prejudicial to the rights of the plaintiff.⁷³

i. *Reasons for Decision.*—The reasons upon which the opinion of the inferior court is founded form no part of a record when a case is brought here by writ of error. They cannot properly be inserted in a bill of exceptions.⁷⁴ But when the bill of exceptions does not purport to set forth all the evidence on either of the subjects to which the exception relates, and the judgment states that it was rendered for "reasons orally assigned," and these are not found in the record, there is nothing on which error can be assigned, and the judgment must be affirmed.⁷⁵

j. *Papers and Documentary Evidence*—(1) *In General.*—In cases at common law, the course of the court has been uniform, not to consider any paper as part of the record, which is not made so by the pleadings, or by some opinion of the court referring to it; this rule is common to all courts exercising appellate jurisdiction, according to the course of the common law; the appellate court cannot know what evidence was given to the jury, unless it is spread on the record in proper legal manner.⁷⁶ Nor can the unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, make that document or that evidence a part of the record, so as to bring it to the cogni-

70. Must show answer to question.—*Nailor v. Williams*, 8 Wall. 107, 19 L. Ed. 348; *Lovell v. Davis*, 101 U. S. 541, 25 L. Ed. 944.

71. Sire v. Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

72. Depositions.—*Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286, citing *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. Ed. 507.

73. Whitney v. Fox, 166 U. S. 637, 41 L. Ed. 1145, citing *Buckstaff v. Russell*, 151 U. S. 626, 636, 38 L. Ed. 292; *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.

74. Reasons for decision.—*Parks v. Turner*, 12 How. 39-46, 13 L. Ed. 883.

The constitution of Louisiana which requires the state judges to give reasons for their decisions, is not operative upon the judges of the circuit court of the

United States. On the contrary, their reasons form no part of the record when the case is brought up to this court. *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883.

75. "Reasons orally assigned."—*Genereux v. Campbell*, 11 Wall. 193, 20 L. Ed. 410.

76. Papers and documentary evidence in general.—*Fisher v. Cockerell*, 5 Pet. 218, 8 L. Ed. 114.

This court will not consider a case upon documents not in the cause below, though filed here by consent as if returned under a writ of diminution. *Hoey v. Wilson*, 9 Wall. 591, 19 L. Ed. 762.

It is very clear that a paper not signed by counsel, nor entered on the record of the court, nor made part of the record of the case by bill of exceptions, or in any other manner, cannot be considered by this court as the foundation on which it is to affirm or reverse the case. *Burr v. Des Moines, etc., R. Co.*, 1 Wall. 99, 101, 17 L. Ed. 561.

zance of this court.⁷⁷ And the mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court.⁷⁸ This may be done by a bill of exceptions, or something which is equivalent.⁷⁹

Illustrative Cases.—For example, papers filed in support of petitions for removal and motions to remand,⁸⁰ maps and plats,⁸¹ and contracts,⁸² must be made a part of the record below to be considered here.

(2) *Admission or Rejection of Documentary Evidence.*—**In General.**—The court cannot pass upon an exception to the admission of a paper in evidence at the trial or to its exclusion, if the record contains no copy of it.⁸³ As for example, the admission or rejection of patents for land,⁸⁴ or plats and models.⁸⁵

k. *Rules of Court.*—The rules of the courts below cannot be judicially noticed by this court. Therefore where a right is claimed under such a rule it must be made a part of the bill of exceptions. "When in a bill of exceptions the court places its action on such rules, with the construction of which, and the course of practice under them, it must be familiar, it would seem that the party assigning error on such rulings should be bound to exhibit in his bill of exceptions so much of the rule or rules as effects the question."⁸⁶

77. Certificates of clerk.—*Reed v. Marsh*, 13 Pet. 153, 10 L. Ed. 103, 104; *Fisher v. Cockerell*, 5 Pet. 248, 254, 8 L. Ed. 114.

78. Paper found among files.—*Sargeant v. State Bank*, 12 How. 371, 384, 13 L. Ed. 1028; *Fisher v. Cockerell*, 5 Pet. 248, 254, 8 L. Ed. 114; *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 608, 43 L. Ed. 1103.

79. Bill of exceptions.—*England v. Gebhardt*, 112 U. S. 502, 505, 28 L. Ed. 811, distinguished in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. Ed. 280.

"We agree, however, with the supreme court of the territory, that this letter, which constituted the withdrawal of appearance, was sufficiently brought into the record by the defendant's bill of exceptions, in which it is set forth at length, and wherein it is averred that said paper, signed by Pickett, was filed by plaintiff in said cause. The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. But it may be put into the record by a bill of exceptions, or something which is equivalent; so, at least, to enable the supreme court of the territory to deal with it as part of the record." *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811; *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 608, 43 L. Ed. 1103.

80. Ordinarily papers filed in support of petitions for removal and motions to remand are not matters of record unless made part thereof by bill of exceptions, though sometimes this is otherwise. *England v. Gebhardt*, 112 U. S. 502, 28 L. Ed. 811; *Bronson v. Schulzen*, 104 U. S. 410, 26 L. Ed. 797; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *McDonnell v. Jordan*, 173 U. S. 229, 234, 44 L. Ed. 1048.

81. Maps and plats.—*Republican River Bridge Co. v. Kansas, etc., R. Co.*, 92 U. S. 315, 23 L. Ed. 515.

Where the finding depends largely for its correctness on surveys not produced here, and there is no plat in the record, such finding is not open to inquiry. *Republican River Bridge Co. v. Kansas, etc., R. Co.*, 92 U. S. 315, 23 L. Ed. 515.

82. Contracts.—Where the only errors assigned which might call for consideration depend upon the terms and the construction of a contract which does not appear in the record, the judgment will be affirmed. *Red River Cattle Co. v. Sully*, 144 U. S. 209, 36 L. Ed. 407.

83. Admission or rejection of documentary evidence.—*Jones v. Grover, etc., Sewing Machine Co.*, 131 U. S., appx. cl, 24 L. Ed. 925.

84. Rejection of land patents.—An assignment, as error, that the court below erred in rejecting certain patents of land offered in evidence by the plaintiff, is factually defective, if the record does not contain copies of the patents. *Clement v. Packer*, 125 U. S. 309, 31 L. Ed. 721.

85. Production of plats and models.—Where an objection is raised in the court below by the plaintiff to the production and exhibition of a plat or model, and the objection is sustained by the court, and to this an exception is taken by the defendants, if no copy of the plat or model is shown here, the exception urged is now sufficient to reverse the judgment. *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460.

86. Rules of court.—While the right to plead the statute of limitations is no more within the discretion of the court than other pleas, when the refusal of the court to permit that plea to be filed is based on the allegation that it is not filed within the time prescribed by the rules

1. *Stipulations*.—Stipulations must in some proper manner appear in the record on appeal, otherwise they cannot be considered.⁸⁷ For example, where the parties in the court below have agreed upon the questions to be considered by this court, and one of the parties to the agreement or stipulation is so unprofessional as to violate this agreement, this court will nevertheless refuse to consider any matters outside of the record agreed upon by the parties.⁸⁸

m. *Exceptions and Objections*.—(1) *To the Evidence*.—To authorize any objection to the admission or exclusion of evidence to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon.⁸⁹

(2) *To the Instructions*.—To authorize any objection to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon.⁹⁰ Unless the record shows that exception was taken in the progress of the trial and before the verdict because of certain alleged errors in the charge, no cause is presented for a review here of the rulings at the trial.⁹¹

(3) *To Master's Report*.—Where exceptions are taken to a master's report, it is the duty of the appellants to have them brought into this court as part of the record; if they took no exceptions, the report stands without exceptions.⁹²

n. *Allowance of Counsel Fees as Damages*.—An objection that counsel fees were allowed as a part of the damages, cannot be entertained unless the fact appears of record.⁹³

o. *Instructions*.—**Statement of General Rule**.—Instructions requested or given rest in parol and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial; and it is the well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably reduces the same to form and causes it to be sealed by the judge.⁹⁴ Therefore, errors in the charge of the court which do not appear in the bill of exceptions at all, will

of practice adopted in that court, it is necessary that the party excepting to the refusal shall incorporate the rule in his bill of exceptions, or this court will presume that the court below construed correctly its own rules. Such rules are indispensable to the dispatch of business and the orderly administration of justice, and it must be presumed that the court below is familiar with the construction and course of practice under them. *Washington, etc., Packet Co. v. Sickles*, 19 Wall. 611, 22 L. Ed. 203. See the title **RULES OF COURT**.

87. *Stipulations*.—*Patrick v. Graham*, 132 U. S. 627, 631, 33 L. Ed. 460. See the title **STIPULATIONS**.

88. *Schley v. Pullman's Palace Car Co.*, 120 U. S. 575, 30 L. Ed. 789.

89. *To the evidence*.—*Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544.

90. *To the instructions*.—*Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544.

91. *Pittsburg, etc., R. Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58, citing *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

92. *To master's report*.—*Belford v. Scribner*, 144 U. S. 488, 36 L. Ed. 514.

93. *Allowance of counsel fees as damages*.—Where an account of items as a

foundation to award damages as counsel fees was exhibited in the court below, but the allowance does not appear on the record, the objection will not be considered by this court. *The Brig Perseverance*, 3 Dall. 336, 1 L. Ed. 625.

94. *Instructions must be put on the record*.—*Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42; *Bennett v. Harkrader*, 158 U. S. 441, 446, 39 L. Ed. 1046; *Bamberger v. Schoolfield*, 160 U. S. 149, 169, 40 L. Ed. 374; *Insurance Co. v. Lanier*, 95 U. S. 171, 24 L. Ed. 383; *Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704.

This court can only reverse a judgment when it is shown that the court below has erred. It cannot proceed upon conjecture of what the court below may have laid down for law; it must be shown in order to be judged what instructions were in fact given, and what were refused. *Jackson v. Huntington*, 5 Pet. 402, 8 L. Ed. 170.

It is well settled that instructions do not become part of the record unless they are incorporated in the bill of exceptions, and thus authenticated by the signature of the judge. *Clune v. United States*, 159 U. S. 590, 40 L. Ed. 269.

not be considered.⁹⁵ In short, objections signed and urged to the rulings and instructions at the trial cannot be considered by this court, in the absence of a bill of exceptions.⁹⁶

A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions.⁹⁷

The refusal of an instruction cannot be reviewed, if it is not shown by anything in the record what were the facts on which it is based.⁹⁸ Where a complaint is made that the court failed to give the defendant's requests for instructions, but the instructions actually given by the court are not disclosed by the record, this court will presume that such instructions covered the defendant's requests so far as they stated the law correctly. This is especially true where no exception is taken to the action of the court in refusing or in giving instructions.⁹⁹

How Placed on the Record.—Settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions can be brought here for revision in any other mode than by a regular bill of exceptions,¹ and these rules are equally applicable to the removal of cases from the District of Columbia.²

95. *Bannon v. United States*, 156 U. S. 464, 39 L. Ed. 494.

If, upon the whole evidence, the plaintiff in error was entitled to a peremptory instruction in his behalf, and the court had refused, when asked, to give such an instruction, its action could not be reviewed here, except upon a bill of exceptions, containing all the evidence. And so, if there was no evidence, or not sufficient evidence, tending to show the facts recited in the charge. If he desired the court to give any particular propositions of law to the jury, so much of the evidence as is necessary to show their pertinency ought to be set forth in the bill of exceptions. *Potter v. Third Nat. Bank*, 102 U. S. 163, 166, 26 L. Ed. 111.

96. *Claasen v. United States*, 142 U. S. 140, 35 L. Ed. 966.

Under § 2922, statutes of New Mexico, all instructions to the jury must be in writing, and by § 3002 the jury, when it retires, shall be allowed to take the pleadings in the case, instructions of the court and any instruments in writing admitted without them. It was held where the record does not affirmatively disclose that the judge failed to give the amended instruction in writing to the jury when it retired, it is too much to expect this court to conjecture that they were not taken, in the absence of any such statement in the record. *Cunningham v. Springer*, 204 U. S. 647, 51 L. Ed. 662.

97. **Request for instructions.**—*Texas, etc., R. Co. v. Volk*, 151 U. S. 73, 78, 23 L. Ed. 78; *Goldshy v. United States*, 160 U. S. 70, 40 L. Ed. 343.

98. **Refusal of instructions.**—*United States v. Stone*, 106 U. S. 525, 530, 27 L. Ed. 163; *Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704.

99. *Andrews v. United States*, 162 U.

S. 420, 40 L. Ed. 1023, citing *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892.

1. **Bill of exceptions the only proper method.**—*Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704.

"Final judgments in a circuit court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instructions as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way. None of the other modes suggested, say the court, in the case of *Pomeroy v. State Bank*, 1 Wall. 592, 17 L. Ed. 638, enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions, and we reaffirm that rule." *Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704.

Statements in the minutes that the plaintiffs excepted in law as well to the refusal of the court to instruct the jury as requested, as to the instructions given, and that the exceptions and the evidence are hereby made record, is not sufficient to make instructions part of the record. It is well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably reduces the same to form and causes it to be sealed by the judge. *Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704.

2. **District of Columbia.**—*Thompson v. Riggs*, 5 Wall. 663, 676, 18 L. Ed. 704.

Sufficiency of Bill of Exceptions.—When complaint is made in the bill of exceptions of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply. The proof of the fact which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them.³ If the transcript of the record contains what purports to be the charge in full, with a memorandum at the close stating that certain portions are excepted to, but they are not verified or included in a proper bill of exceptions, it is not part of the record for any purpose.⁴

Attestation of Instructions by Clerk.—Although there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case, it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions.⁵ There are, for instance, in some states statutes directing that all instructions must be reduced to writing, marked by the judge "refused" or "given" and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record. But in the absence of that or some other statutory provision a bill of exceptions has been recognized as the only appropriate method of bringing into the record the instructions given or refused.⁶

p. **Judicial Notice.**⁷—In reviewing the decisions of inferior federal courts, matters of which this court may take judicial notice, such as the public laws of a state, need not appear on the record,⁸ but private laws,^{8a} special proceedings in a state legislature on private petitions,^{8b} and permits to cut timber on the public domain,^{8c} are governed by a different rule; they are matters of fact, to be proved as such, in the ordinary manner; this court cannot go into an inquiry as to the existence of such facts, upon a writ of error, if they are not found in the record.

3. Sufficiency of bill of exceptions.—*Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848; *New York, etc., R. Co. v. Madison*, 123 U. S. 524, 31 L. Ed. 258.

4. Struthers v. Drexel, 122 U. S. 487, 30 L. Ed. 1216.

5. Marking instructions as filed.—*Metropolitan R. Co. v. MacFarland*, 195 U. S. 322, 332, 49 L. Ed. 219; *Clune v. United States*, 159 U. S. 590, 593, 40 L. Ed. 269.

On a writ of error to this court, to review the action of the court of appeals of the District of Columbia, sustaining an award against the plaintiff in error rendered in condemnation proceeding, this court cannot pass on errors assigned to the action of the court below in refusing to set aside assignment because not supported by the evidence, and in refusing to give certain instructions to the jury where there is no bill of exceptions in the record showing that the court below was asked to and refused to give the alleged instructions, and where there is nothing of record exhibiting the fact that any exception was duly taken to the action of the court in overruling the objections urged by the plaintiff in error to the confirmation of the verdict of the jury, although the transcript contains what purports to be certain instructions asked and refused, marked filed by the clerk, and although there is in the printed record a petition, and other papers concerning the

evidence given before the jury, and although there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. In the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which alone can be considered in determining the merits of the errors assigned. *Metropolitan R. Co. v. MacFarland*, 195 U. S. 322, 49 L. Ed. 219.

6. Struthers v. Drexel, 122 U. S. 487, 491, 30 L. Ed. 1216; *Supreme Court Rules No. 4*, 108 U. S. 574; *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 193, 30 L. Ed. 644; *Clune v. United States*, 159 U. S. 590, 593, 40 L. Ed. 269.

7. See the title JUDICIAL NOTICE. See the title APPEAL AND ERROR, vol. 1, p. 597.

8. Judicial notice of public laws.—*Leland v. Wilkinson*, 6 Pet. 317, 8 L. Ed. 412.

8a. Private laws.—*Leland v. Wilkinson*, 6 Pet. 317, 8 L. Ed. 412.

8b. Special proceedings.—*Leland v. Wilkinson*, 6 Pet. 317, 8 L. Ed. 412.

8c. Permits to cut timber on the public domains are issued in various forms and subject to the discretion of the department giving them. This court will not take judicial notice of the contents thereof. *United States v. Bitter Root Development Co.*, 200 U. S. 451, 50 L. Ed. 550.

5. NECESSITY FOR BILL OF EXCEPTIONS, AGREED STATEMENTS OF FACTS OR SPECIAL VERDICT—*a. Bill of Exceptions.*—At common law, a writ of error lay for error in law apparent on the record, but not for an error in law not apparent on the record. If a party alleged any matter of law at the trial and was overruled by the judge, he was without redress, the error not appearing on the record. To remedy this evil the statute was passed which gives the bill of exceptions. It is to correct an error in law. Blackstone, speaking of this subject, says, "and if either in his directions or decisions he (the judge) mistakes the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point, wherein he is supposed to err." "This bill of exceptions is in the nature of an appeal."⁹

And hence, whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner.¹¹ But alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not the proper subjects of re-examination by writ of error in this court.¹²

9. Bill of exceptions.—2 Blackstone, 372. *Ex parte Crane*, 5 Pet. 190, 199, 8 L. Ed. 92, 96.

Party aggrieved might, before the enactment of statutes at large, 83, sue out writ of error to correct an error in law apparent on the record, or for an error of fact, where either party had died before judgment; but the writ would not lie for an error in law not apparent on the record, as for a refusal to instruct the jury as requested, or for an erroneous instruction given, or for an erroneous ruling in admitting or rejecting evidence. Consequently, where either party alleged anything *ore tenus*, which was overruled by the court, the party was without remedy; because, being an error in law, and not apparent in the record, the appellate tribunal could not take judicial knowledge of the proceeding. Statute under consideration was passed to obviate that difficulty, and to prevent the injustice flowing from it, and throughout the long period it has continued in force, it has ever been regarded as an eminently just and highly beneficial regulation. Writs of error, it is true, bring up the whole record, and it is undeniably competent for the court to reverse the judgment for any apparent error, whether it appear in the bill of exceptions or in any other part of the record. *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Cohens v. Virginia*, 6 Wheat. 264, 410, 5 L. Ed. 257; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Pomeroy v. State Bank*, 1 Wall. 592, 599, 17 L. Ed. 638.

11. Errors apparent on record.—*Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Cohens v. Virginia*, 6 Wheat. 264, 410, 5 L. Ed. 257; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Coughlan v. District of Columbia*, 106 U. S. 7, 27 L. Ed. 74.

Where the error is one of law apparent on the record, it need not be presented by

bill of exceptions. *Moline Plow Co. v. Webb*, 141 U. S. 616, 35 L. Ed. 879, citing *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 23 L. Ed. 260; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Young v. Martin*, 8 Wall. 354, 357, 19 L. Ed. 418; *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 474, 30 L. Ed. 1214.

Where every issue of fact has been withdrawn, and every issue of law in which the other pleadings terminated has been decided in favor of the plaintiffs, the decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends. *Suydam v. Williamson*, 20 How. 427, 436, 15 L. Ed. 978; *Gorman v. Lenox*, 15 Pet. 115, 10 L. Ed. 680; *Aurora City v. West*, 7 Wall. 82, 91, 19 L. Ed. 42.

Plea of statute of limitations.—Where in an action on certain notes secured by a trust deed, the defendant puts in a plea of the statute of limitations, and the notes and deed are filed with and made a part of the pleading, and the execution is not denied under oath by defendant, the action of the court in sustaining the plea of the statute, which ruling was based upon the construction of the notes and deed, is error of law apparent on the record, and need not be presented by bill of exceptions. *Moline Plow Co. v. Webb*, 141 U. S. 616, 35 L. Ed. 879, citing *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 23 L. Ed. 260; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Young v. Martin*, 8 Wall. 354, 357, 19 L. Ed. 418; *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469, 474, 30 L. Ed. 1214.

12. Errors not apparent on the record.—*Storm v. United States*, 94 U. S. 76, 81, 24 L. Ed. 42; *Andes v. Slauson*, 130 U. S. 435, 438, 32 L. Ed. 989; *Kerr v. Clappitt*, 95 U. S. 188, 24 L. Ed. 493.

A bill of exceptions is the safest method, and where the facts are disputed,

This court cannot take the statements made by the defendant on his motion for a new trial as evidence that the matters thus stated did in fact occur at the trial. In order to authenticate such facts a bill of exceptions is necessary.¹³

Determination on Motion to Dismiss.—Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument.¹⁴

b. *Other Modes than Bill of Exceptions.*¹⁵—Final judgments in a circuit court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instruc-

it becomes the only effectual mode by which all the rights of the complaining party can be preserved. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment, or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions. *Suydam v. Williamson*, 20 How. 427, 433, 15 L. Ed. 978; *Storm v. United States*, 94 U. S. 76, 77, 24 L. Ed. 42; *Insurance Co. v. Lanier*, 95 U. S. 171, 24 L. Ed. 383.

"It has been frequently held by this court, that in passing upon the questions presented in a bill of exceptions, it will not look beyond the bill itself." *Reed v. Gardner*, 17 Wall. 409, 411, 21 L. Ed. 665; *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Lincoln v. Clafin*, 7 Wall. 136, 19 L. Ed. 106; *Leftwich v. Lecanu*, 4 Wall. 187, 18 L. Ed. 388; *Russell v. Ely*, 2 Black 575, 580, 17 L. Ed. 258.

"To the same effect is *Worthington v. Mason*, 101 U. S. 149, 152, 25 L. Ed. 848, where this appears: 'As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the latter, complaint is made of the instructions of the court given or refused it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply.' 'The proof of the facts

which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them.' See, also, *United States v. Morgan*, 11 How. 154, 158, 13 L. Ed. 643; *Reed v. Gardner*, 17 Wall. 409, 21 L. Ed. 665; *Jones v. Buckell*, 104 U. S. 554, 26 L. Ed. 841; *Phoenix Life Ins. Co. v. Rad-din*, 120 U. S. 183, 196, 30 L. Ed. 644." *New York, etc., R. Co. v. Madison*, 123 U. S. 524, 527, 31 L. Ed. 258.

Revenue stamp on bond.—Where in an action of assumpsit upon bonds of a county issued to a railroad company, it is objected that there was no revenue stamp upon the bonds, as required by the act of congress, this court, on an objection which assumes that one of a certain value was on them, will not decide whether a sufficient one was or was not there, unless the bill of exceptions shows what revenue stamp was on the bond. "Its assumption in an objection as a ground of objection is no evidence of the fact. *Washington, etc., R. Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114. The fact must appear by the record as an existing fact in the case. If the objector wishes the point to be passed upon by the appellate court, he must take care that the fact shall sufficiently appear in the record." *Chambers County v. Clews*, 21 Wall. 317, 324, 22 L. Ed. 517.

13. Statements by defendant.—*Reagan v. United States*, 157 U. S. 301, 39 L. Ed. 709.

14. Minor v. Tillotson, 1 How. 287, 11 L. Ed. 134.

15. See the title DEMURRER TO THE EVIDENCE. See ante, "Review of Judgments Founded upon Agreed Statement of Facts," IV, E, 12, c.; "Review of Judgments Founded upon Special Verdict," IV, E, 12, d.

tion as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way.¹⁶

Under the judiciary act of 1789 in chancery cases, a statement of facts must accompany the transcript.¹⁷ And this statement of facts was conclusive; the court could not look into the evidence.¹⁸

c. Stipulation or Agreement of Parties.—And a mere stipulation of the parties cannot supply the necessity for a bill of exceptions, a finding of facts or any statement of the case by the parties analogous to a special verdict stating the ultimate facts of the case.¹⁹

6. REQUISITES, SUFFICIENCY AND CONTENTS—*a. Contents of Record*—(1) *In General.*—The thirty-first rule adopted in 1823 provides that: No cause will hereafter be heard until a complete record, containing in itself, without references aliunde, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing, shall be filed.²¹ The 31st rule is now Rule 8, subdivision 3,²² and is still in force as par. 3, Rule 8.²³

Duty of Clerk.—Without any directions to the contrary, the clerk ought to send up the whole of the record in the strict sense of the word, made as directed by Rev. Stat., § 750.²⁴

Omission of Parts of Record by Appellant.—While this court will encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court.²⁵

16. Other modes than bill of exceptions.—*Suydam v. Williamson*, 20 How. 427, 432, 15 L. Ed. 978; *Thompson v. Riggs*, 5 Wall. 663, 675, 18 L. Ed. 704; *New York, etc., R. Co. v. Madison*, 123 U. S. 524, 31 L. Ed. 258.

Whatever the error may be and in whatever stage of the cause it may have occurred it must appear in the record or proceedings, or be shown by a bill of exceptions, agreed statement of facts, demurrer, or special verdict. 1 Chitty on Pleading 431; 1 Tidd's Practice 586; *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *New Orleans R. v. Morgan*, 10 Wall. 256, 261, 19 L. Ed. 892.

17. Statement of facts.—*United States v. Hooe*, 1 Cranch 318, 2 L. Ed. 121; *The Brig Perseverance*, 3 Dall. 336, 1 L. Ed. 625.

18. The Brig Perseverance, 3 Dall. 336, 1 L. Ed. 625.

19. Stipulation or agreement of parties.—*Andes v. Slauson*, 130 U. S. 435, 32 L. Ed. 989; *Glenn v. Fant*, 134 U. S. 398, 33 L. Ed. 969; *Davenport v. Paris*, 136 U. S. 580, 34 L. Ed. 548.

Where there is no bill of exceptions taken in the case, no finding of facts, nor any statement of the case by the parties analogous to a special verdict stating the ultimate facts, and presenting questions of law only, this court will not take jurisdiction upon a stipulation of the parties to which was annexed what was styled an agreed statement of facts, which included all the pleadings and evidence as well as the orders and decrees therein.

It is impossible to regard this stipulation as taking the place of a special verdict of the jury, or a special finding of facts by the court, upon which our jurisdiction could probably be invoked to determine the question of law thereon arising. *Glenn v. Fant*, 134 U. S. 398, 33 L. Ed. 969, followed in *Davenport v. Paris*, 136 U. S. 580, 34 L. Ed. 548.

21. Contents of record in general.—8 Wheat. VI; *Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246; *Redfield v. Parks*, 130 U. S. 623, 624, 32 L. Ed. 1053.

22. Redfield v. Parks, 130 U. S. 623, 32 L. Ed. 1053.

23. Craig v. Smith, 100 U. S. 226, 231, 25 L. Ed. 577; *Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246.

24. Clerk should send up the whole record.—*Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246; *Curtis v. Petitpain*, 18 How. 109, 15 L. Ed. 280.

25. Duty to send up entire record.—In *Florida Cent. R. Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605, the evidence showed that the appellant went with his own copyists to the office of the clerk of the circuit court, and in the absence of the principal clerk selected such of the papers as he thought were necessary, and had them copied into the transcript. "This being done, he caused a certificate to be added, signed in the name of the clerk by a deputy, and sealed with the seal of the court, to the effect that the transcript annexed contained copies of such entries, papers, and proofs as were necessary on the hearing of the appeal

Where the record consists only of an "agreed statement of facts," it is not in conformity with the eleventh and thirty-first rules of this court, and the case will be dismissed.²⁶

Limitations of General Rule.—Ordinarily, the whole of the record, as the word is technically used, in suits at common law, and of the corresponding portions of proceedings in equity, the latter as designated by Rev. Stat., § 750, should be brought here, in order that this court may properly shape its judgments, excepting, of course, what precedes the mandate on a prior appeal or writ of error. But take the instance of a defendant in equity who has pleaded to the whole bill, and whose plea has been overruled as a matter of law, and has been followed by voluminous proofs on the issues of fact raised by the bill and answer. He may be content on his appeal to rest on his plea, and in that event he neither need nor ought to bring here the mass of the proofs following it.²⁷

Unnecessary Matter in the Record.—A transcript on appeal need not always contain all the proof, entries, papers and proceedings below. The supreme court has condemned in a number of cases the bringing up of unnecessary papers and proceedings.²⁸

Where, on an appeal, papers have been improperly sent here, the order of the court below will be closely examined, to determine whether they are included in its terms.²⁹

prayed and allowed in the said cause.' It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed." Whereupon this court ordered that the appellees file with the clerk of this court, on or before the first day of the next term, a statement of the papers, documents, and proofs used on the hearing below, and omitted in the transcript now on file, which they deemed necessary for the proper presentation of the cause, and that unless the appellants shall, on or before the fifteenth day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the circuit court or his deputy, under the seal of the court, the appeal will be dismissed.

26. Where record consists of "agreed statement of facts."—*Curtis v. Pettipain*, 18 How. 109, 15 L. Ed. 280, citing *Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246.

27. Limitations of general rule.—This conforms to the ruling in *Missouri*, etc., *R. Co. v. Dinsmore*, 108 U. S. 30, 27 L. Ed. 640, where apparently the case was disposed of on demurrer, and the court held that the evidence on file was not to be brought before it.

28. Duty to exclude unnecessary matter.—*Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431; *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577; *The Adriatic*, 103 U. S. 730, 26 L. Ed. 605; *Ball*, etc., *Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019; *Hill v. Chicago*, etc., *R. Co.*, 129 U. S. 170, 32 L. Ed. 651.

"The court calls attention to the irrelevant matter and useless repetitions with which the record in this case is incumbered; and, while reversing the decree

below, adjudges that the parties pay their respective costs in this court, and refers to rule 52 in admiralty as containing suggestions which may serve as an appropriate guide in making up the record in a case at law or in equity." *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431.

It is clear from the following language in *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431, that it is the duty of the party who takes an appeal to see to it that unnecessary matter is not put into the record: "We have long suffered from the want of attention of parties, or their counsel, and the incapacity, not to say dishonesty, of clerks below in matters of this kind, and deem this a proper occasion for applying the remedy for such neglect or abuse. We are at a loss to determine whether the complainant or defendant is most to blame for the irrelevant matter which has been introduced into this case; but it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently."

29. *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577.

Where, in a case involving the infringement and validity of letters patent, the circuit court, on the allowance of an appeal from its final decree, directed its clerk to transmit with the transcript "the original exhibits, patent certificates, schedules, drawings, and models on file, along with and as part of the record and transcript," held, that certain affidavits sent here, but not copied into the transcript, although they had been filed as "exhibits" with the bill and the answer thereto, and

Reference from One Record to Another.—A record is not incomplete under the 31st rule because it refers to another record.³⁰

Dismissal.—Where the record in a case is not complete or properly certified, the court will order that unless the appellant causes the omissions to be supplied on or before a specified day, the appeal will be dismissed.³¹ On the other hand, while the court has undoubtedly the power to dismiss the case as for want of prosecution by the plaintiff in error, because of his failure to see that a proper return was filed, yet where more than three years have elapsed without the making of a motion by the defendants in error to dismiss the case because of a failure to comply with the rules, and the case has been submitted to us on printed briefs filed on both sides, on the merits, the plaintiff in error ought to have leave to sue out a writ of certiorari, to bring into this court the papers omitted from the transcript.³²

Sufficiency of Showing on Motion to Dismiss.—So also a motion to dismiss an appeal, made upon the ground that the transcript of the record is incomplete, because of the omission of certain papers said to have been used in the court below, but not to be found when the transcript was made, must be denied, where there is no proof by affidavit that the papers alleged to be wanting were used in the court below, and have been lost. The certificate of the clerk who made the transcript cannot be received as proper evidence of these facts.³³

(2) *Pleadings.*—The complaint and answers are necessary to the hearing in this court, and unless a record containing them is filed here the case cannot be heard.³⁴

(3) *Names of Jurors.*—But it is not necessary that the transcript of the record should contain the names of the jurors.³⁵

(4) *The Citation.*—The judiciary act directs that a citation shall be returned with the record; the adverse party having at least twenty days notice. This notice is twenty days before the return day of the writ of error.³⁶

by consent treated and read as depositions on the hearing below, cannot be considered here as proofs in the cause, as they are not embraced by the order, the purpose of which was to send what had been exhibited below, as contradistinguished from what had been read. *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577.

30. Referring from one to another.—A motion to dismiss a case, because the record as was alleged referred to another record, and was therefore incomplete under the 31st rule, was overruled, because Mr. Chief Justice Taney said: "When this rule was made the records were not printed, and it would have been very inconvenient to refer to other manuscript records of the court. But as the records are now printed, there is no inconvenience in the practice, and it tends to save expense. Moreover, there is in this record a stipulation of the counsel below to refer to another record of the same court now in this court, and which ought to bind the counsel here." *United States v. Davenport*, 142 U. S., appx., 704, 35 L. Ed. 1174.

31. Dismissal.—*Florida Cent. R. Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605.

32. *Redfield v. Parks*, 130 U. S. 623, 625, 32 L. Ed. 1053.

33. Certificates of clerk.—*The Grape-shot*, 7 Wall. 563, 19 L. Ed. 83.

34. Pleadings.—*Redfield v. Parks*, 130 U. S. 623, 625, 32 L. Ed. 1053.

Under rule 8, subdivision 1, which provides as follows: "1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court." And rule 8, subdivision 3, which provides as follows: "3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed," it was held that this court would not hear the case where the pleadings referred to in the transcript of the record are not set forth. The complaint and answers are necessary to the hearing in this court, and unless a record containing them is filed here the case cannot be heard. *Redfield v. Parks*, 130 U. S. 623, 32 L. Ed. 1053.

35. Names of jurors.—*Owens v. Hanney*, 9 Cranch 180, 3 L. Ed. 697.

36. The citation.—*Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664.

On writ of error, the original citation to the defendant in error was omitted from the return; only a copy accompanied the record with an affidavit of service of "a citation whereof the above is a true copy." Held, that the court could not, consist-

(5) *Remedying Incomplete Transcripts.*—If the party appealed against deems the certificate of the clerk irregular, or the transcript incomplete, his remedy is not by motion to dismiss, unless in extreme cases; but he may have ample relief by other methods, which have been clearly pointed out by the supreme court. Substantial omissions have been made good by amendments filed with the consent of both parties.³⁷

Certiorari.—The appropriate and ordinary remedy for an appellee in the case of a defective transcript is to suggest diminution, and ask for certiorari, though the court may sometimes order the latter of its own motion.³⁸

(6) *Stipulation of Parties.*—Matters cannot be brought into a record by an agreement of counsel as to what took place on the trial.⁴⁰

b. *Form and Sufficiency.*—(1) *Statement of Pleadings.*—Some form should be adopted in the record by which pleadings should be stated, and the points controverted, whether of fact or of law. Where the loose papers certified from the supreme court of Minnesota to this court have neither the form nor the substance of a record, there is nothing for this court to try.⁴¹

(2) *Incorporating Rules of Court.*—A rule of court is not properly made a part of the bill of exceptions by putting it at the bottom of the page in a note "a mode of making up records on writs of error which is quite novel."⁴²

(3) *Dismissal and Reinstatement.*—After an appeal has been dismissed for a misprision of the clerk in transmitting an imperfect record, the appeal will be reinstated.⁴³

7. **FILING.**—a. *Necessity for Filing.*—The filing of the record in the appellate court is a jurisdictional necessity.⁴⁴ Where the appellees have failed to lodge a transcript of the record of the cause with the clerk of the court, agreeably to the rules of the court, the appeal will be dismissed.⁴⁵

ently with the judicial act, dispense with a return of the original citation, subscribed by the judge himself. *Wilson v. Daniel*, 3 Dall. 401, 1 L. Ed. 655.

A decree was pronounced by the district court of the United States for the district of Alexandria, in December, 1829, from which the defendants appealed, but did not bring up the record. At January term, 1832, the appellees, in pursuance of the rule of court, brought up the record and filed it; and on motion of their counsel the appeal was dismissed. On the 9th of March, 1832, a citation was signed by the chief justice of the court for the District of Columbia, citing the plaintiffs in the original action to appear before the supreme court, then in session, and show cause why the decree of the circuit court should not be corrected. A copy of the record was returned with the citation, "executed" and filed with the clerk. By the court: The record is brought up irregularly, and the cause must be dismissed. *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 654.

37. **Remedying incomplete transcripts.**—*Hudgins v. Kemp*, 18 How. 530, 534, 15 L. Ed. 511.

In *Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31, on receipt of a supplemental certificate from the clerk of the court below, the supreme court allowed an amendment of a clerical error on motion of one party. The same was permitted in *Chicago v. Bigelow*, 131 U. S., appx., xciii, 19 L. Ed. 257.

38. **Certiorari.**—*Morgan v. Curtenius*, 19 How. 8, 15 L. Ed. 576; *Missouri, etc., R. Co. v. Dinmore*, 108 U. S. 30, 27 L. Ed. 640; *Hoskin v. Fisher*, 125 U. S. 217, 31 L. Ed. 759. See the title CERTIORARI.

Although the certificate to the transcript of a record on a writ of error, does not comply with subdivision 1 of rule 8, and the record is not complete, not containing the pleadings, so that under subdivision 3 of rule 8, this court cannot hear the case, yet where more than three years have elapsed without the making of a motion by the defendants in error to dismiss the case, because of a failure to comply with the rules, and the case has been submitted on printed briefs filed on both sides on the merits, the plaintiff in error will be given leave to sue out a writ of certiorari to bring into this court the papers omitted from the transcript. *Redfield v. Parks*, 130 U. S. 623, 32 L. Ed. 1053.

40. **Stipulation of Parties.**—*South Carolina v. Wesley*, 155 U. S. 542, 39 L. Ed. 254.

41. **Statement of pleadings.**—*Lawler v. Claffin*, 22 How. 23, 16 L. Ed. 230.

42. **Incorporating rules of court.**—*Washington, etc., Packet Co. v. Sickles*, 19 Wall. 611, 22 L. Ed. 203.

43. **Dismissal and reinstatement.**—*The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531.

44. **Necessity for filing record.**—*Hill v. Chicago, etc., R. Co.*, 129 U. S. 170, 32 L. Ed. 651.

45. **Dismissal for failure to file record.**—*Veitch v. Farmers' Bank*, 6 Pet. 757, 8

b. *Duty of Appellant*.—It is the duty of the party who takes a writ of error to see to it that the record is properly presented here.⁴⁶

c. *Time for Filing*.—(1) *In General*.—Section 997 of the Revised Statutes, which is a substantial re-enactment of a similar provision in § 22 of the judiciary act of 1789 (1 Stat. 84), requires that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." Under this legislation it has long been held that if the transcript is not filed and the cause docketed during the term to which it is made returnable, or some sufficient excuse given for the delay, the writ of error or appeal will become inoperative, and the cause may, on that account, be dismissed.⁴⁷ An appeal or writ of error which

L. Ed. 578; Florida Cent. R. Co. v. Schutte, 100 U. S. 644, 25 L. Ed. 605.

46. *Duty of appellant*.—Union Pac. R. Co. v. Stewart, 95 U. S. 279, 24 L. Ed. 431; Redfield v. Parks, 130 U. S. 623, 32 L. Ed. 1053; Florida Cent. R. Co. v. Schutte, 100 U. S. 644, 25 L. Ed. 605.

47. *Transcript to be filed at term next succeeding issuance of writ or taking of appeal*.—Hamilton v. Moore, 3 Dall. 371, 1 L. Ed. 642; Blair v. Miller, 4 Dall. 21, 1 L. Ed. 724; Steamer Virginia v. West, 19 How. 182, 15 L. Ed. 594; Castro v. United States, 3 Wall. 46, 47, 18 L. Ed. 163; United States v. Gomez, 3 Wall. 752, 18 L. Ed. 212; Mesa v. United States, 2 Black 721, 17 L. Ed. 350; Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810; Edmonson v. Bloomshire, 7 Wall. 306, 19 L. Ed. 91; Grigsby v. Purcell, 99 U. S. 505, 596, 25 L. Ed. 354; Carroll v. Dorsey, 20 How. 204, 15 L. Ed. 803; Villablos v. United States, 6 How. 81, 12 L. Ed. 352; United States v. Curry, 6 How. 106, 12 L. Ed. 363; Credit Co. v. Arkansas, etc., R. Co., 128 U. S. 258, 259, 32 L. Ed. 448; Richardson v. Green, 130 U. S. 104, 111, 32 L. Ed. 872; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Wauton v. DeWolf, 142 U. S. 138, 139, 35 L. Ed. 965; Seymour v. Freer, 5 Wall. 822, 18 L. Ed. 564; Garrison v. Cass County, 5 Wall. 823, 18 L. Ed. 491; Hill v. Chicago, etc., R. Co., 129 U. S. 170, 174, 32 L. Ed. 651; Baltimore, etc., R. Co. v. District of Columbia, 127 U. S. 780, 32 L. Ed. 325; State v. Demarest, 110 U. S. 400, 28 L. Ed. 191; Killian v. Clark, 111 U. S. 784, 28 L. Ed. 599; Idaho, etc., Land Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 433.

It has been held repeatedly by this court that when the record is not filed at the term succeeding the allowance of an appeal, the appeal ceases to have any operation or effect, and the case stands as if it had never been allowed. Credit Co. v. Arkansas, etc., R. Co., 128 U. S. 258, 32 L. Ed. 448; Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Small v. Northern Pac. R. Co., 134 U. S. 514, 33 L. Ed. 1006.

It is the duty of the appellants to file the record, and docket the cause, within

the first six days of the term, when the decree appealed from has been entered sixty days before the commencement of the term. United States v. Fremont, 18 How. 30, 15 L. Ed. 302.

Where the record was not brought and filed within the first sixty days of the next term of this court, nor was the record returned within the term, the appeal will be dismissed. German v. United States, 5 Wall. 825, 18 L. Ed. 502.

"Where no return has been made to a writ of error by filing the transcript of the record here, either before or during the term of the court next succeeding the filing of the writ in the circuit court, this court has acquired no jurisdiction of the case, and the writ having then expired, can acquire none under that writ, and it must, therefore, be dismissed. Villablos v. United States, 6 How. 81, 12 L. Ed. 352; Castro v. United States, 3 Wall. 46, 18 L. Ed. 163; Mussina v. Cavazos, 6 Wall. 355, 358, 18 L. Ed. 810; Murdock v. Memphis, 20 Wall. 590, 624, 22 L. Ed. 429." Caillot v. Deetken, 113 U. S. 215, 216, 28 L. Ed. 983.

Rule in Edwards v. United States.—Where the transcript of the record is not lodged in the office of the clerk of this court until after the return term of the appeal, and no attempt is made to get it upon the docket until another term has passed and still another has begun, the case will be dismissed. Fayolle v. Texas, etc., R. Co., 124 U. S. 519, 31 L. Ed. 533, distinguishing Edwards v. United States, 102 U. S. 575, 26 L. Ed. 293.

Illustrative cases.—Judgment was rendered against the plaintiffs in error on the 29th of November, 1886, and writ of error brought December 28th, 1886, accompanied by a citation to the adverse party, duly returnable to the October term, 1887, and served in January and March of the latter year. But the record was not filed herein until December 20th, 1888, and the rule is settled that under such circumstances we do not entertain jurisdiction. Norton v. Brownville, 129 U. S. 505, 32 L. Ed. 784, citing Grigsby v. Purcell, 99 U. S. 505, 25 L. Ed. 354; Credit Co. v. Arkansas, etc., R. Co., 128 U. S. 258, 32 L. Ed. 448; Hill v. Chicago, etc.,

does not bring to this court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ.⁴⁸ Or in the language of very many decisions it would become *functus officio*.⁴⁹

Where two full terms of the court have passed between the filing of the writ of error in the circuit court and its return with the transcript into this court, the writ of error will be dismissed for want of jurisdiction.⁵⁰

These rules apply to appeals as well as to writs of error.⁵¹

At What Day of Succeeding Term.—The transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if the appellee or defendant in error has not in the meantime had the cause docketed and dismissed. But this cannot be done after the expiration of the term, because the writ of error has then become *functus officio*, and the appeal has spent its force.⁵²

Effect of Failure to Perfect Appeal and of Taking New Appeal.—Although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal. Such vitality cannot be restored by an order of the circuit court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one.⁵³

R. Co., 129 U. S. 170, 32 L. Ed. 651; Edmonson v. Bloomshire, 7 Wall. 306, 19 L. Ed. 91.

In *Caillot v. Deetken*, 113 U. S. 215, 28 L. Ed. 983, the writ of error was filed in the circuit court in which the record was March 16, 1882, and the transcript that was returned with it was filed in this court November 28, 1884. Two full terms of the court had passed, therefore, between the filing of the writ of error in the circuit court and its return with the transcript into this court. It must, therefore, be dismissed for want of jurisdiction.

Motion to dismiss premature.—Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a *procedendo*. *Stafford v. Bank*, 16 How. 135, 14 L. Ed. 876.

48. Failure to file record avoids appeal.—*Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, citing *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Mesa v. United States*, 2 Black 721, 17 L. Ed. 350; *United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163.

The fact that no transcript of the record was filed at the next term to that when a decree appealed from was made is, in general, fatal to the appeal. *The Lucy*, 8 Wall. 307, 19 L. Ed. 394, citing *Castro*

v. United States, 3 Wall. 46, 47, 18 L. Ed. 163; *Insurance Co. v. Mordecai*, 21 How. 195, 16 L. Ed. 94.

49. Appeal becomes functus officio.—*Edmonson v. Bloomshire*, 7 Wall. 306, 310, 19 L. Ed. 91; *Gillette v. Bullard*, 20 Wall. 571, 574, 22 L. Ed. 387; *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792.

50. Failure to file for two terms.—*Caillot v. Deetken*, 113 U. S. 215, 28 L. Ed. 983.

51. Same rule as to appeals as to writs of error.—*Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 32 L. Ed. 448; *Edmonson v. Bloomshire*, 7 Wall. 306, 310, 19 L. Ed. 91; *Gillette v. Bullard*, 20 Wall. 571, 574, 22 L. Ed. 387; *Griesby v. Purcell*, 99 U. S. 505, 506, 25 L. Ed. 354.

52. Transcript may be filed on any day of next term.—*Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792, citing *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 32 L. Ed. 448; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

53. Effect of failure to perfect appeal.—*Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, citing *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363, and distinguishing and explaining *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328, approved in *Evans v. State Bank*, 134 U. S. 330, 332, 33 L. Ed. 917.

After the cases of *Hamilton v. Moore* and *Blair v. Miller*, an attempt seems to have been made in *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588 to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, we consider the practice so well established as to make it better

Reason of Rule.—The intelligible ground of these rules is, that the writ of error and the appeal are the foundations of the court's jurisdiction, without which they have no right to revise the action of the inferior court; that the writ of error, like all other common-law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable.⁵⁴

(2) *Waiver.*—Nor is such irregularity waived by general appearance.⁵⁵

(3) *Effect of Filing Record before Motion to Dismiss.*—If the transcript of the record is filed before the motion for dismissal, the motion will not be granted.⁵⁶

(4) *Dismissal and Reinstatement.—In General.*—Where there has been a failure to file the transcript as stated above, the case will be dismissed,⁵⁷ either by the court of its own motion or on the motion of the defendant in error or the appellee at any time before hearing.⁵⁸

But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within two years from the date of the decree, provided the transcript is filed here and the case docketed at the term next succeeding the date of such second appeal.⁵⁹

Official Certificate of Dismissal.—Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term and move to have the appeal reinstated. To allow such a certificate would be to prejudice such a motion.⁶⁰

Reinstatement.—Where it appears that the failure to transmit the tran-

“to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century.” *Grigsby v. Purcell*, 99 U. S. 505, 507, 25 L. Ed. 354.

54. Reason of rule.—*Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Villabolas v. United States*, 6 How. 81, 12 L. Ed. 352; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Mesa v. United States*, 2 Black 721, 17 L. Ed. 350; *United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Blitz v. Brown*, 7 Wall. 693, 19 L. Ed. 280.

55. Waiver.—*Carroll v. Dorsey*, 20 How. 204, 207, 15 L. Ed. 803.

An objection that the transcript was not filed and the cause docketed during the term to which it was made returnable, may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

56. Effect of filing record before motion to dismiss.—The rule to dismiss a writ of error for not filing the transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss. *Bingham v. Morris*, 7 Cranch 99, 3 L. Ed. 281.

57. Dismissal.—*Mesa v. United States*,

2 Black 721, 17 L. Ed. 350; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *Baltimore, etc., R. Co. v. District of Columbia*, 127 U. S. 780, 32 L. Ed. 325; *Killian v. Clark*, 111 U. S. 784, 28 L. Ed. 599.

58. Dismissal on whose motion.—*State v. Demarest*, 110 U. S. 400, 28 L. Ed. 191; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

A motion to dismiss a case because the transcript was not filed and the case docketed until the expiration of more than two years after the entry of such judgment, may be made at any time before the hearing, or the objection be availed of by the court sua sponte, although delay in presenting the point has sometimes been referred to as an element in combination with others, justifying leniency in its disposition. *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792, citing *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

Where the record is not filed by the appellant, within the time prescribed by the rules of this court, and the appellee files a copy of it, the appeal will be dismissed upon his motion. *United States v. Fremont*, 18 How. 30, 15 L. Ed. 302.

59. Dismissal no bar to second appeal.—*Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

60. Official certificate of dismissal.—*Bank v. Swan*, 3 Pet. 68, 7 L. Ed. 605.

script on appeal seasonably was due wholly to the withholding thereof by the clerk, the appeal will be reinstated.⁶¹

(5) *Excuse for Delay in Filing.*—**In General.**—While according to the settled practice, a transcript of the record of the court below must be returned by the clerk and filed in this court before the end of the next term after the allowance of the appeal, yet there are exceptions to this rule. And it has often been held that where the failure to perfect an appeal within the time limited by law, is occasioned by the acts or omissions of the clerk, or where the records in the office are destroyed by an act of God, these facts afford a sufficient excuse for the delay in filing the record in this court at a subsequent term.⁶² In short, remedies may be found where the plaintiff in error or appellant is entirely free from laches or want of diligence, and is prevented from obtaining the transcript by the fraud of the other party, the order of the court or the contumacy of the clerk.⁶³

But in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence. If there has been no fraud or circumvention and the whole difficulty arises from the negligence of the appellants alone they do not come within the exception. And where it does not appear that the clerk was called upon to make the transcript until after the term of this court, to which the appeal was returnable, closed, and no security for costs was ever given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance, the appeal will be dismissed.⁶⁴

61. Reinstatement.—The *Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531.

62. Excuse for delay in filing.—United States *v. Gomez*, 3 Wall. 752, 762, 18 L. Ed. 212; United States *v. Booth*, 21 How. 506, 512, 16 L. Ed. 169; *Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721; United States *v. Vigil*, 10 Wall. 423, 19 L. Ed. 954; *Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 523, 31 L. Ed. 533.

Certain exceptions to that general rule are recognized and allowed, which are as well established as the rule itself. They are admitted as indispensable limitations to guard against fraud and circumvention, and to prevent a failure of justice. Where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal. United States *v. Booth*, 21 How. 506, 512, 16 L. Ed. 169; United States *v. Gomez*, 3 Wall. 752, 763, 18 L. Ed. 212.

Appeals from remote parts of the country.—Upon a motion to dismiss an appeal from the supreme court of the territory of New Mexico on this ground, the court adverted to the fact that the government is obliged to trust the conduct of cases in remote parts of the country to subordinate agents; and that where the distance of the seat of government is so great from them as it was here, the difficulty of communication should be taken into view when considering the question of delay.

United States *v. Vigil*, 10 Wall. 423, 19 L. Ed. 954.

63. United States *v. Gomez*, 3 Wall. 752, 763, 18 L. Ed. 212; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792.

64. Appellant must have been free from fault.—*Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354, citing United States *v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; United States *v. Booth*, 21 How. 506, 16 L. Ed. 169.

Where the judgment sought to be reviewed is entered July 27, 1887, but the transcript is not filed nor was the case docketed until January 13, 1890, considerably more than two years after the entry of such judgment, and it appeared that the plaintiff was a member of this bar and especially bound to know the rules that it was a condition precedent to the filing of the record and docketing of the case that security should be given to or a deposit should be made with the clerk, and besides when there is evidence that plaintiff in error had actual knowledge of the necessity for the deposit, and assured the clerk that it would be forwarded, it had delayed 18 months in making the remittance, the court held that the laches of the plaintiff in error is too gross to be passed over, and the writ of error must be dismissed. "We cannot treat his omission to forward the deposit soon after May 5, 1888, nor the twenty months' neglect that thereupon ensued, as attributable to ignorance or inadvertence, or as excusable upon any ground heretofore deemed sufficient. Mere carelessness in the

Fraud.—Though the general rule in cases of appeals undoubtedly is that the transcript of the record must be filed and the case docketed at the term next succeeding the appeal, yet where the appellant, without fault on his part, is prevented from seasonably obtaining the transcript by the fraud of the other party, the rule will not apply.⁶⁵

Ill-Founded Orders of Lower Court.—Where the state court to which the writ was directed ordered the clerk to disregard the writ and make no return; this affords a sufficient excuse for the delay.⁶⁶

Acts or Omissions of Clerk.—Where the failure to perfect an appeal within the time limited by law is occasioned by the acts or omissions of the clerk, these facts afford a sufficient excuse for the delay in filing the record in this court at a subsequent term.⁶⁷ But where the sole excuse for failure to file the transcript

inception may have finally resulted in forgetfulness; but we cannot, therefore, absolve him from the penalty legitimately attaching to this disregard of our rules." *Green v. Elbert*, 137 U. S. 615, 623, 34 L. Ed. 792.

In *Grigsby v. Purcell*, 99 U. S. 505, 507, 25 L. Ed. 354, the court said: "These appellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances would be to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them." Cited and distinguished in *Fayolle v. Texas, etc.*, R. Co., 124 U. S. 519, 523, 31 L. Ed. 533.

65. Fraud.—*United States v. Booth*, 21 How. 506, 512, 16 L. Ed. 169; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

In *United States v. Gomez*, 3 Wall. 752, 764, 18 L. Ed. 212, the order allowing the appeal was entered on the twenty-fifth day of August, 1862; but on the sixth day of October following, a stipulation was entered in the minutes, that the transcript should be withheld until the next term of that court, in order to give the claimant an opportunity to move the court to set aside the order of appeal. Such a motion was accordingly made by the claimant on the first day of the succeeding December; and on the fourth day of the same month the court directed that the order allowing the appeal should be vacated and set aside.

Reason for vacating the appeal as assigned was, that the five years had expired before it was allowed, which is directly contrary to the decision of this court, and consequently must be considered as overruled. Held, although the decision of the court was erroneous, still the proceedings under the motion had the effect to prevent the appellants, in the meantime, from obtaining a copy of the transcript. Citing *United States v. Gomez*, 1 Wall. 690, 699, 17 L. Ed. 677.

66. Ill-founded orders of lower court.—In *United States v. Booth*, 21 How. 506, 512, 16 L. Ed. 169, the writ of error in that case was returnable at the December term, 1855, and it was accompanied by a citation requiring the defendant to appear on the first day of that term. No return, however, was made at that time, and on the first day of February following, the attorney-general filed affidavits, showing that the writ of error and citation had been duly served, and that the state court had directed the clerk to make no return. Whereupon this court passed an order commanding the clerk of the state court to make the required return, and the cause was continued; but none such was ever made. Unable to procure any such return, the attorney general was allowed, on the 27th day of February, 1857, to file the copy of the record produced when the application was made for the writ of error, and on the sixth day of March following, the court ordered that it should have the same effect as if it had been regularly filed by the clerk, cited in *United States v. Vigil*, 10 Wall. 423, 426, 19 L. Ed. 954; *Grigsby v. Purcell*, 99 U. S. 505, 507, 25 L. Ed. 354.

67. Acts or omissions of clerk.—*United States v. Gomez*, 3 Wall. 752, 762, 18 L. Ed. 212; *Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721; *United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954; *United States v. Booth*, 21 How. 506, 512, 16 L. Ed. 169.

Delay of clerk in copying the record.—The following facts were held not to furnish a valid excuse for failing to file the transcript at the term next succeeding the taking of the appeal. In October, 1883, the appellants Richardson and Day as one party, Sickles and Stevens as one party

of the record on or before the second day, is that the appellant supposed that the clerk of the circuit court would transmit the transcript when it was completed, it is believed that this is not a sufficient excuse, though the court in this case expressly refused to pass upon the question.⁶⁸

Where Writ Is Served before Return Day.—This court will refuse to quash a writ of error, on the ground that the record was not filed with the clerk of the court, until the month of June, 1833, the writ having been returnable to January term, 1832, since the defendant in error might have availed himself of the benefit of the rule of court, which gave him the right to docket and dismiss the cause. Provided the service be before the return day of the writ, a return at a subsequent day will be sustained.⁶⁹

(6) *Limitations of General Rule.*—**Second Appeal.**—Although where the record has not been filed in this court during the succeeding term, the appeal becomes of no avail, because not duly prosecuted, yet if a second appeal is taken within two years of the entry of the decree, a motion to dismiss such second appeal will be denied.⁷⁰ And the filing of the transcript of the record under the second appeal, during the term succeeding its allowance, suffices for the purposes of jurisdiction, which is not defeated by the failure to obtain a citation or give the bond within two years from the rendition of the decree.⁷¹

Time of Allowance of Second Appeal.—But a second appeal allowed two years after the date of the final decree will be dismissed.⁷²

Where jurisdiction is kept alive by entry of the transcript of the rec-

and Nelson and Soule and Thomas M. Nelson as one party, gave to the clerk of the circuit court a joint verbal order to make a transcript of the record without unnecessary delay, and forward it to the clerk of this court, the three parties to pay to the former clerk the fees therefor pro rata, according to the amounts of their respective claims. After such order to the clerk, the appeal of Richardson and Day from the decree of October 8, 1883, was taken. The clerk did not know that each appeal was a separate matter, but believed that all the appeals made but one case, and that, if the record should reach this court in time for any one appeal, it would bring up the case as a whole, with all the appeals; and he understood and believed, while he was copying the record, that if the transcript should arrive at the office of the clerk of this court on or before October 15, 1884, it would be in ample time to make all of the appeals valid, on the filing and docketing of the transcript. The clerk prepared the transcript as soon as he could, having regard to the other duties of his office and to the size of the record (which makes 1235 printed pages, as printed here). He did not complete the making of the transcript until about June 24, 1884, and forwarded it by express to the clerk of this court on October 6, 1884. *Richardson v. Green*, 130 U. S. 104, 111, 32 L. Ed. 872.

Entry of appeal nunc pro tunc.—The court refused to dismiss an appeal by the United States from the Territory of New Mexico, though, contrary to the usually obligatory rule of practice, a transcript of the record had not been filed in this court until about two years after the end of the next term after the allowance of the ap-

peal; it appearing, in excuse for the delay, that an appeal had been properly prayed for in open court at the time that the judgment was rendered, and was then granted; but that the clerk, for some unexplained reason, had neglected to make an entry in his minutes of what was thus done; that the district attorney, on whose application the appeal was granted, not long after retired from office; that so soon as the omission of the clerk was brought to the notice of a new district attorney of the United States, succeeding, he made application to the court to amend the records so that it might appear in accordance with the facts that the appeal had been prayed for at the term in which the judgment was rendered, that the court granted the application and ordered an entry to be made nunc pro tunc of an appeal asked for at the term when the judgment was given, and that it be granted. *United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954.

68. *Wauton v. DeWolf*, 142 U. S. 138, 35 L. Ed. 965.

69. *Pickett v. Legerwood*, 7 Pet. 144, 147, 8 L. Ed. 638, citing *Wood v. Lide*, 4 Cranch 180, 2 L. Ed. 588. See *Grisby v. Purcell*, 99 U. S. 505, 507, 25 L. Ed. 354.

70. *Limitations of general rule.*—*Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

71. *Perfecting second appeal.*—*Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917, citing *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

72. *Time of allowance of second appeal.*—*Small v. Northern Pac. R. Co.*, 134 U. S. 514, 33 L. Ed. 1066.

ord during the term succeeding the taking of an appeal or the bringing of a writ of error, this court may direct it to be subsequently placed upon the docket, or to treat the act of the clerk in docketing it as providentially done.⁷⁵ In short, the transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if the appellee of defendant in error has not in the meantime had the cause docketed and dismissed. But this cannot be done after the expiration of the term, because the writ of error has then become *functus officio*, and the appeal has spent its force.⁷⁶

Failure to Give Clerk's Fee Bond.—Where the transcript of the record was lodged in the clerk's office in time, but through inadvertence a fee bond had not been given, and the cause not docketed during the term, and there had not in the meantime been a motion to docket and dismiss, a motion made at the next term to dismiss the writ of error will be denied.⁷⁷

(7) *Docketing and Dismissing Causes*—aa. *The Rules of Court Stated.*—In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying

^{75.} *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792.

Where the transcript of the record was placed in the hands of the clerk of this court at the next term after the appeal was allowed and perfected by the filing of a bond, but no appearance was entered for the appellant, nor any deposit for costs made, at that term, but these things were done at the next following term, and the case was then docketed, a motion to dismiss the appeal made at the third term thereafter, will be denied. *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872, approving *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293.

When, however, a return is made, and the transcript seasonably deposited in the clerk's office, jurisdiction is not lost by the lapse of the term, but the cause may still be docketed, if the circumstances are such as to justify the court in exercising its discretion to that effect. *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872; *Green v. Elbert*, 137 U. S. 615, 621, 34 L. Ed. 792.

^{76.} *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 32 L. Ed. 448; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917; *Green v. Elbert*, 137 U. S. 615, 621, 34 L. Ed. 792.

^{77.} *Failure to give clerk's fee bond.*—In *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293, the writ of error was returnable to the October term, 1877. The

return was duly made, and the transcript of the record lodged in the office of the clerk of this court on September 27th, 1877. A citation in due form was issued and served in time, but by an oversight of the counsel for the plaintiff in error no fee bond was given, and the cause was not docketed during the term of 1877. No motion to docket and dismiss was ever made, and on the 3d of September, 1878, the attention of counsel having been called to the omission of the security for costs, an acceptable bond was given and the cause docketed in form. It was held that under these circumstances the writ of error would not be dismissed, following *Ownings v. Tierman*, 10 Pet. 447, 9 L. Ed. 489; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913, and distinguishing *Selma, etc., R. Co. v. Louisville Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32, and other cases in the following language: "We are aware that in some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed and the cause docketed during the term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should, therefore, be construed in connection with those facts." This case is distinguished from *Fayolle v. Texas, etc., R. Co.*, 124 U. S. 519, 523, 31 L. Ed. 533, and approved in *Richardson v. Green*, 130 U. S. 104, 112, 32 L. Ed. 872. See post, "Clerks' Fees," IX, J.

that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.⁷⁸

Failure to File Record in Time.—This remedy should be availed of by the defendant in error where the record was not filed in time.⁷⁹

Failure to Give Bond to Secure Clerk's Fees.—But a cause will not be docketed and dismissed on motion of the defendant in error, because the appellants have not filed the bond to secure the fees to the clerk of this court. For this purpose time will be given to the plaintiff in error on his request.⁸⁰ On the other hand, if it has been already docketed and dismissed, and the record shows great negligence on the part of counsel in failing to comply with the rule, as to furnishing the fee bond, a motion of the appellant, at a subsequent term, to set aside the order of dismissal and grant leave to file the record and docket the cause, will be denied.⁸¹

78. The rules of court stated.—Rule 32, 6 Wheat.; Rule 9, 21 Howard VII; *Amblor v. Whipple*, 131 U. S., appx. ccvi, 22 L. Ed. 403; *Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500; *United States v. Fremont*, 18 How. 30, 15 L. Ed. 302; *Wauton v. DeWolf*, 142 U. S., 138, 35 L. Ed. 965; *Hartshorn v. Day*, 18 How. 28, 15 L. Ed. 272; *Parker v. Circuit Judges*, 12 Wheat. 561, 6 L. Ed. 729.

The 43d rule provides, that where the party against whom a judgment or decree is rendered, fails to file the record and docket the case within the time limited by the rule, the other party may docket the case and file a copy of the record with the clerk, in which case it shall stand for argument at the term; or he may, at his election, have the case docketed and dismissed upon producing a certificate from the clerk stating the cause, and certifying that such a writ of error or appeal had been duly sued out and allowed. *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875.

79. Failure to file record in time.—This court will refuse to quash a writ of error, on the ground that the record was not filed with the clerk of the court, until the month of June, 1833, the writ having been returnable to January term, 1832. The defendant in error might have availed himself of the benefit of the 29th rule of the court, which gave him the right to docket and dismiss the cause. *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638, approved in *Sparrow v. Strong*, 3 Wall. 97, 103, 18 L. Ed. 49.

Under the ninth rule, it is the duty of an appellant to docket his case and file the record with the clerk of this court within the first six days of the term, where the decree was rendered thirty days before the commencement of the term, and if this is not done, the appellee may have the case docketed and dismissed as therein provided; though even then the court may by order permit the appellant to docket the case and file the record after such dismissal. And it has always been

held that if the case is not so docketed and dismissed by the appellee, the appellant is in time if the record be filed during the return term. *Evans v. State Bank*, 134 U. S. 330, 331, 33 L. Ed. 917. See *Sparrow v. Strong*, 3 Wall. 97, 103, 18 L. Ed. 49.

80. Duty to furnish bond for clerk's fees.—*Owings v. Tiernan*, 10 Pet. 24, 9 L. Ed. 333; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913.

A defendant in an appeal, using the copy of the record received from the circuit court lodged by the appellant, cannot have the appeal docketed and dismissed, under the 30th rule of the court; on the ground, that the appellant has failed to comply with the 37th rule, which requires a bond to be given to the clerk of the supreme court, before the case is docketed; he must, to sustain a motion to dismiss the cause, produce the certificate of the circuit court, stating the cause, and certifying that such an appeal has been duly sued out and allowed. *West v. Brashear*, 12 Pet. 101, 9 L. Ed. 1016.

A. sued out a writ of error returnable to the October term, 1877. The return was duly made, the transcript of the record lodged in the clerk's office in September of that year, and a citation issued and served in time; but by an oversight of A.'s counsel no fee bond was given. The cause was not docketed. In September, 1878, the bond was filed and the cause then docketed, no motion to docket and dismiss having in the meantime been made. Held, that a motion made at the present term to dismiss the writ must be denied. *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293, following *Owings v. Tiernan*, 10 Pet. 24, 9 L. Ed. 333; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913, and distinguishing *Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32. The principal case is followed in *Richardson v. Green*, 130 U. S. 104, 112, 32 L. Ed. 872.

81. Selma, etc., R. Co. v. Louisiana Nat. Bank, 94 U. S. 253, 24 L. Ed. 32, dis-

Absence of Showing That Appeal Was Allowed.—Likewise a case may be docketed and dismissed where the record contains no showing as to the allowance of the writ of error or an appeal.⁸²

Extension of Time for Certain Western States.—In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.⁸³

Cases from California.—Under the 63rd rule of the court, the appellee, in a case in California, is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next ensuing such appeal, provided the decree of the court below was rendered sixty days before the commencement of the said term of this court.⁸⁴

bb. Filing of Record by Defendant in Error.—The defendant in error or appellee may at his option docket the cause, and file a copy of the record with the clerk of the court; and if the case is docketed, and a copy of the record filed with the clerk of this court, by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term.⁸⁵ But the rule which permits a defendant in error to docket and dismiss a case if the transcript is not filed by the plaintiff within the time therein limited, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff might then file the transcript.⁸⁶

Under the 63rd rule of this court, if the defendant in error files a copy of the record before the expiration of the time which is allowed to the plaintiff in error to file it, and afterwards the plaintiff in error files the record in proper time, the case made by the defendant in error will be dismissed.⁸⁷

cc. Time of Rendition of Judgment.—The meaning of the forty-third rule of this court is, that if a judgment or decree in the court below be rendered more than thirty days before the commencement of the term of this court, and the

tinguishing *Owings v. Tiernan*, 10 Pet. 447, 9 L. Ed. 489; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913.

82. No proof of allowance of appeal.—Where the records contain no other showing of the allowance of a writ of error or an appeal than the recitals in an appeal bond that the defendant "has prosecuted an appeal or writ of error to the supreme court of the United States to reverse the judgment," and an application for revocation of the supersedeas created by the bond is denied, the case may be docketed and dismissed. *Tuskaloosa Northern R. Co. v. Gude*, 141 U. S. 244, 35 L. Ed. 742.

83. Extension of time.—Rule of court, 21 How. VIII.

84. Cases from California.—*United States v. De Pacheco*, 20 How. 261, 15 L. Ed. 820.

An appeal from California was dismissed where the record was not brought and filed within the first sixty days of the next term of this court; the record, moreover, not having been returned within the term. *German v. United States*, 5 Wall. 825, 18 L. Ed. 502.

85. Filing of record by defendant in error.—Rule of court, 21 How. VIII; *United States v. Fremont*, 18 How. 30, 15 L. Ed. 302.

By the rule adopted February term,

1891 (1 Pet. Rule XIX), it is made the duty of the plaintiff to docket the cause or file the record within the first six days of the term, on failure of which the defendant may docket the cause and file the record; and thereupon the cause stands for trial, as if the record had been filed within the first six days. *Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500.

In *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792, the writ of error bore date October 3, 1887, and was filed on that date in the circuit court. It was returnable to October term, 1887, of this court, which term closed by adjournment on May 14, 1888. The transcript reached the clerk May 10, 1888, but the transcript was filed and the case was docketed not until January 13, 1890, though the judgment sought to be reviewed was entered July 27, 1887. The defendants in error filed their motion to dismiss on November 17, 1890, and gave notice that it would be submitted December 15, following. It was held that they were not bound to docket and dismiss the case if they did not choose to do so. The plaintiff in error occupies no position entitling him to complain because they do not.

86. Insurance Co. v. Mordecai, 21 How. 195, 16 L. Ed. 94, 95.

87. Hartshorn v. Day, 18 How. 28, 15 L. Ed. 272.

record be not filed within the first six days of the term, the appellee or defendant in error may docket the case, and move for its dismissal as the rule prescribes. But if the judgment or decree of the court below be rendered less than thirty days before the commencement of the term of this court, the rule does not apply.⁸⁸

dd. *Where Cause Is Docketed before Motion to Dismiss.*—Under the ninth rule of this court, a writ of error or appeal from any judgment or decree rendered thirty days before the commencement of the term may be docketed and dismissed on motion of the defendant in error or appellee, unless the other side docket the cause and files the record with the clerk of the court within the first six days of the term. But if no motion to dismiss be previously made, the record may be filed and the cause docketed at any time within the term.⁸⁹

ee. *Sufficiency of Record.*—Where the party, in proceeding under the 43d rule, elects to file the record and try the cause, the record must certainly be as full and complete as the one which would be required from the opposing party. It must name all the persons which the writ of error or appeal is intended to bring before the court; otherwise there could be no judgment or decree for or against them.⁹⁰ And upon the same ground, the same thing must be done when the case is docketed in order to obtain a judgment of dismissal. The proceeding is in the nature of a writ of error or appeal, in which the party, in whose favor the judgment or decree was rendered, is allowed to bring the case before this court, in order to prevent unnecessary delay. And all the parties to the judgment or decree, whose interests are to be affected by docketing and dismissing the suit, are regarded as in court, for the purpose of being parties to the judgment of dismissal. Nor could the circuit court regularly issue an execution for or against a person not named; as it would not appear that he had been a party to the proceeding here, or that there had been a judgment of dismissal for or against him.⁹¹

ff. *Certificate of Clerk*—aaa. *Necessity for.*—The defendant in error, to entitle himself to the benefit of the rule, must produce the certificate of the clerk, as required by the rule.⁹² In other words, that rule allows the suit to be docketed and dismissed upon the production of the certificate from the clerk of the court below, certifying that the writ of error has been duly sued out and allowed.⁹³

bbb. *Form and Requisites.*—“**Stating the Cause.**”—The rule requires that

88. *Time of rendition of judgment.*—United States v. Boisdore, 7 How. 658, 12 L. Ed. 860; Ex parte Rhodes, 10 How. 144, 13 L. Ed. 363.

89. *Where cause is docketed before motion to dismiss.*—Sparrow v. Strong, 3 Wall. 97, 18 L. Ed. 49, citing Bingham v. Morris, 7 Cranch 99, 3 L. Ed. 281; Wood v. Lide, 4 Cranch 180, 2 L. Ed. 588; Pickett v. Legerwood, 7 Pet. 144, 146, 8 L. Ed. 638; Owings v. Tiernan, 10 Pet. 24, 9 L. Ed. 333; Gwin v. Breedlove, 15 Pet. 284, 10 L. Ed. 740.

90. *Sufficiency of record.*—Smith v. Clark, 12 How. 21, 13 L. Ed. 875.

91. Smith v. Clark, 12 How. 21, 13 L. Ed. 875.

92. *Necessity for certificate of clerk.*—Macomb v. Armistead, 10 Pet. 407, 9 L. Ed. 473.

93. Amis v. Pearle, 15 Pet. 211, 10 L. Ed. 714; West v. Brashear, 12 Pet. 101, 9 L. Ed. 1016.

Necessity for production of certificate.—Motion by the counsel of the defendant to docket and dismiss a case in which a writ of error had been sued out of the

circuit court, the plaintiff in error having failed to file the writ of error in the supreme court, and to prosecute the same. But the counsel for the defendant in error produced the original writ of error, signed by the clerk of the circuit court, and a citation signed by the judges of the circuit court. Held, that the substance of the forty-third rule of the court was complied with; and the case was docketed and dismissed. The production of this writ of error, with the citation, is the highest evidence that the writ of error has been duly sued out and allowed. The certificate of the clerk of the circuit court required by the rule, is but prima facie evidence. Amis v. Pearle, 15 Pet. 211, 10 L. Ed. 714.

Although the party has not filed the certificate mentioned in the rule, yet if he has filed a full transcript of the record, and the transcript shows all of the facts which the clerk by the rule is required to certify, that is sufficient; it has always been held by the court to be equivalent to the certificate which the rule prescribes. United States v. Pacheco, 20 How. 261, 15 L. Ed. 821.

the certificate of the clerk should "state the cause," and this is not done unless the parties to it are named.⁹⁴

Title of Case.—So also, in order to entitle a party to have a case docketed and dismissed, under the forty-third rule of court, the certificate of the clerk of the court below must set forth an accurate titling of the case.⁹⁵

Statement of Parties.—The rule that where the unsuccessful party brings a writ of error, all the parties to it must be named in the writ; and that the name of one or more of them "and others" is not a sufficient description to bring those not named before the court, applies to a writ of error docketed under the forty-third rule.⁹⁶ And the reason for requiring all the parties, whose interests are to be affected by the judgment, to be named in the writ of error, applies with equal force to the case of an appeal from a decree.⁹⁷

Time of Rendition of Judgment or Decree.—In order to sustain a motion to docket and dismiss a case under the forty-third rule of this court, it is necessary to show, by the certificate of the clerk of the court below, that the judgment or decree of that court was rendered thirty days before the commencement of the term of this court.⁹⁸

gg. Operation and Effect of Rule.—Under the sixty-third rule of this court, an appellee in a case from California may docket and dismiss according to that rule; but a new appeal may be taken at any time within five years, or it may be that the record may be filed by the appellant at the same term at which a certificate or record had been filed by the appellee, and the case dismissed.¹

94. Certificate must "state the cause."—*Smith v. Clark*, 12 How. 21, 13 L. Ed. 875; *West v. Brashear*, 12 Pet. 101, 9 L. Ed. 1016.

95. Certificate must state title of cause.—*Holliday v. Batson*, 4 How. 645, 11 L. Ed. 1140.

96. Statement of parties.—*Smith v. Clark*, 12 How. 21, 13 L. Ed. 875; *Holliday v. Batson*, 4 How. 645, 11 L. Ed. 1140.

Where a motion is made to docket and dismiss a case under the 43d rule of this court, the certificate of the clerk below, upon which the motion is founded, must state the names of the parties to the suit. It is not enough to say, *Joseph W. Clark and others*. The names of the "others" ought to be set forth. *Smith v. Clark*, 12 How. 21, 13 L. Ed. 875, citing *Deneale v. Archer*, 8 Pet. 528, 8 L. Ed. 1033; *Holliday v. Batson*, 4 How. 645, 11 L. Ed. 1140.

97. *Smith v. Clark*, 12 How. 21, 22, 13 L. Ed. 875.

98. Certificate must show time of rendition of judgment.—Hence, where the certificate of the clerk stated that a final judgment was pronounced at April term, 1850, it was not sufficient, because non constat that the April term might not have been prolonged until December, 1850. *Ex parte Rhodes*, 10 How. 144, 13 L. Ed. 263.

1. Operation and effect of rule.—It is proper, however, to add, in order to prevent mistake on this subject, that the only effect of docketing and dismissing a case under the 63rd rule of this court providing for appeals from California, is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that

court, which the appeal created, and does nothing more. And after the case has been docketed and dismissed, the party against whom the decree was rendered, may still, at any time within two years from the date of the decree, take a new appeal in the inferior court; and if he files the transcript of the record in this court within the first six days of the term next ensuing his appeal, the appeal will be valid, and the case as fully before this court, for examination and revision, as if it had been brought here at the first term. The act of congress authorizes the appeal at any time within two years, and the period allowed by law cannot be shortened by any rule or practice of a court. Nor was it intended to be diminished by the rules in question. And when an appeal is taken in the court below, if the appellee desires a speedy and final decision of the controversy, it is in his power to bring the case up to the next succeeding term of this court. Indeed, it sometimes happens, under this rule, that the court permits the transcript of the record to be filed by the appellant, and the case docketed for argument, at the same term at which it had previously been docketed and dismissed on the motion of the appellee. And where the appellant satisfies the court that the omission to file the transcript within the first six days was not owing to any fault or negligence on his part, the court has always allowed him to file it at the same term, and docket the appeal for trial, without putting him to the expense and delay of another appeal. *United States v. Pacheco*, 20 How. 261, 15 L. Ed. 821.

After a case has been thus docketed and dismissed at the instance of an appel-

Effect on Judgment Below.—A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus.²

hh. **Reinstatement.**—After a cause has been docketed and dismissed, it cannot be again docketed unless by order of the court. Such is the rule. If a return is made and the transcript deposited in the clerk's office in time, our jurisdiction is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rest largely in the discretion of the court when not provided for by rules.³

But the judgment of dismissal under the rule, is a judgment nisi; and it may be stricken out at any time during the court, upon motion; unless it appears that the omission to file the record and docket the case, at an earlier period of the court, has been injurious to the interests of the defendant in error. The motion to reinstate addresses itself to the sound discretion of the court; and care will always be taken in granting the rule, that no injustice is done to the opposite party.⁴ Thus, when this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon.⁵

Excuses for Failure to File.—Where, by reason of the failure of the appellant to enter into an undertaking to the clerk for the payment of his fees, or otherwise satisfy him in that behalf, the appeal has, upon motion of the appellee, been docketed and dismissed, the court will not, on motion of the appellant, at a subsequent term, set aside the order of dismissal, and grant leave to file the record and docket the cause.⁶ But leave may be given to docket the cause after the term, when the transcript has been filed in time, but through inadvertence a fee bond has not been given, and there has not been in the meantime a motion to docket and dismiss, especially where no harm has been done save possibly a short extension of the time for bringing on the hearing.⁷

lee who is a claimant of land, if a patent should be taken out, it will still be subject to be reviewed by this court at any time within the five years above mentioned. *United States v. Pacheco*, 20 How. 261, 15 L. Ed. 821.

2. Not an affirmance of judgment below.—*United States v. Gomez*, 23 How. 326, 16 L. Ed. 552.

3. Reinstatement.—*Edwards v. United States*, 102 U. S. 575, 576, 26 L. Ed. 293, distinguished in *Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 31 L. Ed. 533.

After an appeal has been docketed and dismissed under the 63d rule of court at a prior term of the court, the same case cannot again be docketed without a new appeal. *Rogers v. Law*, 21 How. 526, 16 L. Ed. 208.

4. Gwin v. Breedlove, 15 Pet. 284, 10 L. Ed. 740, following *Owings v. Tiernan*, 10 Pet. 24, 9 L. Ed. 333.

5. Revocation of mandate.—*United States v. Gomez*, 23 How. 326, 16 L. Ed.

552. See *West v. Brashear*, 131 U. S., appx. lxvi, 9 L. Ed. 1061.

6. Excuses for failure to file.—*Selma*, etc., R. Co. v. *Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32, approved in *Edwards v. United States*, 102 U. S. 575, 576, 26 L. Ed. 293.

In one case, *West v. Brashear*, 131 U. S., appx. lxvi, 9 L. Ed. 1016, an appeal which had been docketed and dismissed for appellant's inability to procure a fee bond for the clerk, as required by the rule of this court, was reinstated where the appellant at the same term was subsequently prepared to furnish it. See also, *Selma*, etc., R. Co. v. *Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32.

7. Edwards v. United States, 102 U. S. 575, 26 L. Ed. 293, citing and approving *Owings v. Tiernan*, 10 Pet. 447, 9 L. Ed. 489; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913, distinguished in *Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 31 L. Ed. 533.

Hearing of Motion.—Where the motion to dismiss by the defendant in error, and the motion by the plaintiff in error to docket the case are contemporaneous, the motion of the plaintiff in error must prevail.⁸

ii. *Supersedeas.*—After a case has been docketed and dismissed under the forty-third rule of the court, and the plaintiff in error sues out another writ of error, this court will, when the case appears to require it, order a supersedeas to stay all proceedings pending the second writ of error. The supersedeas is issued under the fourteenth section of the act of the 24th of September, 1783.⁹

Appeals from District of Columbia.—Whether an appeal operates as a supersedeas or not, it is within the operation of the rule of the court of appeals of the District of Columbia providing for the docketing and dismissing appeals where a transcript is not filed within the time limited, when an appeal shall operate as a supersedeas; or, “in any and all cases;” after the time limited for filing the transcript, and default in respect thereto.¹⁰

(8) *Extension of Time.*—A certificate from the clerk of the circuit court, that he cannot make out the record in time to comply with the 63d rule of this court, does not furnish a sufficient reason for an extension of the time prescribed by that rule.¹¹

(9) *How Objection Made.*—The objection that the plaintiff in error or the appellant as the case may be, has not filed a transcript and docketed the case during the term to which it was made returnable, may be taken advantage of by the court upon its own motion, or by the appellee or defendant in error at any time before the hearing. Mere appearance does not amount to a waiver.¹²

d. *Remedies in Case of Failure or Refusal to File.*—(1) *Motion for Rule to File.*—A motion will sometimes lie on the part of the defendants in error, for a rule upon the plaintiff in error to file a copy of the record.¹³

(2) *Mandamus.*—Mandamus is an appropriate remedy to compel the clerk, in case of refusal, to prepare and deliver the transcript; but where it is doubtful whether the remedy would be effectual—as where the proceedings had been such that the question as to pendency of the appeal itself, could not well be determined without an inspection of the record—a resort to it is not obligatory. In such cases if the suit be an appeal in a land case from the California district, in which the United States is a party, it may apply to the district attorney for a transcript; the latter as well as the clerk having power under an act of congress of March 3, 1861, in such cases of appeal, to transcribe and certify the record to this court.¹⁴

But a writ of mandamus will not lie from this court to compel the clerk below to send up a transcript of the record, where no writ of error has in fact been issued. “Certainly it has been the prevailing custom from the beginning for the clerk of this court, or the clerk of the circuit court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court. Consequently, the simple lodging of the allowance with him cannot

8. *Hearing of motion.*—Gwin v. Breedlove, 15 Pet. 284, 10 L. Ed. 740, following Owings v. Tiernan, 10 Pet. 24, 9 L. Ed. 333.

The rule of court for docketing and dismissing causes, passed at January term, 1835, has never been applied to any cases, where, before the motion was made, the cause had been actually placed on the docket. Under such circumstances, on a motion to docket, when a motion to dismiss was contemporaneously made, the cause was allowed to be docketed; the usual bond for the clerk's fees being given. Time was given to the plaintiff in error to give the bond. Owings v. Tiernan, 10

Pet. 24, 9 L. Ed. 333.

9. *Supersedeas.*—Hardeman v. Anderson, 4 How. 640, 11 L. Ed. 1138.

10. *District of Columbia.*—United States v. Alvey, 182 U. S. 456, 461, 45 L. Ed. 1180.

11. *Extension of time.*—Bulkeley v. Honold, 18 How. 40, 15 L. Ed. 261.

12. *How objection made.*—Grigsby v. Purcell, 99 U. S. 595, 25 L. Ed. 354.

13. *Motion for rule to file.*—Boyd v. Scott, 11 How. 292, 13 L. Ed. 701.

14. *Mandamus to compel delivery of transcript.*—United States v. Gomez, 3 Wall. 752, 18 L. Ed. 212.

be considered as a demand for the writ; and, besides, this proceeding is not to require him to issue the writ, but to furnish a transcript to be annexed to and returned with the writ (Rev. Stat., § 997), which it is not his duty to give until there is a writ to which it can be annexed and with which it can be returned."¹⁵

e. *Withdrawal of Transcript*.—As a general rule, to save expense, leave will be granted to an appellant to withdraw the transcript, when the case has been dismissed for defects and omissions in the removal of the cause,¹⁶ as for example, where a cause is dismissed on the ground that the writ of error was not returned,¹⁷ or dismissed on the ground that a writ of error is taken to a decree in chancery instead of an appeal.¹⁸

Dismissal on Plaintiff in Error's Own Motion.—But where a writ of error is dismissed by the plaintiff in error on his own motion, a motion made at the same time on his behalf for leave to withdraw the transcript of the record heretofore filed herein, will be denied. "The transcript has become a part of the records of this court, which we cannot permit to be mutilated or destroyed. Its contents are accessible here, and the original record remains in the circuit court. If information is desired, either source may be resorted to."¹⁹

Redocketing.—Where leave is granted to a plaintiff in error to withdraw the record because of a defective certificate of authentication, it cannot, after it has been perfected, be returned here and placed on the docket, as if it had been regularly filed.²⁰

8. AUTHENTICATION AND CERTIFICATION—*a. Necessity for.*—In order to give this court jurisdiction of an appeal or writ of error, "an authenticated transcript of the record" of the court below must be filed in this court at the return term.²¹ Papers produced, purporting to be the substance of the record below, but not properly authenticated, cannot be considered as a record.²²

b. Who May Certify.—The certificate must be made by an officer authorized by law to make it.²³ But if the record contains the judgment duly certified, over which this court can exercise jurisdiction, it is not essential that it should be certified by the court rendering the judgment.²⁴

c. The Certificate of Authentication—(1) *Necessity for Certificate.*—Where

15. *Ex parte Ralston*, 119 U. S. 613, 615, 30 L. Ed. 506, citing *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447.

16. **Right of appellant to withdraw transcript.**—*Porter v. Foley*, 21 How. 393, 16 L. Ed. 154; *Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143.

17. **No return of writ.**—Where a cause is dismissed for want of jurisdiction because the writ of error was not returned, leave will be granted the plaintiff in error if he desires it, in order to save expense, to withdraw the transcript, and use it in connection with the proper and legal process to bring the case here; and if withdrawn, a receipt for it must be left with the clerk. *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154, opinion of Mr. Chief Justice Taney.

In *Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143, the court dismissed the appeal because it did not appear that an appeal had been taken in the district court, but added that if the plaintiff in error desires to supply the omission, and take an appeal in the district court, and bring his case legally before us, he has leave, in order to save expense, to withdraw the transcript now filed, and use it upon his

appeal, leaving a receipt for it with the clerk of the United States supreme court. See in accord *Porter v. Foley*, 21 How. 393, 16 L. Ed. 154.

18. **Where a writ of error is taken to a decree in chancery** instead of an appeal and is consequently dismissed, leave may be granted the plaintiff in error to withdraw the transcript of the record to save the expense of another transcript on a subsequent appeal. *Williams v. Savings Bank*, 141 U. S. 249, 35 L. Ed. 740.

19. *Cheney v. Hughes*, 138 U. S. 403, 34 L. Ed. 993.

20. **No right to redocket.**—*Blitz v. Brown*, 7 Wall. 693, 19 L. Ed. 280.

21. **Necessity for authenticated transcript.**—Rev. Stat., § 997; *Edmondson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Idaho, etc., Land Co. v. Bradbury*, 132 U. S. 509, 512, 33 L. Ed. 433.

22. *Ray v. Law*, 3 Cranch 179, 2 L. Ed. 404; *San Pedro, etc., Co. v. United States*, 146 U. S. 120, 36 L. Ed. 911.

23. **Who may certify.**—*United States v. Gomez*, 1 Wall. 690, 701, 17 L. Ed. 677.

24. **Court rendering judgment need not certify.**—*Webster v. Reid*, 11 How. 437, 13 L. Ed. 761, citing *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

the record does not show a proper certificate, this is sufficient ground for dismissal.²⁵

Remedy.—When the only defect in a transcript sent to this court is that the clerk has not appended to it his certificate that it contains the full record (there being no allegation of contumacy), a certiorari is not the proper remedy for relief to the plaintiff in error. He should ask leave to withdraw the transcript to enable him to apply to the clerk of the court below to append thereto the necessary certificate.²⁶

(2) *Form and Sufficiency.*—The 11th rule of the supreme court requires, that the clerk of the circuit court to which any writ of error shall be directed, may make return of the same, by annexing a true copy of the record and of all the proceedings in the cause, under his hand and the seal of the court.²⁷ The 11th rule is now Rule 8, subd.²⁸ Where the clerk certifies the transcript sent up to be "a true, full and perfect copy from the record of all the proceedings in the suit," this is sufficient for all the purposes of jurisdiction.²⁹ On the other

25. Necessity for certificate.—Campbell v. Read, 2 Wall. 198, 17 L. Ed. 779.

26. Remedy where certificate omitted.—Hodges v. Vaughan, 19 Wall. 12, 22 L. Ed. 46.

27. Form and sufficiency.—Keene v. Whittaker, 13 Pet. 459, 10 L. Ed. 246; Redfield v. Parks, 130 U. S. 623, 624, 32 L. Ed. 1053.

If the clerk of a court certify at the foot of a paper, purporting to be a record, "that the foregoing is truly taken from the record of proceedings" of this court; and if the judge, chief justice, or presiding magistrate, certify that such attestation of the clerk is in due form of law, it is to be presumed, that the paper so certified is a full copy of all the proceedings in the case, and is admissible in evidence. But if the writing produced, do not purport to be a record, but a mere transcript of minutes extracted from the docket of the court, it is not admissible in evidence. Ferguson v. Harwood, 7 Cranch 408, 3 L. Ed. 386.

28. Redfield v. Parks, 130 U. S. 623, 32 L. Ed. 1053.

Sufficiency of authentication of patent as part of evidence in case.—Where at the end of the depositions of the witnesses are the exhibits referred to therein, among which is a copy of the patent in question, marked "Defendants' Exhibit William Wield, W. C. W. Executor;" and at the end of the entire record the certificate of the clerk of the circuit court verifying the same, under the seal of the court, as a true transcript of all the proceedings in the cause on file and of record in his office, and the patent is referred to and used in the examination, is marked as an exhibit in the cause by the examiner and is actually found in the record and returned and certified as a part thereof, it was held that though the depositions contain no express minute that the patent was offered in evidence, it must be received as so offered. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481,

35 L. Ed. 521, citing Hoskin v. Fisher, 125 U. S. 217, 31 L. Ed. 750.

29. What is a sufficient certification.—Missouri, etc., R. Co. v. Dinsmore, 108 U. S. 30, 27 L. Ed. 640.

A certificate that a transcript of a record is a "full, true, and correct copy of all the proceedings, entries, and files in the district court for the southern district of California, except the transcript sent up from the board of land commissioners in the case," is so far good that the party alleging it to be bad will be referred, if dissatisfied with the transcript, to his remedy of a suggestion of diminution and motion for certiorari. United States v. Gomez, 1 Wall. 690, 17 L. Ed. 677.

Section 464 of the Code of Washington Territory provides that "in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript, but in the original form; but a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant." In an appeal in equity the appellant requested the clerk to "transmit to the supreme court all the papers filed in this cause except subpoenas as by law provided." The cause had been referred to a referee, who had returned with his report and finding, five packages, numbered 1, 2, 3, 4, and 5, with a certificate that it was "the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitutes the evidence submitted to and taken by me in said action." The clerk of the court transmitted these packages to the supreme court with a certificate that "the letters, papers, and exhibits herewith transmitted and numbered * * * are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court," and further certified that

hand, where the certificate of the clerk of a circuit court, only certifies "that the foregoing writing, annexed to this certificate, is a true, correct, and compared copy of the original remaining of record in my office," this is not a compliance with Rule 8, subd. 1, which requires that the annexed papers are "a true copy of the record, and of the assignment of errors, and of all proceedings in the case."³⁰

Foreign statutes must be properly certified to be a part of the record.³²

Seal and Signature.—A writ of error will be dismissed where the transcript contains only a blank form of a certificate of authentication, without the seal of the court below or the signature of its clerk. Leave, however, will be granted to the plaintiff in error to withdraw the record, but not for the purpose of having it perfected and returned here and placed on the docket, as if it had been regularly filed.³³ But where the certificate authenticating a record, not only begins with setting out the name and office of the clerk as the maker of the certificate, but has appended to it the seal of the court, and lacks only the clerk's signature to make it conform to the best precedents, this court will take jurisdiction of the case.³⁴

On a writ of error to a state court, the record may be authenticated by

the transcript on appeal was a "full, true, and correct transcript of so much of the record * * * as I am by statute and directions of attorneys in said cause" required to transmit to the supreme court." Held, that the certificates showed that the transcript contained all the evidence introduced by the parties on the trial below, and that the appeal had been duly taken and perfected. *Ex parte Parker*, 120 U. S. 737, 30 L. Ed. 818.

30. *Redfield v. Parks*, 130 U. S. 623, 32 L. Ed. 1053.

Where there was no certificate of the judge, or clerk, that the record was returned in obedience to the writ, though at the end of what purported to be the record, the clerk added the words "copy, teste, W. M., clerk," it was held that the verification of the record was defective. *Wilson v. Daniel*, 3 Dall. 401, 1 L. Ed. 655.

32. Where a Canadian statute was introduced and treated as evidence by consent of counsel upon a motion for a rehearing in the district court, though it did not appear of record, and, in obedience to a writ of certiorari from the court of appeals, was certified up to the court of appeals by the clerk of the district court as a true copy of the original act as published, it was held that the court of appeals should have treated the act as properly before it, notwithstanding the clerk does not formally certify it to be a part of the record, but only certifies that he had "carefully compared the same with the original act as published, and find the same to be a true copy of such original and of the whole thereof." "It thus appears that the Canadian statute had been used in the district court by consent of counsel, had been treated as part of the record, and that the copy sent up was a true copy of the statute as published. It

is true that the clerk did not formally certify it to be a part of the record, but the fact that it had been so treated was established by the affidavit; and the writ of certiorari upon its face recited the fact that a copy of the statute had been introduced in evidence, as alleged, and required the court below to 'send the record and proceedings, with all things concerning the same, as fully and entirely as they remained of record in said district court.' In view of these proceedings, we think the circuit court of appeals should have accepted the certified copy of the statute as properly in evidence before it." *The New York*, 175 U. S. 187, 198, 44 L. Ed. 126.

33. *Seal and signature.*—*Blitz v. Brown*, 7 Wall. 693, 19 L. Ed. 280.

34. "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk." *Idaho, etc., Land Co. v. Bradbury*, 132 U. S. 509, 513, 33 L. Ed. 433, distinguishing *Blitz v. Brown*, 7 Wall. 693, 19 L. Ed. 280, on the ground that the only certificate of authentication in that case was a blank form, wanting both the seal of the court below and the signature of the clerk, so that there was really no authentication whatever; and this court therefore in that case dismissed the writ of error, but permitted the plaintiff in error to withdraw the record for the purpose of suing out a new writ.

the seal of the court and the certificate or signature of the clerk, without that of the judge.³⁵

Signature by Deputy Clerk.—Since the act of June 8, 1872 (17 Stat. 330), Rev. Stat. 558, 624, 678, authorizing the appointment of deputies of the clerks of the courts of the United States, a transcript of the record is sufficiently authenticated for the purposes of an appeal or a writ of error to this court, if it is signed by the deputy in the name of and for the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court.³⁶

Weight of Certificate.—Great faith will be given to a certificate of a clerk below (in the face of things apparent on the transcript itself, and in face of the assertion by counsel of one side and the admission by counsel of the other), that a record sent here by him is a full, complete, true and perfect transcript of the record and proceedings in a court below.³⁷

Remedying Defective Certificates.—If, in point of fact, the certificate of the clerk that the transcript sent up is "a true, full and perfect copy from the record of all the proceedings in the suit" is not true, the remedy is by certiorari, to supply deficiencies, and not by motion to dismiss.³⁸

d. *Transfer of Causes from Territorial Courts.*—Under the constitutional provision for the continuance of the courts and officers of the territory of Florida, upon its admission into the Union, until superseded under the laws of the state, it was held that the clerk of the court of appeals of the territory of Florida had authority to certify up the record, and that it was sufficiently authenticated by the seal of that court.³⁹

9. **PRINTING**—a. *Necessity for Printing Record.*—Where the record has not been printed a motion to dismiss an appeal or a writ of error will not be considered, if there is any question about the facts on which the motion rests.⁴⁰ This rule has been applied to a motion to dismiss a cross appeal.⁴¹ It has also been applied where a motion to affirm the judgment of the court below,⁴² to strike out assignments of error,⁴³ or to advance the cause on the docket,⁴⁴ are united with a motion to dismiss the writ of error.

Right to Use Record in a Former Case.—But if the questions involved in a pending case are precisely the same as those passed upon in a former case, and no controversy exists as to the facts, a motion to save the expense of printing the record may be sustained, and the cause remanded upon the authority of the prior decision.⁴⁵

b. *Duty of Plaintiff in Error.*—Under Rule 10, § 2, it is the duty of the plaintiff in error to cause the record to be printed.⁴⁶

c. *Right to Take Original Records to Printer.*—The clerk shall not permit any original record or paper to be taken from the courtroom, or from the office, with-

35. **Error to state court.**—*Worcester v. Georgia*, 6 Pet. 515, 536, 8 L. Ed. 483, 492, citing *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Buel v. Van Ness*, 8 Wheat. 312, 5 L. Ed. 624; *McCulloch v. State*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

36. **Signature by deputy clerk.**—*Garnau v. Dozier*, 100 U. S. 7, 25 L. Ed. 536.

37. **Weight of certificate.**—*The Rio Grande*, 19 Wall. 178, 22 L. Ed. 60.

38. **Remedying defective transcripts.**—*Missouri, etc., R. Co. v. Dinsmore*, 108 U. S. 30, 27 L. Ed. 640. See *Hudgins v. Kemp*, 18 How. 520, 15 L. Ed. 511.

39. **Transfer of causes from territorial courts.**—*Bradford v. Williams*, 4 How. 576, 11 L. Ed. 1109, opinion of Mr. Justice McLean.

40. **Necessity for printing record.**—*St.*

Louis Nat. Bank v. United States Ins. Co., 100 U. S. 43, 25 L. Ed. 547. See the title APPEAL AND ERROR, vol. 1, p. 497.

41. **Dismissal of cross appeal.**—*Mayer v. Walsh*, 108 U. S. 17, 27 L. Ed. 635.

42. **Uniting motion to affirm with motion to dismiss.**—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 27 L. Ed. 630.

43. **Motion to strike out assignment of errors.**—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 27 L. Ed. 630.

44. **Motion to advance.**—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 27 L. Ed. 630.

45. **Right to use record in a former case.**—*Oregon Railway, etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620.

46. **Duty of plaintiff in error.**—*Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176.

out an order from the court; but records on appeals and writs of error, exclusive of original papers sent up therewith, may be taken to a printer to be printed, under the requirements of Rule 10. The clerk shall take to the printer the original record in the office, except in cases prohibited by the rules. When the original cannot be taken, he shall furnish the printer with a manuscript copy. He shall supervise the printing, and see that the printed copy is properly indexed. He shall take care of and distribute the printed copies to the judges, the reporter, and parties, from time to time, as required.⁴⁷

d. *How Much to Be Printed*.—On motion to dismiss or affirm, it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript.⁴⁸ It is not necessary that the entire record be printed.⁴⁹

e. *Clerk's Fees and Costs of Printing*.—See post, "Costs," XVIII.

(1) *In General*.—In the appropriation act of congress, passed March 3, 1877, it was provided as follows: "And there shall be taxed against the losing party in each and every cause pending in the supreme court of the United States, or in the court of claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States; but this shall only apply to records printed after the 1st of October next."⁵⁰

And the rules of court, subsec. 4 provide, that in cases where a manuscript copy of the record is not furnished the printer, the fee of the clerk for his service under the subsection 3 shall be one-half the rates now allowed by law for making a manuscript copy, and that shall be charged to the party bringing the cause into court, unless the court shall otherwise direct. When a manuscript copy is required to be made, full fees for a copy may be charged, but nothing in addition for the other services required. In all cases the clerk shall deliver a copy of the printed record to each party without extra charge. In cases of dismissal, reversal, or affirmance, with costs, the fee allowed in the last paragraph shall be taxed against the party against whom the costs are given. In cases of dismissal for want of jurisdiction, such fees shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.⁵¹

(2) *Payment by Whom*—aa. *Appellant or Plaintiff in Error*.—Under Rule 10, it is the duty of the clerk to have the record printed, and a fee has been fixed for preparing the record for the printer, indexing the same, and supervising the printing. Ordinarily this fee is to be paid in the first instance by the party who prosecutes the cause. If he fails to make the payment when demanded in time to enable the clerk to cause the printing to be done in due course, he fails in the orderly prosecution of his suit, and may be dealt with accordingly. Con-

47. Right to take original records to printer.—In the matter of Amendments to Rules 1 and 10, 108 U. S. 1, 3.

For a history of the rules of court and legislation regarding the practice prevailing in the clerk's office of sending original records to the printer to be printed, and of taxing in the bills of costs a fee for one manuscript copy of the record, when no such copy is in fact made. In the Matter of Amendments to Rules 1 and 10, 108 U. S. 1.

48. How much to be printed.—Walston v. Nevin, 128 U. S. 578, 32 L. Ed. 544; Carey v. Houston, etc., R. Co., 150 U. S. 170, 179, 37 L. Ed. 1041.

"Appellees have printed the original and amended bills; the answers and recitations; the opinion of the circuit judge

in disposing of the case; the final decree; the two appeals and proceedings thereon; and the assignments of errors in both courts. This was quite sufficient for the purposes of the motion." Carey v. Houston, etc., R. Co., 150 U. S. 170, 179, 37 L. Ed. 1041.

49. Entire record need not be printed.—Walston v. Nevin, 128 U. S. 578, 32 L. Ed. 544.

50. Clerk's fees and costs of printing in general.—19 Stat. 244; Indianapolis, etc., R. Co. v. Vance, 96 U. S. 594, 24 L. Ed. 825; Phelps v. Elliott, 140 U. S. 694, 35 L. Ed. 745.

51. In the Matter of Amendments to Rules 1 and 10, 108 U. S. 1, 4, 27 L. Ed. 629.

sequently if, through the fault of a plaintiff in error or appellant, printed copies of the record are not furnished to the justices or the parties when required in the due prosecution of the cause the writ or appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary.⁵²

Defendant in Error May Pay Fees.—If the plaintiff in error fails in this the defendant in error may pay the costs and fees and thus secure the printing.⁵³ In other words, where the plaintiff in error has neglected to have the record printed by the time it was wanted by the defendant in error on his motion to dismiss, this court may adjudge the costs incident to the printing against the plaintiff in error as part of the costs of a motion to dismiss.⁵⁴

Costs of Printing Divided between Appellants.—In some cases the costs of printing the record have been divided up between the appellants.⁵⁵ In others the cost of printing the record is equally divided.⁵⁶

Receiver in Foreclosure Proceedings.—Where the mortgagor, appellant in a suit to foreclose a mortgage cannot pay the cost of printing the record on appeal, and a receiver has been appointed in whose hands there are rents and profits collected during the pendency of the suit, the receiver may be required to pay to the clerk the sum estimated to be necessary to complete the cost of printing the record.⁵⁷

bb. *Against Losing Party.*—Under § 7, in case of reversal, affirmance, or dismissal with costs, the amount of the cost of printing the record and the clerk's fee are to be taxed to the party against whom the costs are given.⁵⁸ And under the provisions of the act of March 3, 1877 (19 Stat. 344), the cost of printing all records in this court, after Oct. 1, in that year, which is paid by the government, must be taxed against the losing party.⁵⁹

But where each one of the two principal appellants has succeeded in part on his appeal, the expense of printing the record will be charged equally on such two appellants.⁶⁰

cc. *Party Appealing in Cross Suit.*—The party appealing in a cross suit from rulings excluding evidence cannot be required to pay one-half the cost of printing the record, where the complainant in the original bill has also appealed from a decree of dismissal.⁶¹

dd. *Party Causing Unnecessary Matter to Be Printed.*—Under Rule 10, this

52. Appellant or plaintiff in error.—*Steever v. Rickman*, 109 U. S. 74, 75, 27 L. Ed. 861.

53. Defendant in error may pay fees.—*Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176.

54. Bradstreet v. Higgins, 114 U. S. 262, 29 L. Ed. 176.

55. Costs of printing divided between appellants.—*Clay v. Field*, 138 U. S. 461, 34 L. Ed. 1044; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 481, 29 L. Ed. 963.

56. Costs of printing equally divided.—*Mellen v. Buckner*, 139 U. S. 388, 416, 35 L. Ed. 199; *Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 481, 29 L. Ed. 963.

57. Receiver.—*Grant v. Phoenix Mut. Life Ins. Co.*, 120 U. S. 271, 30 L. Ed. 658.

58. Costs taxed against losing party.—*Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176.

59. Indianapolis, etc., R. Co. v. Vance, 96 U. S. 594, 24 L. Ed. 825; *Nichols v. Marsh*, 131 U. S. 401.

The appellee, the successful party in this court, caused the printing of the record, after said last-mentioned date, to be done at his own expense, but at a cost no greater than if the work had been done at the government printing office. Held, that such cost be taxed against the appellant. *Indianapolis, etc., R. Co. v. Vance*, 96 U. S. 594, 24 L. Ed. 825.

60. Costs equally divided.—*Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963.

61. Party appealing in cross suit.—M. filed a bill in equity against S. for the infringement of letters patent. S. answered and filed a cross bill. The decree dismissed the original bill from which M. appealed. Thereupon S. took an appeal in the cross suit from rulings excluding evidence. In this court the clerk required S. to pay one-half the cost of printing the record. This court, after argument, affirmed the decree dismissing the original bill, and dismissed the cross appeal. *Marsh v. Nichols*, 128 U. S. 605, 32 L. Ed. 538. Held, that S. was entitled to recover of M. the amount so paid. *Nichols v. Marsh*, 131 U. S. 401.

court may impose costs upon a party guilty of requiring unnecessary parts of the record to be printed.⁶²

(3) *In Cases of Dismissal or Affirmance*.—In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.⁶³ But "in each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct."⁶⁴

In all cases of dismissal for want of jurisdiction, the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise order.⁶⁵

Fees Divided between Parties.—Under the rule which provides that in cases of dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy of the record, the practice has always prevailed for the clerk to charge each party one-half of the fees of the manuscript copy furnished the printer.⁶⁶

(4) *Time of Payment*.—As the clerk must now account to the treasury for the fees and emoluments of his office, he may demand payment in advance.⁶⁷

Where the record has been printed by the appellants themselves the

62. Party causing unnecessary matter to be printed.—Ball, etc., *Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019.

The court said that: "In proper cases the costs of the useless part of the record will be taken against the party who brings it here." *De Groot v. United States*, 5 Wall. 419, 427, 18 L. Ed. 700. But in some cases the court divides the costs of the transcript or abstract equally between the parties. In Ball, etc., *Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019, half the cost of printing the record of the case was imposed on the appellee guilty of requiring unnecessary parts of the record to be printed, and in *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431, each party to the appeal was required to pay his own costs.

"Where the appellee has seen fit to encumber the record with copies of some fifty immaterial patents, we think it a proper case for the application of the 10th rule, which authorizes us (paragraph 9) to impose costs upon an appellee guilty of requiring unnecessary parts of the record to be printed, and that he should be charged with half the cost of printing the record in this case. "Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently." *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 284, 24 L. Ed. 431; Ball, etc., *Fastener Co. v. Kraetzer*, 150 U. S. 111, 118, 37 L. Ed. 1019.

Where the court is at a loss to determine whether the complainant or defendant is most to blame for irrelevant matter which has been introduced into this case, but as it is clearly the duty of the party taking an appeal to see to it that the record is properly presented here,

therefore each party to the appeal is required to pay his own costs in this court. *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 285, 24 L. Ed. 431.

63. In cases of dismissal or affirmance.—*Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

64. *Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

65. *Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

66. Fees divided between the parties.—*Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

67. Time of payment.—*Steever v. Rickman*, 109 U. S. 74, 27 L. Ed. 861; *Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190.

If the printing of the record is actually done under the clerk's supervision he may require the payment of the fee chargeable under the rule before the printing is done. If the parties themselves furnish the printed copies, the fee must be paid, if demanded, in time to enable him to make the necessary examinations and be ready to deliver the copies to the parties or their counsel and to the court when needed for any purpose in the progress of the cause. The fee is for the service specified in this item of the table, and is indivisible. Consequently, if the clerk performs any part of the service he is entitled to collect the whole fee; and if the printed record is used at all, it must be examined by him to see if it conforms to the copy certified below and on file as the transcript of the record. So that if the printed copies are used for any purpose in the progress of the cause the whole fee is chargeable. *Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190.

case may be docketed without security for the fee allowed to the clerk by Rule 24, § 7, but the printed copies cannot be delivered to the justices or the parties for use on the final hearing or on any motion in the progress of the cause, unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies.⁶⁸

(5) *Remission of Fees and Costs.*—The clerk's fees for supervising the printing may be remitted in a proper case,⁶⁹ and upon the proper showing being made.⁷⁰

f. *Duty of Clerk with Respect to Indexing and Delivery of Copies.*—The clerk is responsible to the court for the correctness and proper indexing of the printed copies of the record, for their presentation to the justices in the form and of the size prescribed by the rules, and for their delivery when required to the parties entitled thereto.⁷¹

g. *Stipulation of Parties.*—Where parties stipulate under Rule 32 that the record shall not be printed, but the court in ignorance of this agreement dismisses it under Rule 10 when the case is reached, the court, upon representation of the parties, may vacate such order and permit the cause to be restored to the docket on payment of costs of printing the record.⁷²

10. CONSTRUCTION OF RECORD.—This court will not, by a technical construction of an obscure record, preclude itself from correcting an error committed in the trial below, if a construction can be given to it which will give jurisdiction.⁷³

11. AMENDMENT AND CORRECTION OF RECORD—*a. Power of Court.*—The power to correct mistakes in its record, occasioned by oversight, which are of such nature that the record does not show what was in fact done or decided, is a power that is inherent in all courts of superior jurisdiction, and is frequently exercised in furtherance of justice. The power in question does not extend, of course, to the correction of errors of law committed by the court, which, in all cases, must be remedied by appeal or writ of error, but is strictly limited to the correction of mistakes or misprisions of the clerk or other officers, by reason of which the record does not speak the truth, or fails to speak the whole truth.⁷⁴

b. *What Law Governs.*—The power of making amendments, and the mode of removing a case from an inferior to an appellate court of the United States are regulated by acts of congress, and do not depend on the laws or practice of the state in which the court may happen to be held.⁷⁵

68. *Bean v. Patterson*, 110 U. S. 401, 403, 28 L. Ed. 190.

69. *Remission of fees and costs.*—On consideration of the motion for leave to furnish fifteen copies of the record as already printed, and for a remission of the clerk's fee for supervising the printing, it is now here ordered by the court that, upon the appellants' filing fifteen copies of the record as already printed, and making payment of \$100 as for cost of additional printing required, the balance of the estimated costs be remitted. *Dent v. Ferguson*, 131 U. S. 397, 401.

70. *Remission of fees to intervening petitioner.*—And in one case a motion by an intervening petitioner to have refunded to him the sum deposited with the clerk under an order of this court requiring such deposit to be made in order that his counsel might have two printed copies of the record, was granted as to a part of such deposit, where it appeared that the petitioner was not one of the principal litigants in the appeal but was simply an intervening judgment creditor having no interest in the matter in controversy, that his demand was quite small

when compared with the amount involved in the controversy between the principal litigants, and that he was not a party to the determination of the question involved in the controversy between the same parties to the litigation, but simply intervened as the only manner in which he could protect his rights. *Richardson v. Green*, 133 U. S. 30, 33 L. Ed. 516.

71. *Duty of clerk with respect to indexing and delivery of copies.*—*Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190.

72. *Stipulation of parties.*—*Rosenthal v. Coates*, 148 U. S. 142, 37 L. Ed. 399.

73. *Construction of record.*—*Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 32 L. Ed. 1057.

74. *Power of court to amend record.*—*Matheson v. Stewart*, 2 How. 263, 281, 11 L. Ed. 250; *Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331; *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395; *In re Wight*, 134 U. S. 136, 33 L. Ed. 865.

If the record is defective, the errors can be corrected in several modes. *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

76. *What law governs.*—*Hudgins v.*

c. *Consent of Parties*.—An amendment of the record may be made here by consent.⁷⁷

d. *Amendable Defects*.—(1) *Clerical Errors*.—The court will permit a mere clerical error to be amended here, upon the clerk's certificate, without sending a certiorari.⁷⁸ Thus where, by misprision of the clerk of the circuit court, the judgment in a case brought up by a writ of error had not been entered according to the declaration, the supreme court allowed an amendment to be made by the entry of the judgment, without awarding a certiorari to the circuit court. This was done in a case which had been brought up by a writ of error to the previous term of the court.⁸⁰

(2) *Defects in Findings of Court*.—Where under the act of congress authorizing trials by the court, it does not appear on the record whether the finding was general or special, such defect in the record it is competent for the court to supply by amendment.⁸¹

e. *Amendments in Appellate Court*.—(1) *Power of Court to Allow*.—This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the circuit court for that purpose. There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty second section of the judiciary act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. But it has been the practice of this court, where amendments are necessary, to remand the cause to the circuit court for that purpose. The only exception to this rule has been, where the counsel on both sides have agreed to the amendments. This has been often done, and it has not been supposed that there was any want of power in the court to permit it. The objection that consent cannot give jurisdiction has no application to the case.⁸²

Kemp, 18 How. 530, 15 L. Ed. 511; S. C., 15 L. Ed. 514.

77. *Consent of parties*.—Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 512. Kennedy v. State Bank, 8 How. 586, 12 L. Ed. 1209; McCormick v. Sullivant, 10 Wheat. 192, 199, 6 L. Ed. 300.

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity. But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the circuit court. Kennedy v. State Bank, 8 How. 586, 12 L. Ed. 1209.

78. *Clerical errors*.—Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 512; S. C., 15 L. Ed. 514.

80. Woodward v. Brown, 13 Pet. 1, 10 L. Ed. 31.

Although the motion for a certiorari is denied, the court will allow an amendment to be made on the transcript, by the entry of the judgment, it appearing by the certificate of the clerk of the circuit court that the judgment was so entered on that day and before the granting of the writ of error, and that certain words were inadvertently omitted by the clerk of the circuit court in preparing the

transcript. Stitt v. Huidekopher, 131 U. S., appx. cxviii, 21 L. Ed. 644, citing Woodward v. Brown, 13 Pet. 1, 10 L. Ed. 31. See Stitt v. Huidekopher, 17 Wall. 384, 21 L. Ed. 644.

81. *Defects in findings of court*.—Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395.

82. *Power of court to allow amendments*.—Kennedy v. State Bank, 8 How. 586, 12 L. Ed. 1209; Udall v. Steamship Ohio, 17 How. 17, 15 L. Ed. 42.

"And in respect of the allowance of amendments, when the ends of justice require it, the course has been to remand the cause with directions. Wiggins Ferry Co. v. Ohio, etc., R. Co., 142 U. S. 396, 35 L. Ed. 1055, and cases cited." United States v. Coe, 155 U. S. 76, 84, 39 L. Ed. 76. See the title MANDATE AND PROCEEDINGS THEREON.

There can be no substantial amendment in this court; but if the pleadings or evidence are so defective that no decree can be founded upon them, and the case appear to have merits, the court will reverse the decree and remand the cause to the court below with directions to permit amendments and further proofs. Brig Caroline, 7 Cranch 496, 500, 3 L. Ed. 417; Mary Ann, 8 Wheat. 380, 5 L. Ed. 641; The Mabey, 10 Wall. 419, 420, 19 L. Ed. 963.

Amendment of Pleadings.—If justice appears to require it, an amendment of the pleadings may be made even on appeal.⁸³

(2) *In Admiralty.*—In admiralty proceedings, amendments are made in the appellate court, not only as to form, but as to matter of substance, as by the filing a new count to the libel; the parties being permitted, whenever public justice and the substantial merits require it, to introduce new allegations and new proofs; non allegata allegare, et non probata probare.⁸⁵ But an amendment in a case in admiralty, before the court of appeals, cannot introduce a new subject of controversy, although the most liberal principles prevail in such cases.⁸⁶

(3) *Consent of Parties.*—An amendment may be made here by consent.⁸⁷

Amendments to Confer Finality on Interlocutory Decisions.—But where an appeal is taken to an intermediate court of appeals from a decree which is not final, such intermediate appellate court cannot consent to an amendment of the record by an insertion of a final decree by an agreement of the counsel in the case; nor can this court consent to such an amendment.^{87a}

(4) *Amendable Defects*—aa. *Clerical Errors.*—And so, also, where it appears by the certificate of the clerk that he has committed a clerical error in the transcript, in the form in which he has entered a judgment, in ejectment, and it is evident from the declaration that it is a mere clerical error, this court may suffer it to be amended here, without sending a certiorari to the circuit court to have it corrected.⁸⁸

83. *Jones v. Meehan*, 175 U. S. 1, 28, 29, 44 L. Ed. 49; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 447, 32 L. Ed. 788; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 413, 414, 35 L. Ed. 1055.

Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made. *Schooner Ann v. United States*, 7 Cranch 570, 3 L. Ed. 442; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 415, 35 L. Ed. 1055.

85. **Amendments in admiralty.**—*The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405. See the title ADMIRALTY, vol. 1, p. 167.

In admiralty cases, where the pleadings may be amended, and new evidence taken in the appellate court, a liberal practice in relation to appeals is specially warranted. *Rice v. Minnesota, etc., R. Co.*, 21 How. 82, 85, 16 L. Ed. 31; *The Grace Girdler*, 6 Wall. 441, 442, 18 L. Ed. 790.

86. *Houseman v. Schooner North Carolina*, 15 Pet. 40, 10 L. Ed. 653.

87. **Consent of parties.**—*Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162.

It has not been the practice of this court to allow amendments, except by the

consent of parties; though, in the case of *Kennedy v. State Bank*, 8 How. 586, 610, 12 L. Ed. 1209, this court say: "There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc., but the practice has been to remand the cause to the lower court for amendment." *Udall v. Steamship Ohio*, 17 How. 17, 15 L. Ed. 42; *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

Failure to allege jurisdiction.—If the jurisdiction of the inferior courts of the United States is not alleged in the proceeding, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. They are not absolute nullities, therefore, and this court may grant leave to amend the record by consent of parties. *Kennedy v. State Bank*, 8 How. 586, 12 L. Ed. 1209; *McCormick v. Sullivan*, 10 Wheat. 192, 199, 6 L. Ed. 300; *Hodgson v. Bowerbank*, 5 Cranch 303, 6 L. Ed. 103.

87a. **Amendment to confer finality on interlocutory decision.**—Where the decree of the district court, in a case of admiralty jurisdiction, was not a final decree, the circuit court, to which it was carried by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by an insertion of a final decree by an agreement of the counsel in the case; nor can this court consent to such an amendment. *Mordecai v. Lindsay*, 19 How. 199, 15 L. Ed. 624, approved in *Merritt v. Petty*, 16 Wall. 338, 346, 21 L. Ed. 499.

88. **Clerical errors.**—*Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31; *Hudgins*

bb. *Failure of Record to Show Jurisdiction.*—See the title **COURTS**.

The record cannot be amended in this court so as to show a jurisdictional fact, but the court below may, in its discretion, allow it to be done when the case gets back.⁸⁹ Therefore, where in an appeal from the circuit court to the supreme court, the defect of jurisdiction in the circuit court appears upon the transcript, it cannot be cured by an amendment in the United States supreme court, because consent cannot give jurisdiction, nor legalize it when exercised without the authority at law.⁹⁰

(5) *Venire De Novo.*—Although a venire de novo is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted, the venire de novo, is in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matter of law; and is never “equivalent to a new suit,” no statute of the United States alters the law in this regard.⁹¹

f. *The Motion or Application.*—Where an amendment is desired, there should be a motion made, by inserting in the transcript the evidence on which the right is based, before the motion is made to dismiss.⁹²

g. *At What Stage of Proceedings.*—**In General.**—The power to correct mis-

v. Kemp, 18 How. 530, 15 L. Ed. 511; *S. C.*, 15 L. Ed. 514.

Where by a misprision of the clerk of the circuit court, the judgment, in a case brought up by a writ of error, had not been entered according to the declaration, the supreme court allowed an amendment to be made, by the entry of the judgment, without awarding a certiorari to the circuit court. This was done in a case which had been brought up by a writ of error to the previous term of the court. *Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31, cited in *Stitt v. Huidekopher*, 131 U. S., appx. cxviii, 21 L. Ed. 644.

89. Failure of record to show jurisdiction.—*Continental Life Ins. Co. v. Rhoades* 119 U. S. 237, 30 L. Ed. 380, citing *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100; *Robertson v. Cease*, 97 U. S. 646, 676, 24 L. Ed. 1057.

Where the record fails to show jurisdiction, the defect cannot be cured by amendment. *Jackson v. Allen*, 132 U. S. 27, 33 L. Ed. 249, citing *Crehore v. Ohio*, etc., *R. Co.*, 131 U. S. 240.

While this court may be authorized to reverse a decree rendered by the circuit court without jurisdiction, we have no power to amend the record so as to give jurisdiction to that court by proceedings here. The case in this court must be tried upon the records made in the circuit court. *Cameron v. Hodges*, 127 U. S. 322, 32 L. Ed. 132.

Amendment to the pleading stating the interest will not be allowed in this court. “If amendments be allowed so as to give jurisdiction to this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise, and litigation would be encouraged. The plaintiff, under such circumstances, would never fail to sustain the jurisdiction of this court, on his appeal. On the ground

that the matter in dispute does not appear on the face of the libel to exceed \$2,000, the appeal is dismissed.” *Udall v. Steamship Ohio*, 17 How. 17, 15 L. Ed. 42.

90. *Montgomery v. Anderson*, 21 How. 386, 16 L. Ed. 160, following *Mordecai v. Lindsay*, 19 How. 199, 200, 15 L. Ed. 624.

Where the decree of the district court, in a case of admiralty jurisdiction, was not a final decree, the circuit court, to which it was carried by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by an insertion of a final decree by an agreement of the counsel in the case; nor can this court consent to such an amendment. *Mordecai v. Lindsay*, 19 How. 199, 15 L. Ed. 624.

91. *Venire de novo.*—*United States v. Hawkins*, 10 Pet. 125, 9 L. Ed. 369; *Garland v. Davis*, 4 How. 131, 154, 11 L. Ed. 907.

92. The motion or application.—*Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

Correspondence between the district judge and the petitioner’s counsel, in which the judge does no more than express his willingness that the record should be amended, provided it could properly be done, has no proper place in the record of the court, especially where it does not appear that the judge intended or expected his letter to be filed or recorded. Accordingly, where it does not appear that the judge afterwards allowed, or was requested to allow, any amendment of the record, or of the appeal, the petitioner or his counsel cannot amend either the record or the appeal by his own act, without leave of the judge. *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. Ed. 406, reaffirmed in *Washington v. Covert*, 164 U. S. 702, 41 L. Ed. 1182.

takes in the record may be exercised within any reasonable period, even after the lapse of the term at which the mistake was committed, and even after the erroneous record has been removed to an appellate court by appeal or writ of error.⁹⁴ And it is laid down as a general rule, at law (the principle of which is equally applicable to chancery proceedings), that those things which are amendable before error brought, are amendable afterwards, so long as diminution may be alleged and certiorari awarded—provided, of course that the time for amendment has not passed by.⁹⁵

Amendments at Subsequent Term.—This court has no power to allow an amendment of the record after the term has passed and the cause has been dismissed or otherwise finally disposed of.⁹⁶ For example, after a case has been dismissed for want of jurisdiction, the pleadings having been technically defective, the court will not, at a subsequent term, allow them to be amended, and the case to be reinstated on the docket; it would be, in effect, a reversal of the former decree, after the case had been finally disposed of in this court. There will be no difficulty in making the amendment in the circuit court, in such a case, if that court shall see fit, in its discretion, to allow it to be done, and the cause may then be reheard there; and on a decree, newly rendered, may be brought up on appeal to this court; or a decree may be there rendered, by consent of parties, in order to bring up the case without delay.⁹⁸

Amendments Nunc Pro Tunc.—But where there was an omission to enter something which had actually been done at a former term, amendments of the record nunc pro tunc will be permitted.^{98a} Thus the court at a subsequent term,

94. At what stage of proceedings.—*Matheson v. Stewart*, 2 How. 263, 11 L. Ed. 250.

We have no doubt of our power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which we intended it. As said by Mr. Justice Strong, delivering the opinion of the court in the case of *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395: "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time." *Elizabeth v. American, etc., Pavement Co.*, 131 U. S., appx. cxlviii, 24 L. Ed. 1059.

95. *Hovey v. McDonald*, 109 U. S. 150, 157, 27 L. Ed. 888.

96. Amendments at subsequent term.—*Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502.

At a subsequent term it is a familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term.

97. *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395.

Even judgments may be corrected in accordance with the truth. It has been held by this court that, at a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if an-

other be bad, and the minutes of the judge show that the evidence sustained the good one. *Matheson v. Stewart*, 2 How. 263, 282, 11 L. Ed. 250; *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395.

Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; but every court of record has power to amend its records, so as to make them conform to and exhibit the truth. Ordinarily, there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was. *Insurance Co. v. Boon*, 95 U. S. 117, 126, 24 L. Ed. 395.

98. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502.

In *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502, in which it was said: "We have no power over the decrees rendered by this court, after the term has passed, and the cause has been dismissed, or otherwise finally disposed of here."

98a. Amendments nunc pro tunc.—*The Bayonne*, 159 U. S. 687, 40 L. Ed. 306, citing *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

Direct appeals under court of appeals act.—The district court of the United States for the Southern District of New York has monthly terms. Rev. Stat., § 572. The decree here was entered December 21, and the appeal allowed December 31, 1892. On the seventeenth of the following January, during a new term of the court, the assignment of er-

may by an order, correct the record by incorporating into it *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered.⁹⁹

Clerical Errors.—And this court also has jurisdiction to amend any clerical errors after a term has elapsed.^{99a}

h. Waiver of Errors and Imperfections in Record.—Although there may be errors and imperfections in the record and proceedings in a case in the circuit court, if the parties go to a trial of the case, they must be considered as waived; and they cannot constitute an objection to the judgment of the circuit court after verdict, on a writ of error to the supreme court.¹

12. **IMPEACHMENT OR CONTRADICTION OF RECORD.**—Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the circuit court, can be received here to impeach its verity, or to show that the certificate ought not to have been given.² In other words, where the record transmitted to this court, certified by the clerk of the circuit court, states that the appeal was taken in open court, this is sufficient evidence of that fact. And certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted, are not admissible to contradict the record upon a motion to dismiss.³

The Bill of Exceptions.—Thus, whether the report of the evidence, as set forth in the bill of exceptions, is or is not incomplete, or imperfectly stated, cannot be known in an appellate court. Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such, cannot be contradicted.⁴

13. **RETURN OF RECORD TO COURT BELOW.**—Should the court below send to us a request for a return of the record, in order that it might proceed further

rors was directed to be filed *nunc pro tunc* as of December 31, 1892. Held, if that assignment could be treated as a certificate, it came too late, and, as there is nothing in the record prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record *nunc pro tunc*. The Bayonne, 159 U. S. 687, 692, 40 L. Ed. 306.

The record may be amended in a criminal case so as to show the arraignment and pleas of the accused, even at a subsequent term, in accordance with the rule as to the entries *nunc pro tunc*. Gonzales v. Cunningham, 164 U. S. 612, 623, 41 L. Ed. 572, citing *In re Wight*, 134 U. S. 126, 33 L. Ed. 865; *United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954.

99. Findings of court.—*Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395.

99a. Clerical errors.—*In re Wight*, 134 U. S. 126, 33 L. Ed. 865.

In United States v. Vigil, 10 Wall. 423, 19 L. Ed. 954, the supreme court sustained an amendment by the circuit court of a record sent on appeal, in order that it might appear that the appeal was taken in open court; and this was also recognized as proper practice in *Gonzales v. Cunningham*, 164 U. S. 612, 615, 41 L. Ed. 572.

1. Waiver of errors and imperfections in record.—*Evans v. Gee*, 11 Pet. 80, 9 L. Ed. 639.

It was urged that the transcript of the record from the district court showed that a general demurrer had been filed, which had not been disposed of; that a nonsuit had been taken by the defendant in the district court, and that a motion to set it aside had been overruled; that the case had been submitted to the jury without an issue between the parties, and that the verdict had been returned by eleven instead of twelve jurors. On these alleged grounds, it was claimed that the judgment of the district court should be reversed. By the court: Whatever might have been the original imperfections, if not waived expressly, they were so by the defendant going to trial upon the merits; and thus they cannot constitute an objection to the judgment on a writ of error. *Evans v. Gee*, 11 Pet. 80, 9 L. Ed. 639.

2. Impeachment or contradiction of record.—*Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

Where the record, certified by the clerk of the circuit court, states that an appeal from a decree in chancery was taken in open court, no evidence dehors the record can be received to impeach its verity, on a motion to dismiss the appeal for want of jurisdiction upon the ground that the case has not been regularly brought up. *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

3. Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511.

4. Contradicting bill of exceptions.—*Chaffee v. Boston Belting Co.*, 22 How. 217, 222, 16 L. Ed. 240.

with the cause, this court might in a proper case, and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. And the application of the parties must be addressed to that court, and not to us.⁵

I. Docketing and Entry of Appeals.—1. *In General.*—The entry of the appeal in the clerk's office is analogous to the issuing a writ of error; it is returnable to the next term of the appellate court; and a citation to the opposite party to appear is necessary.⁶

Necessity for Entry of Appeal.—But where the appeal is taken orally in open court, an omission of the clerk to enter it in the order book could not divest the party of the enjoyment of his legal right to appeal. Nor is it necessary to inquire whether the entry made in the order book is to be regarded as a part of the record, or merely a memorandum to preserve the history of the case, by entering the appeal in the book where it is usually found, and would naturally be looked for by the party interested. In either view the entry is not necessary to give validity to the appeal. If it is made in open court, the clerk has official knowledge of the fact. And it would be his duty even if no written memorandum of it had been made, to certify to this court, when the security is approved by the judge, and the appeal allowed. And his certificate of the fact is all that is required in the appellate tribunal.⁷

2. *TIME OF DOCKETING.*—a. *In General.*—An appeal becomes inoperative where the appellants fail to docket the case here at the return term, in the absence of some sufficient excuse.⁸ But where the transcript is deposited seasonably in the clerk's office, jurisdiction is not lost by not docketing the case before the lapse of the term; it still may be docketed if, in the judgment of the court, it is a case to justify the exercise of its discretion.⁹

5. **Return of record to court below on application of parties.**—*Roener v. Simon*, 91 U. S. 149, 23 L. Ed. 267, opinion of Mr. Chief Justice Waite.

6. **Docketing and entry of appeals.**—*Villabolas v. United States*, 6 How. 81, 90, 12 L. Ed. 352.

7. **Necessity for entry of appeal.**—*Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

8. **Case must be docketed at return term.**—*Fayolle v. Texas, etc., R. Co.*, 124 U. S. 519, 31 L. Ed. 533; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Killian v. Clark*, 111 U. S. 784, 28 L. Ed. 599; *Caillot v. Deetken*, 113 U. S. 215, 28 L. Ed. 983; *United States v. Gomez*, 3 Wall. 752, 763, 18 L. Ed. 212; *Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *The Tornado*, 109 U. S. 110, 27 L. Ed. 874; *Thé S. S. Osborne*, 105 U. S. 447, 26 L. Ed. 1065; *State v. Demarest*, 110 U. S. 400, 28 L. Ed. 191; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91. See ante, "The Record or Transcript," IX. H.

Where the court of claims rendered judgment on February 4, 1844, and from that judgment both parties appealed, that of the United States being docketed in this court October 24, 1884, but that of the claimant not being docketed until January 7, 1888, such latter appeal will be dismissed for want of due prosecution. *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662, citing *The S. S.*

Osborne, 105 U. S. 447, 26 L. Ed. 1065; *Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688; *The Tornado*, 109 U. S. 110, 117, 27 L. Ed. 874.

9. *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792; *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

In *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792, the writ of error bore date October 3, 1887, and was filed on that day in the circuit court. It was returnable to October term, 1887, of this court, which term closed by adjournment on May 14, 1888; the transcript reached the clerk May 10, 1888. The transcript was filed and the case docketed January 13, 1890. The judgment sought to be reviewed was entered July 27, 1887. It thus appears that the case was not docketed until the expiration of considerable more than two years after the entry of such judgment, the statutory limitation upon the bringing of the writ of error.

Where the transcript was put into the hands of the clerk of this court at the term next after the appeal was allowed, but the appearance was not entered at that term because rule 9 had not been complied with, nor had the appeal been docketed because the rule as to deposits for costs had not been complied with, but on a compliance with these rules at the next term the case was docketed and an appearance entered, it was held that a motion to dismiss at the third term thereafter on the ground that the case was

Acceptance of Appeal Bond after Term.—Moreover the rule that an appeal allowed in open court, becomes inoperative if it is not docketed here before the end of the term to which it is made returnable, applies whether the bond approved by the lower court after the term was accepted to perfect that appeal or not. In short an appeal allowed in open court is of the date of its allowance.¹⁰

But a motion in this court for a new bond long after the entry of the case on the docket of this court, which was made at the return term, precludes the defendant in error from relying on the contention that the appeal was docketed too late.¹¹

By the act of May 23d, 1828 (4 Stat. at Large 284), relating to private land claims in Florida, appeals from the superior court of the territory of Florida must be entered in the clerk's office within four months from the date of the decree.¹²

Docketing in Advance of Return Day.—The docketing of the cause by the defendant in error in advance of the return day of the writ, does not prevent the plaintiff in error from doing what is necessary while the writ was in life to give it full effect.¹³

Extension of Time for Filing Appeal Bond.—The entries, on stipulation of the parties, of various orders extending the time for filing the appeal bond and certificate of evidence, are equivalent to an order at the date of each respectively, renewing the allowance of the appeal in open court in the presence of both parties, so as to give the original allowance of the appeal effect as of the new date, so that upon a motion to dismiss because the appeal was not docketed before the end of the term, the appeal will not be regarded as actually taken until the entry of the last extension of time for filing a bond and certificate of

not docketed at the term at which the transcript was filed, will be denied. *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 372.

10. Appeal perfected after the term.—*Radford v. Folsom*, 123 U. S. 725, 31 L. Ed. 292, citing *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

Where an appeal is allowed in open court, and the appeal bond was to be for \$20,000 if for supersedeas, and \$2,000 if for costs only, it was held that the acceptance of the bond by the district judge, after the term in which a decree is rendered, no citation ever being issued or served, cannot be considered as the allowance of a new appeal at that date. *Radford v. Folsom*, 123 U. S. 725, 31 L. Ed. 292, citing *Hewitt v. Filbert*, 116 U. S. 142, 29 L. Ed. 581.

Where the decree appealed from was entered on the 20th of May, 1878, and an appeal allowed the appellants in open court on the 22d of May, but no bond for the appeal was given until the 7th of October, 1881, the day on which the cause was for the first time docketed here, the appeal of May 22d becomes inoperative by reason of the failure to give the necessary bond and docket the case here during the October term, 1878, and the acceptance of the bond on the 7th of October, could not have the effect of an allowance of a new appeal, because it was more than two years after the decree had been entered. *Killian v. Clark*, 111 U. S.

784, 28 L. Ed. 599, following *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

In *Stewart v. Masterson*, 124 U. S. 493, 31 L. Ed. 507, the decree from which the appeal was taken was rendered November 7th, 1884, and contained on its face the allowance of an appeal to this court. That appeal was returnable to October term, 1885, which began October 12th of that year. It does not appear that any bond was approved during the term in which the decree was rendered, but one was approved October 10th, which was before the beginning of the return term. The citation was signed November 2, 1885, after that term began, requiring the appellee to appear in this court on the second Monday in October, 1886. This citation was served February 17th, 1886, but the case was not docketed in this court until June 11th, 1886, which was after our term of 1885 ended, but before that of 1886 began. Held, that the bond approved October 10th, 1885, must be deemed to have been taken under the appeal allowed in open court, and that appeal became inoperative by reason of the failure to docket it here during the term of 1885.

11. Waiver of objections.—*Waldron v. Waldron*, 156 U. S. 361, 39 L. Ed. 453.

12. Act for settlement of private land claims.—*Villabolas v. United States*, 6 How. 81, 12 L. Ed. 352.

13. Docketing in advance of return day.—*Davies v. United States*, 113 U. S. 687, 689, 28 L. Ed. 1149.

evidence.¹⁴

b. *Excuses for Failure to Docket in Time.*—**In General.**—If the appellant can show that his failure to docket the appeal within the time required by law was due to the fraud or circumvention of others, without any negligence or laches of his own, this will constitute an excuse.¹⁵

Illustrative Cases.—For example, where there has been fraud or circumvention,¹⁶ or where the state court to which the writ was directed ordered the clerk to disregard the writ and make no return,¹⁷ or where by an oversight of counsel no security for costs was given, but the omission is supplied before a motion to docket and dismiss is made,^{17a} these circumstances will excuse the delay. But in all such cases it must appear that the appellant or plaintiff in error has not himself been guilty of laches or of want of diligence.¹⁸ Therefore, where the whole difficulty arises from the negligence of the appellants alone, as by their failure to call upon the clerk to make the transcript until after the term of the court to which the appeal was returnable had closed, and by failure to give security for costs, this will not constitute a sufficient excuse for failure to file.¹⁹

Ignorance of the rules is no excuse for failure to docket in time,²⁰ nor the fact that the appellant relied upon the promises of the clerk to see the case docketed.^{20a}

3. **WHERE CAUSE IS BROUGHT UP BY APPEAL AND WRIT OF ERROR.**—When the same cause is brought to this court by appeal and by writ of error, on the same record, it is not necessary to docket it twice.²¹

4. **HOW OBJECTION TAKEN.**—The objection that the cause has not been docketed in time may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before the hearing.²²

5. **DISMISSAL.**—Where an appeal has been docketed after the time when by law it should have been done, it will be dismissed for want of prosecution,²³

14. **Extension of time for perfecting appeal.**—*Goodwin v. Fox*, 120 U. S. 775, 30 L. Ed. 815.

15. **Excuses for failure to docket in time.**—*Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 523, 31 L. Ed. 533; *Grigsby v. Purcell*, 99 U. S. 505, 507, 25 L. Ed. 354; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *United States v. Booth*, 21 How. 506, 16 L. Ed. 169.

16. **Fraud.**—*United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212.

17. **Orders of lower court.**—*United States v. Booth*, 21 How. 506, 16 L. Ed. 169.

17a. **Failure to give fee bond.**—*Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293, distinguished in *Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 523, 31 L. Ed. 533.

18. **Appellant must be free from laches.**—*Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

Where a decree was rendered November 12, 1883, and an appeal was taken at the same time in open court returnable to the October term, 1884, which ended May 4, 1885, but it was not docketed here until January 17, 1886, this is too late, as the appeal became inoperative through the failure of the appellants to docket the case here at the return term, where the excuse presented for the failure to docket in time is not sufficient to

give the appellants the benefit of any exception to this rule which is recognized in *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 31 L. Ed. 533.

19. *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293.

20. **Ignorance of rules.**—*Van Rensselaer v. Watts*, 7 How. 784, 12 L. Ed. 913; *Green v. Elbert*, 137 U. S. 615, 34 L. Ed. 792.

20a. **Reliance upon promises of clerk.**—*Fayolle v. Texas*, etc., R. Co., 124 U. S. 519, 31 L. Ed. 533, distinguishing *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

21. **Where cause is brought up by appeal and writ of error.**—*Plymouth Gold Min. Co. v. Amador*, etc., Canal Co., 118 U. S. 264, 30 L. Ed. 232, citing *Hurst v. Hollingsworth*, 94 U. S. 111, 24 L. Ed. 31.

22. **How objection taken.**—*Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

23. **Dismissal.**—*Hilton v. Dickinson*, 108 U. S. 165, 27 L. Ed. 688, following *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *The Tornado*, 109 U. S. 110, 27 L. Ed. 874; *The S. S. Osborne*, 105 U. S. 447, 26 L. Ed. 1065; *Credit Co. v. Arkansas*, etc., R. Co., 128 U. S. 258, 32 L. Ed. 448; *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662; *Hamilton v. Moore*, 3 Dall. 371, 1 L. Ed. 642; *Blair v. Miller*, 4 Dall. 21, 1 L. Ed. 724; *Steamer Virginia v.*

and this rule applies equally to a cross appeal.²⁴

The Motion to Dismiss.—The appellee at any time before the hearing may take advantage of the objection, or the court upon its own motion may dismiss the appeal.²⁵

6. **WAIVER.**—Mere appearance does not amount to a waiver of an objection for failure to docket in time.²⁶

J. Clerks' Fees.—1. **IN GENERAL.**—The rule of court promulgated May 8, 1876, is as follows: "In all cases the plaintiff in error or appellant (on docketing a cause and filing the record) shall enter into an undertaking to the clerk, with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf."²⁷

2. **WHO ENTITLED.**—As the law now stands the fees and emoluments of the office belong to the government, subject only to the payment of the annual salary of the clerk, necessary clerk hire, and incidental expenses, and the clerk is the collecting agent for the government.²⁹

3. **LIABILITY FOR.**—Each party is liable to the clerk for his fees for services performed for such party; and it is immaterial to the clerk which party recovers judgment.³⁰

4. **SERVICES WITH RESPECT TO RECORD.**—The fee to be charged by the clerk for preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, is fifteen cents per folio.³¹

Payment of Fees in Advance.—If the printing of the record is actually done under the clerk's supervision he may require the payment of the fee

West, 19 How. 182, 15 L. Ed. 594; *Castro v. United States*, 3 Wall. 46, 47, 18 L. Ed. 163; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Killian v. Clark*, 111 U. S. 784, 28 L. Ed. 599; *Caillot v. Deetken*, 113 U. S. 215, 28 L. Ed. 983; *Mesa v. United States*, 2 Black 721, 17 L. Ed. 350; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810.

24. **Cross appeals.**—*Hilton v. Dickinson*, 108 U. S. 165, 27 L. Ed. 688.

25. **The motion to dismiss.**—*Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

26. **Waiver.**—*Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

27. **Clerks' fees in general.**—*Matthews v. McStea*, 91 U. S. 7, 23 L. Ed. 188; *Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32.

By Rule 10, the plaintiff in error, or appellant, is required, on docketing a case and filing the record, to enter into an undertaking with the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise to satisfy the clerk in that behalf. The practice, since the act of March 3, 1883, 22 Stat. 631, c. 143, has been for parties to deposit the sum of \$25 in lieu of a fee bond, and the rule provides for the subsequent advance of the cost of printing the record and the fee for its preparation. The fee for docketing a case and filing and indorsing the transcript of the record is fixed by the rule at five dollars, and the twenty-five dollars above referred to covers that

sum and the estimated costs up to the time for printing. *Green v. Elbert*, 137 U. S. 615, 622, 34 L. Ed. 792.

Rule 10 of this court requires every plaintiff in error or appellant, on docketing his cause, to secure the costs. *The S. S. Osborne*, 105 U. S. 447, 451, 26 L. Ed. 1065.

29. **Who entitled.**—*Bean v. Patterson*, 110 U. S. 401, 403, 28 L. Ed. 190.

The act of March 3, 1883, c. 143, 22 Stat. 631, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1884, made an entire change in the emoluments of the clerk of this court. Before that act the clerk collected the fees of his office, paid the expenses, and kept what remained as his own compensation. He was not accountable to the government or to any one else for the income. The act of 1883 established a maximum for his annual compensation, and required him to pay into the treasury all the fees and emoluments of the office over his salary, necessary clerk hire, and incidental expenses. The same act made it the duty of the court to prepare a table of fees to be charged by the clerk. *Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190.

30. **Liability for.**—*Caldwell v. Jackson*, 7 Cranch 276, 277, 3 L. Ed. 341, opinion of Marshall, Ch. J.

31. **Services with respect to record.**—Rule 24, § 7; *Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190. See ante, "The Record or Transcript," IX, H.

chargeable under the rule before the printing is done. If the parties themselves furnish the printed copies, the fee must be paid, if demanded, in time to enable him to make the necessary examinations and be ready to deliver the copies to the parties or their counsel and to the court when needed for any purpose in the progress of the cause. The fee is for the service specified in this item of the table, and is indivisible. Consequently, if the clerk performs any part of the service he is entitled to collect the whole fee; and if the printed record is used at all, it must be examined by him to see if it conforms to the copy certified below and on file as the transcript of the record. So that if the printed copies are used for any purpose in the progress of the cause the whole fee is chargeable.³²

5. **DOCKETING AND DISMISSING CAUSES FOR FAILURE TO FILE FEE BOND.**—Where the clerk's fees are not paid as required by the rule of court, and there has been no waiver, the appellee may pay the docket fees and have the cause dismissed.³⁴ But the rule of the court for docketing and dismissing causes,

32. Payment of fees in advance.—*Bean v. Patterson*, 110 U. S. 401, 402, 28 L. Ed. 190.

Where the record has been printed by the appellants themselves, the case may be docketed without security for the fee allowed to the clerk by Rule 24, § 7, but the printed copies cannot be delivered to the justices or the parties for use on the final hearing or on any motion in the progress of the cause unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies. *Bean v. Patterson*, 110 U. S. 401, 403, 28 L. Ed. 190.

34. Docketing and dismissing causes for failure to file fee bond.—*Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32; *Owings v. Tiernan*, 10 Pet. 447, 9 L. Ed. 489; *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913.

The transcript of the record had been lodged by the plaintiffs in error with the clerk of the court on the 24th of October, 1835, who refused to file it or docket the cause until the plaintiffs had given the fee bond in pursuance of the thirty-seventh rule of the court. The counsel for the plaintiffs in error moved to have the transcript filed and docketed; alleging they had done all the law required to be done in order to bring the case before this court. On the part of the defendant in error, his counsel filed and read in open court certified copies of the writ of error, citation and appeal bond, and of the judgment of the circuit court; and having stated that the plaintiffs in error had failed to have the case docketed according to the thirtieth rule of the court, they moved to have the case docketed and dismissed. The court overruled the motion to docket and dismiss the cause, and also the motion to have the transcript filed, and the cause docketed without the fee bond being first given. These motions were overruled on the 18th of January, 1836; and the court allowed the plaintiffs in error until the first day of March following to give to the clerk the fee bond; on the failure so to give the same, the writ of error to be dismissed.

Owings v. Tiernan, 10 Pet. 447, 9 L. Ed. 489, followed in *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913; *Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32; *Edwards v. United States*, 102 U. S. 575, 576, 26 L. Ed. 293; *Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

In *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293, a writ of error was issued, returnable at October term, 1877. A transcript of the record was lodged in the office of the clerk of this court in September, 1877, but by an oversight of the counsel for the plaintiff in error no fee bond was given, and the cause was not docketed during October term, 1877. In September, 1878, an acceptable fee bond was given, and the cause was formally docketed. A motion was made, at October term, 1880, to dismiss the writ of error. This court denied the motion, and said (p. 576): "We are aware that in some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed and the cause docketed during the term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should therefore be construed in connection with those facts. In *Owings v. Tiernan*, 10 Pet. 447, 9 L. Ed. 489; and *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913, leave was given to docket the cause after the term, when the transcript had been filed in time, but through inadvertence a fee bond had not been given and there had not been in the meantime a motion to docket and dismiss. That is this case. * * * If a return is made and the transcript deposited in the clerk's office in time, our jurisdiction is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rest largely in the discretion of the court, when not provided for by rules. Rule 9 is of that class." *Richardson v. Green*, 130 U. S. 104, 112, 32 L. Ed. 872.

passed at January term, 1835, has never been applied to any cases, where, before the motion was made, the cause had been actually placed on the docket. Under such circumstances, on a motion to docket, when a motion to dismiss was contemporaneously made, the cause was allowed to be docketed; the usual bond for the clerk's fees being given. Time was given to the plaintiff in error to give the bond.³⁵

Necessity for Certificate.—A defendant in an appeal, using the copy of the record received from the circuit court lodged by the appellant, cannot have the appeal docketed and dismissed, under the 30th rule of the court, on the ground that the appellant has failed to comply with the 37th rule, which requires a bond to be given to the clerk of the supreme court before the case is docketed. He must, to sustain a motion to dismiss the cause, produce the certificate of the circuit court stating the cause, and certifying that such an appeal has been duly sued out and allowed.³⁶

Docketing Nunc Pro Tunc.—A motion to direct the clerk to docket the case as of the time the transcript of the record was received by him will be denied, where the failure of the clerk to file and docket was due to the neglect of the parties to file his fee bond in time, by reason of the ignorance of the parties that such fee bond had to be furnished.³⁷

Reinstatement.—And the court will not on motion of appellant at a subsequent term, set aside the order of dismissal and grant leave to file the record and docket the cause.³⁸ Though it may be reinstated where the appellant at the same term is prepared to furnish the fee bond for the clerk.³⁹

6. **RIGHT TO WITHHOLD MANDATE UNTIL PAYMENT.**—Where the clerk has no security for his fees charged to the appellee, it is not improper for him to withhold the mandate, when asked for by that party, until such fees are paid or he is in some manner satisfied in that behalf.⁴⁰

K. Waiver of Irregularities in Transfer of Cause.—In General.—The true line of distinction running through the cases is between facts which are jurisdictional and those which are not. The issuance of the writ and filing it with the court below within the time prescribed by law are jurisdictional, and cannot be waived. They are the only means known to the law for bringing up for review cases at law; but any mere irregularity in getting up the record may be waived.⁴¹ However, nothing can be treated by this court as merely technical, and for that reason be disregarded, which was prescribed by congress as the mode of exercising the court's appellate jurisdiction.⁴²

Issuance of Writ of Error.—Accordingly, the supreme court has uniformly

35. *Owings v. Tiernan*, 10 Pet. 24, 9 L. Ed. 333, followed in *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913.

36. **Necessity for certificate.**—*West v. Brashear*, 12 Pet. 101, 9 L. Ed. 1016.

37. **Docketing nunc pro tunc.**—In *Van Renssalaer v. Watts*, 7 How. 784, 12 L. Ed. 913, a record was lodged with the clerk early in 1848, but no fee bond given. At the January term, 1849, the counsel for the appellant, having then filed the necessary bond, moved the court to direct the clerk to docket the cause as of the day the record was received by him; but this was refused, Mr. Chief Justice Taney saying, "This court consider the practice established by the decision in *Owings v. Tiernan*, 10 Pet. 24, 9 L. Ed. 333, and do not wish to disturb it." Approved in *Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 254, 24 L. Ed. 32; *Edwards v. United States*, 102 U. S. 575, 26 L. Ed. 293.

38. **Reinstatement.**—*Selma, etc., R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. Ed. 32.

39. *West v. Brashear*, 131 U. S., appx. lxvi, 9 L. Ed. 1016.

40. **Right to withhold mandate until payment.**—*Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

41. **Waiver of irregularities in transfer of cause.**—*Stevens v. Clark*, 62 Fed. Rep. 321, 326, citing *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *McDonough v. Millaudon*, 3 How. 693, 11 L. Ed. 787; *Northern Pac. R. Co. v. Austin*, 135 U. S. 315, 318, 34 L. Ed. 218; *Montana R. Co. v. Warren*, 137 U. S. 348, 351, 34 L. Ed. 681. Consult also the foregoing particular sections.

42. *Edmonson v. Bloomshire*, 7 Wall. 306, 310, 19 L. Ed. 91, citing *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

held that it can obtain appellate jurisdiction in a case at law only by the issuing by the proper authority of a writ of error, and by filing the same in the court which rendered the judgment. And there can be no waiver of the writ.⁴³

And it is essential that the record should be filed during the term at which the appeal was returnable.⁴⁴

Limitations.—Likewise, the time prescribed by the statute is jurisdictional and cannot be waived by the parties.⁴⁵

But, neither the signing of the citation, nor the approval of the bond, is necessary to our jurisdiction.⁴⁶

Removal of Causes.—As the time within which a removal of a cause to a federal court must be applied for, is not jurisdictional, but modal and formal, it may, though obligatory to a certain extent, be waived.⁴⁷ An objection to the exercise by the circuit court of the United States of jurisdiction over a case, otherwise removable, upon the ground that the petition for removal was filed too late, is an objection which may be waived.⁴⁸

43. Issuance of writ of error.—*Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Evans v. State Bank*, 134 U. S. 330, 33 L. Ed. 917.

44. Time of filing record.—*Evans v. State Bank*, 134 U. S. 330, 331, 33 L. Ed. 917; *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

45. Limitations.—The case of *Credit Co. v. Arkansas, etc.*, R. Co., 128 U. S. 258, 32 L. Ed. 448, is very instructive, and shows the great strictness with which these questions of the appellate jurisdiction of the United States supreme court have been treated. It was an appeal in a chancery case. The final decree in the circuit court was entered on January 22, 1883. The law allowed two years from final entry of the decree in which to appeal. On January 22, 1885, exactly two years after such entry, a petition for an appeal was presented by counsel for complainant to Mr. Justice Miller, and allowed. At the same time, Mr. Justice Miller signed a citation to the defendants to appear in the supreme court of the United States, at the next term, to answer the appeal. A bond for costs was also, at the same time, presented and approved by the same justice. These papers, if they had been filed in the court where the decree was entered on that day, would have perfected the appeal within the two years, and given the supreme court jurisdiction; but they were not presented to the circuit court, nor filed with the clerk thereof, until five days later, on January 27, 1885. The cause was argued at length in the supreme court when it was reached upon the docket, and submitted on the merits. The supreme court, nevertheless, dismissed the appeal for the want of jurisdiction, because not taken in time; that is to say, within the two years allowed by law. The doctrine declared in *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665, that the writ of error is not "brought," in the legal meaning of the term, until it is filed in the court which rendered the judgment, is reaffirmed, and the same doc-

trine applied to appeals. There an appeal had been prayed for and allowed within the time, and all the papers necessary to perfect it filed in the proper court, five days thereafter. The cause, when reached, was argued and submitted on the merits. So far as the little matter of the delay of five days in filing the appeal papers could be waived by the parties, it was waived; but the court refused to take jurisdiction, notwithstanding the waiver. The same doctrine is affirmed in subsequent cases. See *Small v. Northern Pac. R. Co.*, 134 U. S. 514, 515, 33 L. Ed. 1006; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246.

46. Signing of citation and approval of bond.—*Evans v. State Bank*, 134 U. S. 330, 331, 33 L. Ed. 917.

47. Removal of causes.—*Northern Pac. R. Co. v. Austin*, 135 U. S. 315, 34 L. Ed. 218, citing *Ayers v. Watson*, 113 U. S. 594, 28 L. Ed. 1093.

48. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 691, 38 L. Ed. 311.

The time of filing a petition for the removal of a case from a state court into the circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district, a noncompliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district. *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 650; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 37 L. Ed. 98; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 688, 38 L. Ed. 311.

X. Assignment of Errors.

A. The Rules of Court Stated.—Rule 21 of this court provides that the brief of the counsel for the plaintiff in error shall contain "An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged." And the rule further declares that "without such an assignment of errors counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court at its option may notice a plain error not assigned."⁵⁰

Direct Appeals under Circuit Court of Appeals Act.—Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under § 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.⁵¹

B. Office of Assignment.—An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, but this court may refer to such assignment by way of convenience to ascertain the contentions of plaintiff in error.⁵²

C. Necessity for—1. **IN GENERAL.**—By Rule 35 of this court, if errors are not stated in the assignment of errors filed with the petition for the writ, they will be disregarded.⁵⁴ Such questions only as are specified in the assignment of errors are, in general, to be regarded as open to the plaintiff.⁵⁵

And though this court may be satisfied that a plain error has been committed in a judgment below against a defendant in error, and that he ought to have more than the court below adjudged to him, yet if he himself have as-

^{50.} **The rules of court stated.**—*Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449.

Total disregard of rule.—The court calls the attention of the bar to the necessity of a strict compliance with the 21st rule in the assignment of errors; a compliance which it declared is necessary to the disposition of the business which now "presses" upon the court. It accordingly passes without any notice at all a number of errors meant to be assigned by the plaintiff in error, but which were not assigned in the way prescribed by the said rule. *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

^{51.} **Direct appeals under court of appeals act.**—Rule 35, 139 U. S., appx., 705.

^{52.} **Office of assignment.**—*Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 555, 575, 40 L. Ed. 536, reaffirmed in *Jeske v.*

Cox, 171 U. S. 685, 43 L. Ed. 1179.

An assignment of error cannot import into a cause questions of jurisdiction which the record does not show distinctly raised and passed on in the court below. *Harkrader v. Wadley*, 172 U. S. 148, 162, 43 L. Ed. 399.

^{54.} **Necessity for assignment of errors.**—*Behn v. Campbell*, 205 U. S. 403, 51 L. Ed. 857.

^{55.} *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99.

By rule of court in Washington territory an assignment of errors must be made in an equity cause, but is not necessary in law cases. Held, that a possessory action in the nature of ejectment was an action at law, and accordingly no assignment of errors is necessary. *Brown v. Rank*, 132 U. S. 216, 33 L. Ed. 340.

signed no error, the error of the court below cannot be corrected here on the writ of the opposite side.⁵⁶

But Rule 8 does not require a copy of the assignment of errors in the transcript when no such assignment was filed in the court below.⁵⁷

Qualifications of General Rule.—While the general rule is that questions not raised by the assignment of errors will not be noticed on appeal, this court may notice a plain error, though not assigned.⁵⁸ Hence, if a plain error is committed in a criminal case in a matter absolutely vital to the accused, this court is at liberty to correct it, although the question was not properly raised.⁵⁹

2. RULE REQUIRING ITS ANNEXATION TO AND RETURN WITH WRIT OF ERROR.
—**In General.**—By § 997 of the Revised Statutes an assignment of errors must be annexed to or returned with the writ,⁶⁰ and the rules, regulations and restrictions are, as remarked before, the same as to appeals as to writs of error.⁶¹

56. *Tilden v. Blair*, 21 Wall. 241, 22 L. Ed. 632; *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 277, 39 L. Ed. 977.

A judgment will be affirmed where the plaintiff in error has filed no assignment of errors, as required by the rules of court. *Ryan v. Kockh*, 17 Wall. 19, 21 L. Ed. 611.

A judgment affirmed for want of such an assignment of errors as is required by the twenty-first rule; there being in the record no plain error not assigned and such as the court thought fit to be noticed by it without a proper assignment. *Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449.

"We have been much embarrassed in the consideration of this case by the want of the assignment of errors required by Rev. Stat., § 997, and the twenty-first rule of this court, and should have felt ourselves justified upon that ground in refusing to take cognizance of the case. We have, however, examined the evidence so far as it bears upon the question of these defendants' liability upon their stock subscriptions, and have found it confusing and unsatisfactory." *Camden v. Stuart*, 144 U. S. 104, 117, 36 L. Ed. 363.

To admission of evidence at preliminary examination.—An exception to the action of a trial court in permitting to be read in evidence the evidence of a witness which had been taken in the presence of the accused in open court at a preliminary hearing, and read to and signed by the witness, the reason given by the district attorney for the use of the deposition being that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court, is of no avail, where no error was assigned in the court below to the admission of this evidence, nor is it made the subject of assignment in this court. And where the record does not disclose the nature or effect of the testimony so admitted. "In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant."

Murray v. Louisiana, 163 U. S. 101, 108, 41 L. Ed. 87.

The supreme court of the United States on writ of error to the circuit court of appeals will not review contentions that error was committed by a trial court in the admission of proof where no error concerning the admission or rejection of testimony was assigned in the circuit court of appeals, and that court treated the case upon the assumption that the correctness of the ruling of the lower court concerning the admission of testimony was unchallenged by the plaintiff in error. *McLoughlin v. Tuck Co.*, 191 U. S. 267, 48 L. Ed. 178.

57. *Gumbel v. Pitkin*, 113 U. S. 545, 547, 28 L. Ed. 1128.

58. Plain errors noticed without assignment.—*United States v. Tennessee, etc.*, R. Co., 176 U. S. 242, 44 L. Ed. 452; *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 49 L. Ed. 726; *Behn v. Campbell*, 205 U. S. 403, 51 L. Ed. 857.

An appeal will not be dismissed because there is no assignment of errors annexed to the transcript, as required by §§ 997 and 1012 of the Revised Statutes. Paragraph 4 of Rule 21 of this court provides that the court may at its option notice a plain error not assigned. *Ackley School District v. Hall*, 106 U. S. 428, 27 L. Ed. 237; *United States v. Pena*, 175 U. S. 500, 44 L. Ed. 251.

59. *Wiborg v. United States*, 163 U. S. 632, 633, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 49 L. Ed. 726.

60. Rule requiring its annexation to and return with writ of error.—*Micas v. Williams*, 104 U. S. 556, 26 L. Ed. 842; *Staten Island R. Co. v. Lambert*, 131 U. S. appx. cxxi, 24 L. Ed. 615; *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 35 L. Ed. 715.

61. *Farrar v. Churchill*, 135 U. S. 609, 613, 34 L. Ed. 246.

When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option,

Dismissal.—Where no assignment of errors is found in the transcript annexed to and returned with the writ of error as required by § 997 of the Revised Statutes, the case will be dismissed.⁶³

But it has been held that a failure to annex to or return with a writ of error an assignment of errors, as required by § 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, Rule 21, it will ordinarily be enough.⁶⁴ In one case where there was no assignment of errors annexed to the transcript of the record, as required by § 997 of the Revised Statutes, the court refused to dismiss, but merely called the attention of counsel to this disregard of the statute "in the hope that nothing more was needed to prevent its recurrence hereafter."⁶⁵

Affirmance.—Sometimes, where an assignment of errors is not annexed to or returned with the writ of error as required by § 997 of the Revised Statutes, this court will affirm the judgment without opening the record.⁶⁶

3. EFFECT OF ITS OMISSION.—Where there is no assignment of errors, the defendant in error may either move to dismiss the writ, or he may open the record and pray for an affirmance.⁶⁸

D. Reason and Object of Rule.—Matter assigned in the appellate court as error in fact never appears upon the record of the inferior court; if it did, it would be error in law. The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.⁶⁹

The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points.⁷⁰

E. Form and Sufficiency—1. IN GENERAL.—The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. This court can only try to respond to such points made by counsel as seem to be material to the judgment which we must render.⁷¹

may notice a plain error not assigned or specified. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion. *Farrar v. Churchill*, 135 U. S. 609, 614, 34 L. Ed. 246; Rule 21, § 2, subdiv. 4; *Benites v. Hampton*, 123 U. S. 519, 520, 31 L. Ed. 260.

63. **Dismissal for noncompliance with rule.**—*Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260; *Rowe v. Phelps*, 152 U. S. 87, 38 L. Ed. 365; *Barrington v. Missouri*, 205 U. S. 483, 484, 51 L. Ed. 890.

64. *Ackley School District v. Hall*, 105 U. S. 428, 27 L. Ed. 237; *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. Ed. 1128.

65. *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246.

66. **Affirmance for want of assignment.**—*Boston Min. Co. v. Eagle Min. Co.*, 115 U. S. 221, 29 L. Ed. 392.

Where no assignment of errors accompanies the transcript of the record, the judgment will be affirmed. *Stevenson v.*

Barbour, 140 U. S. 48, 35 L. Ed. 338, citing *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60, 34 L. Ed. 585; *Pacific Express Co. v. Malin*, 132 U. S. 531, 538, 33 L. Ed. 450.

Where a writ of error is brought for a review of a judgment of a state court, but no assignment of errors is returned with the writ as required by § 997 of the Revised Statutes, this court will affirm the judgment under § 4 of Rule 21, 108 U. S. 585, for want of a due prosecution of the writ of error. *Dugger v. Tayloe*, 121 U. S. 286, 30 L. Ed. 946.

68. **Effect of its omission.**—*Maxwell v. Stewart*, 21 Wall. 77, 22 L. Ed. 564.

69. **Reason and object of rule.**—*Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684.

70. **Object of rule.**—*Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 648, 23 L. Ed. 341.

71. **Form and sufficiency in general.**—*Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 648, 23 L. Ed. 341.

Therefore the assignment of errors must point out definitely and specifically the errors relied on.⁷²

Appeals from Territorial Courts.—The assignment of errors on the appeal from the district court to the supreme court of the territory cannot be accepted in this court as the equivalent of the assignment required by the statute.⁷³

Assignments Must Not Be Too General.—An assignment of errors that the court erred in submitting the case to the jury, and entering up the verdict, that the court erred in overruling a motion for new trial or in arrest of judgment, etc., is too general to meet the requirements of the 21st rule of this court.⁷⁴

The renewal in the supreme court of the United States of a motion to dismiss which has already been considered and denied by the supreme court of a territory, amounts to no more than an assignment of error to the action of that court, to be passed on and disposed of as such, if otherwise we have jurisdiction of the case.⁷⁵

2. AS TO THE INSTRUCTIONS.—Rule 21 of this court provides: When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis; whether it be instructions given or instructions refused.⁷⁶ It is only the specific allegations of error in the rulings or charges of the judge at the trial that we are called upon to consider.⁷⁷

Illustrative Cases.—An assignment of error which alleges simply that the court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted or in what part of the charge it is—is an insufficient assignment under the 21st rule of court.⁷⁸ An assignment of error to the action of the court “in adopting the theory announced throughout the instruction given on the part of the defendants,” is obviously too general.⁷⁹ An assignment of error to a charge of the court “that there is nothing in the pleadings, evidence, or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of its charge here excepted to: that the portion of said charge here excepted to is prejudicial to the defendant and is misleading to the jury, is error in the charge and error in law on all the evidence and facts in the case,” is too general, uncertain, and indefinite to be noticed.⁸⁰

But although the assignments of error do not in terms state the precise language used by the court, yet if they indicate the subject matter in the charge to which the exceptions relate with sufficient clearness to enable us from

72. Where, beyond what may be inferred from the finding of the court, that the plaintiff is an alien, it does not appear that the defense of alienage was set up in the court below, nor does the assignment of errors contain any specification of such a question, except that the plaintiff is not liable to a succession tax and that the decision of the court below that he is so liable is erroneous, such an assignment is not a compliance with the rule upon that subject. *Scholey v. Rew*, 23 Wall. 331, 350, 23 L. Ed. 99.

An assignment of error in the following language: “The court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, and not from the date of the return of their assessment. This is the only error relied upon by plaintiff in error,” is precise and specific enough. *Clin-*

ton v. Missouri Pac. R. Co., 122 U. S. 469, 470, 30 L. Ed. 1214.

73. **Appeals from territorial courts.**—*Benites v. Hampton*, 123 U. S. 519, 520, 31 L. Ed. 260.

74. **Assignments must not be too general.**—*Van Stone v. Stillwell*, etc., Mfg. Co., 142 U. S. 128, 35 L. Ed. 961.

75. *Albright v. Sandoval*, 200 U. S. 9, 11, 50 L. Ed. 346, reaffirmed in *Gutierrez v. New Mexico*, 202 U. S. 614, 50 L. Ed. 1171.

76. **As to the instructions.**—*Deitsch v. Wiggins*, 15 Wall. 539, 540, 21 L. Ed. 228.

77. *Eastern Transp. Line v. Hope*, 95 U. S. 297, 298, 24 L. Ed. 477.

78. *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 637.

79. *Bogk v. Gassert*, 149 U. S. 17, 37 L. Ed. 637.

80. *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746.

a mere inspection of the charge to ascertain the particular matter referred to they are sufficiently specific.⁸¹

Materiality of Charge.—The assignments of error to the giving or refusing of instructions, will not be noticed, where there is nothing in the record to show the materiality of the charge complained of, or of the requests to charge which were refused.⁸²

3. AS TO THE EVIDENCE.—Rule 21 of this court provides: When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.⁸³

Error cannot be assigned here on an exclusion of oral proof, unless it appears that the offer was made in good faith. But if the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.⁸⁴

Assignments Must Not Be Too General.—An assignment of error is too broad and general under Rule 21 of this court, to bring up an objection made to the nonexistence of evidence to support the verdict and judgment below, unless in the language of the rule, it "sets out separately and particularly each error asserted and intended to be urged."⁸⁵

Illustrative Cases.—An assignment of errors that the court erred in admitting any evidence in the case is too general to meet the requirements of the 21st rule of this court.⁸⁶

The Rule in the Case of Depositions.—An assignment of error, based upon the exclusion by the trial court of an answer given in the deposition of a witness to a particular question, will be disregarded by this court if the answer, or the full substance of it, is not set forth in the record in appropriate form for examination.⁸⁷ The requirement that an assignment of error, based upon the

81. *Hickory v. United States*, 160 U. S. 408, 414, 40 L. Ed. 474.

82. **Must show materiality of charge.**—*New York, etc., R. Co. v. Madison*, 123 U. S. 524, 31 L. Ed. 258, citing *Worthington v. Mason*, 101 U. S. 149, 152, 25 L. Ed. 848; *United States v. Morgan*, 11 How. 154, 158, 13 L. Ed. 643; *Reed v. Gardner*, 17 Wall. 409, 21 L. Ed. 665; *Jones v. Buckell*, 104 U. S. 554, 26 L. Ed. 841; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 196, 30 L. Ed. 644.

83. **As to the evidence.**—*Deitsch v. Wiggins*, 15 Wall. 539, 541, 21 L. Ed. 228.

84. **Rejection of oral proof.**—*Scotland County v. Hill*, 112 U. S. 183, 186, 28 L. Ed. 692.

85. **Assignments must not be too general.**—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, citing *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961.

86. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961.

87. **Assignments to exclusion of depositions.**—*Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 542, 22 L. Ed. 406; *Florida R. Co. v. Smith*, 21 Wall. 255, 261, 22 L. Ed. 513; *Thompson v. First Nat. Bank*, 111 U. S. 529, 535, 28 L. Ed. 507; *Shauer v. Alterton*, 151 U. S.

607, 617, 38 L. Ed. 286; *Whitney v. Fox*, 166 U. S. 637, 41 L. Ed. 1145.

In the case of *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286, it was held to be the settled construction of the twenty-first rule of this court that an assignment of error, based upon the exclusion of an answer to a particular question in the deposition of a witness, would be disregarded here, unless the record sets forth the answer or its full substance. *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 542, 22 L. Ed. 406; *Florida R. Co. v. Smith*, 21 Wall. 255, 262, 22 L. Ed. 513; *Thompson v. First Nat. Bank*, 111 U. S. 529, 535, 28 L. Ed. 507; *Buckstaff v. Russell*, 151 U. S. 626, 636, 38 L. Ed. 292.

In *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 542, 22 L. Ed. 406, one of the assignments of error was the rejection of a deposition. In respect to that assignment, the court said: "It is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of

admission or rejection of evidence, must, in the case of a deposition, excluded in whole or in part, state the full substance of the evidence so admitted or rejected, means that the record must show, in appropriate form, the nature of such evidence, in order that this court may determine whether or not error has been committed to the prejudice of the party bringing the case here for review.⁸⁸

But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded. Besides, and this is a consideration of some weight, such a statement, in open court, and in the presence of the witness, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.⁸⁹

4. **AS TO THE JUDGMENT.**—It is very doubtful whether a general assignment of errors that the judgment below on a special case was for the wrong party is sufficient.⁹⁰ But an assignment of error that the court erred in submitting the case to a jury and entering up a judgment upon the verdict,⁹¹ that the court erred in entering up judgment recognizing and enforcing a mechanic's lien,⁹² or which simply avers that the court of appeals erred in affirming the judgment of the trial court, without any specification of any particular error committed,⁹³ are too general to meet the requirements of the 21st rule of this court.

5. **AS TO RULINGS UPON REPORT OF MASTER.**—When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.⁹⁴

exceptions must make it appear that if it had been admitted, it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict." At the date of the trial of that cause in the court of original jurisdiction it was provided, by Rule twenty-one of this court, that "when the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. Any alleged error not in accordance with these rules will be disregarded." 11 Wall. ix. Subsequently, the rule was modified so as to substitute for

the words above quoted the following: "When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." 14 Wall. xii. This change of phraseology did not affect the substance of the rule. *Shauer v. Alterton*, 151 U. S. 607, 616, 38 L. Ed. 286. This principle was reaffirmed in *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. Ed. 507.

88. *Buckstaff v. Russell*, 151 U. S. 626, 636, 38 L. Ed. 292.

89. *Buckstaff v. Russell*, 151 U. S. 626, 636, 28 L. Ed. 292.

90. **As to the judgment.**—*Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99.

91. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961.

92. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961.

93. *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188.

94. **As to rulings upon report of master.**—*Benites v. Hampton*, 123 U. S. 519, 520, 31 L. Ed. 260.

6. **As to DEMURRER.**—An assignment of errors that the court erred in overruling a demurrer to the evidence is too general to meet the requirements of the 21st rule of this court.⁹⁵

F. Construction of Assignment.—Like every other pleading, an assignment of errors is subject to a reasonable construction.⁹⁶

G. Scope of Assignment.—The assignment of errors is not limited to the bill of exceptions, but may embrace any errors which appear on the face of the record.⁹⁷

H. Striking Out.—A motion to strike out assignments of error will not be considered, in the absence of a printed record.⁹⁸

XI. Briefs.

A. Necessity for Briefs.—This court will confine its attention to the errors relied on in the brief of the plaintiff in error, although numerous other errors are set forth in the assignment of errors filed in the court below.⁹⁹ And where no brief has been filed in behalf of the defendants in error, and the supreme court of the United States is not informed by the record of the precise grounds upon which the court below proceeded, it will restrict its examination of the case to the single question upon which the plaintiff in error questions the correctness of the judgment.¹

B. Form and Contents of Brief—1. **THE RULES OF COURT STATED.**—The twenty-first rule was promulgated November 16th, 1872, the fourth section of which requires that the brief should contain, in the order there stated: First, a concise abstract or statement presenting succinctly the questions involved, and the manner in which they were raised; second, an assignment of the errors relied upon, setting out, in cases brought up by writ of error, separately and specifically each error asserted and intended to be urged, and in cases brought up by appeal, as specifically as may be, the error alleged to exist in the decree; or, if the error be alleged in a ruling upon the report of a master, stating the exception to the report and the action of the court upon it; third, a brief of the argument exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and authorities relied upon in support of each point, and containing, when a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case, printed at length. The fifth section of the rule also required that when the error allowed is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. And the sixth section required that when the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.²

This rule was amended as follows: Section 3. The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side. Section 4. This brief shall contain, in the order here stated: I. A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised. II. An assignment of

^{95.} **As to demurrer.**—*Van Stone v. Stillwell, etc.*, Mfg. Co., 142 U. S. 128, 35 L. Ed. 961.

^{96.} **Construction of assignment.**—*Edwards v. Elliott*, 21 Wall. 532, 550, 22 L. Ed. 487.

Generally, as to the construction of pleadings, see the title PLEADING.

^{97.} **Scope of assignment.**—*Woodward v. Brown*, 13 Pet. 1, 5, 10 L. Ed. 31.

^{98.} **Striking out.**—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 27 L. Ed. 630.

^{99.} **Necessity for briefs.**—*Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 35 L. Ed. 1160; *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 111, 38 L. Ed. 373.

1. No brief for defendant in error.—*Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131.

2. The rules of court stated.—*Portland Co. v. United States*, 15 Wall. 1, 2, 21 L. Ed. 113; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260; *Deutsch v. Wiggins*, 15 Wall. 539, 540, 21 L. Ed. 228.

the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged, and, in cases brought up by appeal, the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it. III. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. Section 5. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. Section 6. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. Section 7. Counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted. Section 8. Without such an assignment of errors, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned. Section 9. When, according to this rule, a plaintiff in error, or an appellant, is in default, the case may be dismissed on motion, and when a defendant in error, or an appellee, is in default, he will not be heard, except on consent of his adversary, and with request of the court. Section 10. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if the printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.³

Effect of Noncompliance with Rule.—Where the defendants have filed a brief, which does not contain either a statement of the case or an assignment of errors, such a party is not entitled to be heard. But where the plaintiffs below have filed a printed brief in a case, without objecting that the defendants have not complied with the twenty-first rule, the court will proceed to examine the questions presented in the bill of exceptions exhibited in the record.⁴ Or in other words, where the brief, in violation of Rule 21 of the United States supreme court, contains no specification of errors, no statement of the case presenting the questions involved with reference to the pages of the record in support thereof, and fails to quote the evidence whose rejection or admission was complained of, in accordance with the discretionary power vested in the court by § 5 of the above rule, the appeal will be dismissed on motion.⁵

2. **ABSTRACT OR STATEMENT OF CASE**—a. *In Brief of Plaintiff in Error.*—The rule first requires that the brief shall contain a concise abstract or statement of the case presenting succinctly the questions involved, and the manner in which they are raised.⁶ Where this rule is not complied with, the case will be dismissed.⁷

3. Amendment to the 21st rule, 14 Wall. xi.

4. **Effect of noncompliance with rule.**—*Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42.

5. *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260.

6. **Abstract or statement of case.**—Section 4, par. 1, Rule 21; 14 Wall. xi; *Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449; *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

7. **Effect of noncompliance with rule.**—*Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260.

If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed. *The Schooner Catharine*, 7 Cranch 99, 3 L. Ed. 281.

The case will be dismissed if the counsel for the appellant does not file a brief in the form required by the amendment to the 21st rule, promulgated November

But it may afterwards be reinstated by consent of parties.⁸

b. *In Brief of Defendant in Error.*—The brief of the defendant in error need contain no statement of the case unless that presented by the appellant is controverted.⁹

3. SPECIFICATION OF ERRORS—a. *In Brief for Plaintiff in Error*—(1) *In General.*—By the twenty-first rule of this court, it is, among other things, provided that the brief of counsel for plaintiff in error or appellant shall contain a specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.¹⁰ The judgment will be affirmed where the plaintiff in error has filed no assignment of errors.¹¹

(2) *As to Instructions.*—When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused.¹² An assignment of error which alleges simply that the court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted or in what part of the charge it is—is an insufficient assignment under the 21st rule of court.¹³

(3) *As to the Evidence.*—Where the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.¹⁴ When the evidence excepted to is not quoted in the brief, the exception is supposed to be abandoned.¹⁵

Appeals from Territorial Courts.—Where upon an appeal from the supreme court of a territory there is no other specification of error in the admission of testimony than the following, “generally in admitting improper evidence offered by the plaintiff, to which the defendant duly objected and took exception,

16th, 1872, and to be seen at large in 14 Wall. xi; *Portland Co. v. United States*, 15 Wall. 1, 21 L. Ed. 113.

8. **Reinstatement.**—*The Schooner Catharine*, 7 Cranch 99, 3 L. Ed. 281.

9. **Statement of case in brief of defendant in error.**—Rule 21, § 7, 14 Wall. xii.

10. **Specification of errors.**—*Farrar v. Churchill*, 135 U. S. 609; 613, 614, 34 L. Ed. 246; § 4 par. 2, Rule 21, 14 Wall. ix; *Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449; *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 35 L. Ed. 715; *Rowe v. Phelps*, 152 U. S. 87, 38 L. Ed. 365.

Where beyond what may be inferred from the finding of the court, that the plaintiff is an alien, it does not appear that the defense of alienage was set up in the court below, nor does the assignment of errors contain any specification of such a question, except that the plaintiff is not liable to a succession tax and that the decision of the court below that he is so liable is erroneous, such an assignment is not a compliance with the rule upon that subject, *Scholey v. Rew*, 23 Wall. 331, 350, 23 L. Ed. 99.

11. **Affirmance.**—*Ryan v. Kock*, 17 Wall. 19, 21 L. Ed. 611.

12. **As to instructions.**—Rule 21, § 5, 14 Wall. xi; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 229.

13. *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779.

14. **As to the evidence.**—Rule 21, § 6, 14 Wall. xi; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260; *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Marshall v. Burtis*, 172 U. S. 630, 634, 43 L. Ed. 579.

A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict. *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 542, 22 L. Ed. 406.

15. *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260.

as appears fully in the bill of exceptions," and there is no specification in the briefs as required by Rule 21, this court will not review rulings on the admission or rejection of testimony.¹⁶

(4) *As to Master's Report*.—Rule 21 requires that when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.¹⁷

(5) *Effect of Omission of Specification*.—When there is not such an assignment of errors counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.¹⁸ In short, where the brief of counsel contains no specification of errors as required by Rule 21, the writ of error will be dismissed.¹⁹

Though it has been held that a judgment will be affirmed for want of such an assignment of errors as is required by the twenty-first rule; there being in the record no plain error not assigned and such as the court thought fit to be noticed by it without a proper assignment.²⁰

Thus, where a writ of error is brought for the review of a judgment of a state court, but no counsel has appeared for the plaintiffs in error, and the case has been submitted by the defendants in error on briefs, without any specification of errors by the plaintiffs, as required by Rule 21, § 2, 108 U. S. 585, this court will affirm the judgment for want of a due prosecution of the writ of error.²¹ In other words, where there is no specification of errors relied on in the brief of counsel for plaintiff in error, the judgment will be affirmed.²²

And in one case where the brief of counsel did not contain a specification of errors, such as is required by our rule, the court said: "We shall not in this instance decline to consider what we suppose to be the errors relied on, but we call attention to this disregard of the rule, in the hope that nothing more is needed to prevent its recurrence hereafter."²³

b. *In Brief for Defendant in Error*.—The counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required by the plaintiff or appellant, except that no as-

16. Appeals from territorial courts.—*Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260; *Marshall v. Burtis*, 172 U. S. 630, 634, 43 L. Ed. 579.

17. As to master's report.—*Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658.

In affirmance of this principle, Rule 21 (Sub. 2) requires that "when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it." This presupposes that the particular exception relied upon was taken in the court below, and was passed upon by the court adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court. It would be manifestly unjust if this court, after having affirmed the action of the court below in every other particular,

should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, when if exception had been duly taken, the error could have been at once corrected. *Topliff v. Topliff*, 145 U. S. 156, 173, 36 L. Ed. 658.

18. Effect of omission of specification.—Rule 21, § 8, 14 Wall. xi.

19. Dismissal.—*Barrington v. Missouri*, 205 U. S. 483, 51 L. Ed. 890; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260; *Rowe v. Phelps*, 152 U. S. 87, 38 L. Ed. 365.

20. Affirmance.—*Treat v. Jemison*, 20 Wall. 652, 22 L. Ed. 449.

21. Dugger v. Tayloe, 121 U. S. 286, 30 L. Ed. 946; *Barrington v. Missouri*, 205 U. S. 483, 51 L. Ed. 890.

22. Stevenson v. Barbour, 140 U. S. 48, 35 L. Ed. 338, citing *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60, 34 L. Ed. 585; *Pacific Express Co. v. Malin*, 132 U. S. 531, 538, 33 L. Ed. 450.

23. Farrar v. Churchill, 135 U. S. 609, 34 L. Ed. 246.

signment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted.²⁴

4. **THE ARGUMENT.**—The brief shall contain a brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and authorities relied upon in support of each point.²⁵ Where in the argument there is no reference to the pages of the record relied on to support the points which were made, the case will be dismissed.²⁶

5. **INCORPORATION OF STATE STATUTES IN BRIEF.**—When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.²⁷

6. **SCANDAL AND IMPERTINENCE.**—The language of briefs, as well as that employed in oral argument, must be respectful.²⁹ Where the printed argument of the plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court, the brief of the plaintiff in error will be stricken from the files and the writ of error dismissed. It is our duty to keep our records clean and free from scandal.³⁰

C. Filing.—1. **WHO MAY FILE.—In General.**—The court will allow briefs to be presented by or on behalf of persons who are not parties to the suit but who are interested in the questions to be decided.³¹ So, also, where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances.³²

Amicus Curiae.—An attorney, by leave of court, may under some circumstances file a brief as *amicus curiae*.³³ But where it does not appear that the appli-

24. **In brief for defendant in error.**—Rule 21, § 7, 14 Wall. xi.

25. **The argument.**—Rule 21, § 4, subd. 3, 14 Wall. xi.

26. *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260.

27. **Incorporation of state statutes in brief.**—Rule 21, par. 4, subd. 3, 14 Wall. xi; *Benites v. Hampton*, 123 U. S. 519, 31 L. Ed. 260.

Where the parties in a cause have disregarded Rule 21 (par. 4, subd. 3), which provides that "when a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length" either in or with the brief, the submission of a cause under Rule 20 will be set aside and the cause restored to its place on the docket. *School District v. St. Joseph Fire, etc., Ins. Co.*, 101 U. S. 472, 25 L. Ed. 868.

29. **Scandal and impertinence.**—Briefs of counsel must not contain aspersions on the conduct of opposing counsel. The court said that it was not pleasant to be compelled to remind counsel that language used in briefs must be respectful. *Kneeland v. American Loan, etc., Co.*, 138 U. S. 509, 34 L. Ed. 1052.

Mr. Chief Justice Fuller in one case said: "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from

the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free from scandal. The brief of the plaintiff in error will be stricken from the files and the writ of error dismissed, and it is so ordered." *Green v. Elbert*, 137 U. S. 615, 624, 34 L. Ed. 792.

30. *Green v. Elbert*, 137 U. S. 615, 624, 34 L. Ed. 792.

31. **Who may file.**—It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit. *Stryker v. Goodnow*, 123 U. S. 527, 540, 31 L. Ed. 194.

32. **Right of counsel not employed in case to file.**—*Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547; *Florida v. Georgia*, 17 How. 478, 491, 15 L. Ed. 181; *The Gray Jacket*, 5 Wall. 370, 18 L. Ed. 646; *Northern Securities Co. v. United States*, 191 U. S. 555, 48 L. Ed. 299.

33. **Amicus curiae may file brief.**—*The Three Friends*, 166 U. S. 1, 49, 41 L. Ed. 897.

cant is interested in any other case which will be affected by the decision of the pending case, and the parties are represented by competent counsel, the need of assistance cannot be assumed and leave to file a brief as *amicus curiæ* will not be granted.³⁴

2. **TIME OF FILING**—a. *Brief of Counsel for Plaintiff in Error*.—The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged on the opposite side.³⁵ Though the court may allow counsel, after argument of the cause is heard, to file printed arguments on question not discussed before.³⁶

But motion to open judgment and permit argument or printed brief, by plaintiff in error, will be dismissed.³⁷

b. *Brief of Counsel for Defendant in Error*.—Counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required and no statement of the case, unless that presented by the plaintiff or appellant is controverted.³⁸

3. **NOTICE OF FILING**.—Each counsel for defendant in error shall, on application, be given a copy of the printed brief of the appellant.³⁹

Time of Filing Brief on Motion to Dismiss.—Though a failure of the party making a motion to dismiss, to send a copy of his brief to the counsel on the other side within the time required by the amendment made at December term, 1871, to Rule 6, would entitle such counsel of the other side to ask to postpone the hearing in order to give time for further preparation, yet if he have himself before the hearing filed a full argument upon the merits of the motion, the failure of his opposing counsel to have complied with the amendment to the rule would hardly warrant an objection that the notice of the motion was insufficient.⁴⁰

4. **EFFECT OF FAILURE TO FILE**—a. *Brief of Plaintiff in Error*.—When, according to this rule, a plaintiff in error, or an appellant, is in default the case may be dismissed on motion.⁴¹ Though it has been held that a judgment will be affirmed where the plaintiff in error has filed no brief, as required by the rules of this court.⁴²

34. *Northern Securities Co. v. United States*, 191 U. S. 555, 48 L. Ed. 299.

35. **Time of filing brief**.—Rule 21, § 3, 14 Wall. xi.

36. **Right to file brief after argument**.—Although no error is assigned on a ruling upon a plea to the jurisdiction, and it is not referred to in the argument here, this court may if they desire to do so, allow counsel after argument of the cause is heard, to file printed arguments on that question. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 116 U. S. 472, 29 L. Ed. 696.

37. **Judgment will not be opened to permit filing**.—Where a cause is reached in the regular order of the docket, and submitted on brief by defendant in error, no counsel appearing for plaintiff, on February 1, and decided February 24, the court continuing till February 26, when it adjourned to first Monday of April, and up to the adjournment no appearance had been entered for, or motion made by plaintiff in error, a motion to open the judgment and permit argument

or printed brief, by plaintiff in error, comes too late. *Watterson v. Payne*, 154 U. S. appx. 534, 15 L. Ed. 890.

38. **Effect of defendant in error filing brief unconditionally**.—Rule 21, § 7, 14 Wall. xii; *Thomas v. Wooldridge*, 23 Wall. 283, 23 L. Ed. 135.

39. **Notice of filing**.—Rule 21, § 3, 14 Wall. xi.

Marshall, Ch. J., said: A pamphlet has been sent to the judges touching the questions in controversy in this cause. The court desire it to be understood, that the practice of the court is not to receive or examine such papers, unless they have been presented in court, and shown to the opposite counsel. *Mitchell v. United States*, 8 Pet. 307, 8 L. Ed. 955.

40. **Notice of motion to dismiss**.—*Thomas v. Wooldridge*, 23 Wall. 283, 23 L. Ed. 135.

41. **Dismissal for failure to file**.—Rule 21, § 9, 14 Wall. xii; *James v. McCormack*, 105 U. S. 265, 26 L. Ed. 1044.

42. **Affirmance for failure to file**.—*Ryan v. Kock*, 17 Wall. 19, 21 L. Ed. 611; *Du-*

When the notice of a motion to dismiss is not accompanied by a copy of the brief or argument to be used in its support, the counsel on the other side may have good cause for postponing the hearing to give time for further preparation, if application therefor is made.⁴³

b. Brief of Defendant in Error.—When a defendant in error, or an appellee, is in default, he will not be heard, except on consent of his adversary, and with the request of the court.⁴⁴

D. Printing Briefs.—All records, arguments and briefs printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and as well as all quotations contained therein, and the covers thereof must be printed in clear type (never smaller than small pica) and on unglazed paper.⁴⁵ Hereafter the supreme court of the United States will insist upon a strict compliance with the terms of Rule 31, as amended, providing for printing briefs.⁴⁷

Expense of counsel or parties for printing briefs will not be taxed as costs.⁴⁸

E. Admissibility in Evidence.—Briefs of counsel may be admitted in evidence.⁴⁹

XII. Effect of Appeal.

A. In General.—Effect of a writ of error under the 22d section of the judiciary act, is substantially the same as that of the writ of error at common law, and the practice and course of proceedings in the appellate tribunals are the same except so far as they have been modified by acts of congress, or by the rules and decisions of this court.⁵⁰ And a writ of error upon the final judgment at common law brings up the whole record, and subjects to review all the proceedings in the cause.⁵¹

The writ of error operates upon the record, and its effect, under the judiciary act, is to bring it into this court, and submit it to a re-examination.⁵² It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribunal. Suits cannot, under the judiciary act, be commenced against the United States; and yet writs of error,

vall v. United States, 154 U. S., appx. 548, 18 L. Ed. 252.

^{43.} Thomas v. Woolridge, 23 Wall. 283, 23 L. Ed. 135.

^{44.} Brief of defendant in error.—Rule 21, § 9, 14 Wall. xii.

Where no brief has been filed on behalf of the defendants in error and we are not informed by the record of the precise ground upon which the court below proceeded, we will restrict our examination in the case to the single ground upon which the plaintiff in error questions the correctness of the judgment. Kennedy v. McKee, 142 U. S. 606, 35 L. Ed. 1131.

^{46.} Printing briefs.—Rule 31, 178 U. S. 617; Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 294, 45 L. Ed. 194.

In Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 294, 45 L. Ed. 194, the court said in reference to the briefs filed therein, the briefs filed herein are in plain violation of the amendment to Rule 31, 178 U. S. 617. The type used in quoting the statute is so small as to be exceedingly difficult to read. Many briefs are still printed on glazed paper. Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 294, 45 L. Ed. 194.

^{47.} Strict compliance with rule as to printing.—Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 294, 45 L. Ed. 194.

^{48.} Costs of printing briefs.—It has never been the practice of this court, in cases brought before it under its appellate jurisdiction, to tax as costs disbursements by counsel or parties for printing briefs. We see no reason for adopting a different rule in cases within our original jurisdiction. Ex parte Hughes, 114 U. S. 548, 29 L. Ed. 281.

^{49.} Briefs admissible in evidence.—When after reference to the pleadings and proceedings there remains some ambiguity or uncertainty (in it) as to the judgment of the court in the former trial, briefs of counsel may be properly admitted in evidence. Burthe v. Denis, 133 U. S. 514, 33 L. Ed. 768.

^{50.} Effect of appeal in general.—United States v. Dashiell, 3 Wall. 688, 18 L. Ed. 268, 270.

^{51.} Fitzpatrick v. Flannagan, 106 U. S. 648, 660, 27 L. Ed. 211.

^{52.} The writ operates upon the record.—Cohens v. Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Suydam v. Williamson, 20 How. 427, 437, 15 L. Ed. 978.

accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed, as they are with or without error; and it has never been supposed that the writ of error in such cases, though sometimes involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error, and the original suit.⁵³

B. On Jurisdiction of Trial Court—1. **IN GENERAL**.—A writ of error has the effect to remove the record into the court granting the writ, and when the conditions prescribed in the 23d section of the judiciary act are complied with, the jurisdiction of the subordinate court is suspended until the cause is remanded from the appellate tribunal.⁵⁴ In other words after the allowance of an appeal, and an acceptance of the bond for the appeal by one of the judges in accordance with such an order of allowance, the jurisdiction is transferred from the court below, and from that time the suit is cognizable only in this court. And although the case is not actually entered in this court, it is no longer subject to the control of the court below.⁵⁵

Necessity for Perfecting Appeal.—But of course, besides merely taking an appeal, those additional things must be done which the law requires to be done, in order to give the appeal a suspensive effect, whether it be security for the payment of the claim or other condition imposed by law.⁵⁶ The authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below, has no application to a case where an application for an appeal was filed by the claimant, but the appeal was never allowed nor perfected, and where it does not appear that a transcript of the record was ever filed in this court.⁵⁷

Power to Perfect Appeal.—One of the qualifications of the general rule as to the suspensive effect of an appeal is, that the inferior court may perfect its judgment or decree, usually at any time during the term at which it is rendered. If, when an appeal is taken or a writ of error is sued out, the record has not been made up, it may be made up in due form. If any obvious mistake has oc-

53. It does not act upon the parties.—*Nations v. Johnson*, 24 How. 195, 204, 16 L. Ed. 628.

54. Jurisdiction of lower court suspended.—*Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915.

The control of the court below over its decree is suspended during the pendency of the appeal. *Ensminger v. Powers*, 108 U. S. 292, 27 L. Ed. 732.

55. *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025, citing *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121, and distinguishing *Phillips v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040.

Where a final decree was rendered April 30, 1878, and an order was entered May 7, on the minutes of the court below, sitting in general term, allowing an appeal to this court, but no security was then taken, either for costs or to obtain a supersedeas, and on the 29th of June, being the sixtieth day after the rendition of the decree, a bond with sureties, conditioned according to law for a supersedeas, was approved by one of the justices of the court below, and filed with the clerk, and on the same day the same justice signed a citation, it was held that the power of the justice over the appeal and security, in the absence of an allegation

that the approval of the bond was procured by fraud, was exhausted when he took the security and signed the citation. From that time the control of the supersedeas as well as the appeal was transferred to this court. It follows therefore that the supersedeas, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently the court below is without power now to proceed with the execution of the decree appealed from. *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121.

56. Appeal must be perfected.—*Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888.

Where an appeal to this court is perfected, although this court dismisses the appeal for the failure of the appellants to file and docket the cause in this court, yet the cause is out of the court below and in this court, and the trial court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded. *Ensminger v. Powers*, 108 U. S. 292, 27 L. Ed. 732; *Mitchell v. United States*, 9 Pet. 711, 9 L. Ed. 283.

57. *Hubbell v. United States*, 171 U. S. 203, 43 L. Ed. 136.

curred it may be corrected; as where the jury by mistake has given damages in a penal action, or has given damages for a larger sum than the declaration demanded, the plaintiff may enter a remittitur of the damages on the record, after a writ of error is brought.⁵⁸

2. **APPEALS IN CHANCERY.**—In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject.⁵⁹

In this country the effect of an appeal from a decree or order in chancery is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law (when security is required), suspends further proceedings, and operates as a supersedeas of execution. This, as we have seen, is the case in the circuit courts of the United States. But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order, either of the court which makes the decree, or of the appellate tribunal.⁶⁰

How Much of Cause Transferred.—An appeal in equity brings up all the matters which were decided in the circuit court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.⁶¹

Likewise, where the appeal asked and granted is "of this cause," that is of the whole cause as far as it had then progressed, this brings up orders previously made in the cause, although the bond required by the court was made to operate as a supersedeas only of the order of a latter date.⁶²

3. **APPEALS FROM DISTRICT OF COLUMBIA.**—The regulation of appeals from the special to the general term of the supreme court of the District of Columbia is specially provided. By these rules it is declared that, after judgment is entered in the circuit court, or at a special term, execution may be issued, unless the party condemned moved to vacate or set it aside, or resort to a review of it before the general term; but no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, unless the appellant, with surety, within twenty days after the judgment or decree, execute and file an undertaking in the form prescribed.⁶³

4. **EFFECT ON INJUNCTIONS BELOW.**—The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect.⁶⁴ When an injunction has been dissolved, it cannot

58. **Power of inferior court to perfect appeal.**—*Hovey v. McDonald*, 109 U. S. 150, 157, 27 L. Ed. 888, citing *Tidd's Pract.* 942.

59. **Appeals in chancery in England.**—*Hovey v. McDonald*, 109 U. S. 150, 160, 27 L. Ed. 888.

60. **Effect of chancery appeals in this country.**—*Hovey v. McDonald*, 109 U. S. 150, 160, 27 L. Ed. 888.

To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment. R. S. 1007. This regulation applies to proceedings in equity as well as to cases at

law. *Hovey v. McDonald*, 109 U. S. 150, 159, 27 L. Ed. 888; *Ensminger v. Powers*, 108 U. S. 292, 27 L. Ed. 732.

61. **How much of equity cause removed.**—*Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 90.

62. **Orders previously made in cause.**—*Central Trust Co. v. Seasingood*, 130 U. S. 482, 32 L. Ed. 985.

63. **Appeals from District of Columbia.**—*Hovey v. McDonald*, 109 U. S. 150, 159, 27 L. Ed. 888.

64. **Effect of appeals on injunctions below.**—*Hovey v. McDonald*, 109 U. S. 150, 161, 27 L. Ed. 888; *Slaughter House Cases*, 10 Wall. 273, 297, 19 L. Ed. 915; *Leonard v. Ozark Land Co.*, 115 U. S. 465, 468, 29 L. Ed. 445; *Knox County v. Harshman*, 132 U. S. 14, 16, 33 L. Ed. 249.

Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well set-

be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. A fortiori, the mere prosecution of an appeal cannot operate as an injunction where none has been granted.⁶⁵ Hence, an injunction out of the circuit court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court.⁶⁶

A writ of error to a state court cannot have any greater effect than if the judgment or decree had been rendered or passed in a circuit court, and as we have seen neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.⁶⁷

Power of Court to Suspend Operation of Injunction.—But it was not decided in the *Slaughter House Cases*, that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or nonexercise is not an appealable matter.⁶⁸ It is thus apparent that the supreme court, while asserting

it everywhere, in suits in equity, that an appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity. *Slaughter House Cases*, 10 Wall. 273, 297, 19 L. Ed. 915.

"The injunction ordered by the final decree was not vacated by the appeal. *Slaughter House Cases*, 10 Wall. 273, 297, 19 L. Ed. 915; *Hovey v. McDonald*, 109 U. S. 150, 161, 27 L. Ed. 888. It is true that in some of the *Slaughter House Cases* the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case, but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding the appeal." *Leonard v. Ozark Land Co.*, 115 U. S. 465, 468, 29 L. Ed. 415.

65. *Knox County v. Harshman*, 132 U. S. 14, 16, 33 L. Ed. 249.

66. *Parker v. Circuit Judges*, 12 Wheat. 561, 6 L. Ed. 729.

67. **Error to state court.**—*Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915.

This court, in the *Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915, decided that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, said "it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court;" and held that the same rule applies to writs of error from state courts in equity proceedings; and the decision of the court was based upon that view of the law. It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. *Hovey v. McDonald*, 109 U. S. 150, 161, 27 L. Ed. 888.

68. **Rule in Slaughter House Cases qualified.**—In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October term, 1878, declared that, "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party." Rule 93. *Hovey v. McDonald*, 109 U. S. 150, 161, 27 L. Ed. 888.

"This court no doubt has the power to modify an injunction granted by a decree

its power, deemed it advisable to rest the discretion to suspend the operation of a writ of injunction pending appeal from final decree with the trial judge, and established the rule that in general the appellate court would not, pending the appeal and in advance of a decision by that court upon the merits, interfere with the discretion lodged with the trial judge. This conclusion is bottomed on manifest grounds of propriety.⁶⁹ Of course, where the power is not exercised by the court, nor by the judge who allows the appeal, the decree retains its intrinsic force and effect.⁷⁰

5. AMENDMENTS AND DIRECTIONS.—In chancery proceedings it is a rule that when a clerical error has crept into the decree, or some ordinary direction has been omitted, the court will entertain an application to rectify it, even though it has been passed and entered. Where a decree has omitted a direction that is of course at the time it is made, it may be corrected by the insertion of that direction; as where, in a creditor's suit, the decree has omitted the usual direction to take an account of the personal estate, it was ordered to be inserted. This rule is formulated in the 8th Equity Rule established by this court for the government of the circuit courts, which declares that "clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or judge thereof, upon petition, without the form or expense of rehearing." Such corrections, by analogy to the practice in cases at law, may undoubtedly be made after an appeal is taken.⁷¹

The supreme court of the District of Columbia has power in special term to amend its decree after the appeal is entered.⁷²

6. ENFORCEMENT OF JUDGMENT OR DECREE.—In General.—One general rule in all cases (subject however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. This includes a suspension of the power to execute the judgment or decree. But, of course, besides merely taking an appeal, those additional things must be done which the law requires to be done, in order to give to the appeal a suspensive effect, whether it be security for the payment of the claim or other condition imposed by law.⁷³ Therefore a complainant, after having appealed from a decree in his favor, will not be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate court, in order to obtain a decree for a larger sum.⁷⁴

After appeal from the judgment of a justice of the peace, and security duly given, if the appeal is not filed, the justice cannot issue execution against the original defendant but must proceed against the bail.⁷⁵

Under the act of March 3, 1863, allowing district courts to enforce judg-

below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October term, 1878, in the case of the Sandusky Tool Co. v. Comstock (not reported), and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case, and necessarily take much time, we promulgated the present equity Rule 93, which is as follows: 'When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.' Leon-

ard v. Ozark Land Co., 115 U. S. 465, 468, 29 L. Ed. 445.

^{69.} See Leonard v. Ozark Land Co., 115 U. S. 465, 29 L. Ed. 445.

^{70.} Hovey v. McDonald, 109 U. S. 150, 162, 27 L. Ed. 888.

^{71.} Amendments and directions.—Hovey v. McDonald, 109 U. S. 150, 157, 27 L. Ed. 888.

^{72.} Rule in District of Columbia as to amendments pending appeal.—Hovey v. McDonald, 109 U. S. 150, 27 L. Ed. 888.

^{73.} Enforcement of judgment or decree.—Hovey v. McDonald, 109 U. S. 150, 157, 27 L. Ed. 888.

^{74.} Taylor v. Savage, 1 How. 282, 11 L. Ed. 132, affirmed in Taylor v. Savage, 2 How. 395, 11 L. Ed. 313.

^{75.} Appeals from judgments of justices of the peace.—Plowman v. Abrams, 1 Dall. 316, 1 L. Ed. 154.

ments and decrees rendered by them prior to the passage of the act repealing all circuit court powers given to certain district courts of the United States, it was held that the district courts did not have power to take any steps in the execution of a decree in favor of the appellants, where they had appealed from the decree, because it would be "against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree. This is not a case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined."⁷⁶

But where a decree goes against an executor, and before an appeal is prayed he is removed and the administrator de bonis non with the will annexed is appointed, if such administrator is not made a party in the court below, and bond be not filed in time, the complainants may enforce the decree.⁷⁷

Where a second appeal is taken and the court thereupon orders execution of the original decree, and there is an appeal from the latter decree, this is not a supersedeas to further proceedings in the circuit court to execute the original decree.⁷⁸

7. IN CRIMINAL CASES—*a. In Capital Cases.*—The sentences in capital cases are not vacated by the writs of error, but only their execution stayed pending proceedings in the higher court.⁷⁹

b. In Habeas Corpus Proceedings.—An appeal from a judgment of the United States circuit court, denying an application for a writ of habeas corpus, does not deprive the state court of all power to proceed, until the mandate of this court is sent down to the circuit court; nor does § 766 of the Revised Statutes, limit-

76. Appeals from district to circuit courts.—*Bronson v. La Crosse, etc.,* R. Co., 1 Wall. 405, 409, 17 L. Ed. 616.

77. *Taylor v. Savage,* 1 How. 282, 11 L. Ed. 132.

78. Second appeals.—An original decree was made by the circuit court of Rhode Island, at the term, 1834, and an appeal was taken to January, 1835, of the supreme court; this appeal was dismissed at January term, 1837, on the motion of the counsel for the appellees, without an examination or decision on the merits of the cause; at the November term of the circuit court, the defendants prayed and were allowed a second appeal to the supreme court; which appeal had not been yet entered on the docket of the supreme court; the circuit court afterwards proceeded to order execution of the decree of 1834, and the defendant appealed to the supreme court from this decree; held, that this appeal from the decree of the circuit court, ordering the execution of the original decree, was not a supersedeas to further proceedings in the circuit court to execute the original decree; and that the circuit court was at liberty to use its discretion to proceed to execute the original decree. *Carr v. Hoxie,* 13 Pet. 460, 10 L. Ed. 247.

79. In capital cases.—*Schwab v. Berggren,* 143 U. S. 442, 36 L. Ed. 218; *Cross v. United States,* 145 U. S. 571, 36 L. Ed. 821.

Section 845 of the Revised Statutes of the District of Columbia which provides: "That when the judgment is death or confinement in the penitentiary the court shall on the application of the party condemned, to enable him to apply for a writ of error, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term," relates simply to the right of the accused to a postponement of the day of executing his sentence in case he should apply for it in order to have a review of an alleged error; and with the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law. "Unquestionably, congress did not intend that the execution of a sentence should not be carried out, if judgment were affirmed on writ of error, except where the appellate court was able to announce a result within the time allowed for the application for the writ to be made. The postponements were rendered necessary by reason of delays occasioned by the acts of the condemned in his own interest, and the position that he thereby became entitled to be set at large cannot be sustained." *In re Cross,* 146 U. S. 271, 36 L. Ed. 969, citing *McElvaine v. Brush,* 142 U. S. 155, 159, 35 L. Ed. 971.

ing the power of the state court before and after an appeal from the final decision in the circuit court of the United States on an application for a writ of habeas corpus by one alleged to be restrained of his liberty in violation of the constitution, or some law or treaty of the United States, justify any such contention. "Of the object of the statute there can be no doubt. It was—in cases where the applicant was held in custody under the authority of a state court or by the authority of a state—to stay the hands of such court or state, while the question as to whether his detention was in violation of the constitution, laws or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state court in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein."⁸¹

c. *Right of Trial Court to Bail Accused.*—**In General.**—The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.⁸²

Under the act of March 3, 1879, c. 176, upon writs of error from the circuit court to review judgments of the district court upon convictions in criminal cases, the justice of this court assigned to the circuit, or the circuit judge—that is to say, any member of the appellate court, except the district judge, presumably the judge who rendered the judgment below—might allow the writ, to operate as a supersedeas, and might take bail for the defendant's appearance in the circuit court.⁸³

And upon a writ of error from this court to the highest court of a state to review a decision against a right claimed under the constitution and laws of the United States, and which lies both in criminal and in civil cases, and operates as a supersedeas under the same circumstances in the one as in the other, bail may be taken pending the writ of error; but, because of the relation between the two governments, in the court of the state only, it being enacted by the act of July 13, 1866, c. 184, § 69, in accordance with the practice previously prevailing in some states, that the plaintiff in error, if charged with an offense bailable by the laws of the state, shall not be released from custody until final judgment upon the writ of error, "or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the state court, shall be given;" or, if the offense is not so bailable, until such final judgment.⁸⁴

By the act of February 6, 1889, c. 113, § 6, it was enacted that final judgments of any court of the United States upon conviction of a crime punishable with death might, upon the application of the defendant, be reviewed by this court "upon a writ of error, under such rules and regulations as said court may prescribe;" and that every such writ of error should "be allowed as of right, and without the requirement of and security for the prosecution of the same, or for costs;" and should "during its pendency operate as a stay of proceedings upon the judgment, in respect of which it is sued out," and might be immediately filed in this court; but should not be sued out or granted, except upon a petition filed, with the clerk of the court in which the trial was had, during the same term, or within sixty days after its expiration.⁸⁵

81. In habeas corpus proceedings.—In *re Jugiro*, 140 U. S. 291, 35 L. Ed. 510.

82. Right of trial court to bail accused.—*Hudson v. Parker*, 156 U. S. 277, 285, 39 L. Ed. 424.

83. Appeals from district to circuit court.—20 Stat. 354; *Hudson v. Parker*, 156 U. S. 277, 285, 39 L. Ed. 424.

84. Bail pending error to state court.—14 Stat. 172; Rev. Stat., § 1017; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 537, 562, 567, 8 L. Ed. 483; *Hudson v. Parker*, 156 U. S. 277, 285, 39 L. Ed. 424.

85. Act of Feb. 6, 1889.—25 Stat. 656; *Hudson v. Parker*, 156 U. S. 277, 286, 39 L. Ed. 421.

Construction of Act of Feb. 6, 1889.—Although that act expressly recognized the power of this court to make rules regulating the proceedings upon writs of error in capital cases, yet, as by its terms the writ was to be allowed as of right, without requiring any security, and was of itself to operate as a stay of proceedings, no rule upon the subject was considered necessary, and none was made by this court. It can hardly be doubted, however, that congress intended that the allowance of the writ of error and stay of proceedings, while suspending the execution of the sentence, should neither have the effect of discharging the prisoner from custody, nor of preventing his being admitted to bail, upon sufficient cause shown, pending the writ of error; and, no special provision upon the subject of bail in a capital case after conviction having been made by act of congress or rule of court, it would seem that it might be taken by the justice or judge who allowed the writ of error.⁸⁶

Summary.—By these statutes, bail after conviction was provided for in every class of writs of error pending in the courts of the United States in cases of bailable offenses; for, when they were enacted, no writ of error lay from this court to the circuit court or district court in any criminal case.⁸⁷

Direct Appeals under Court of Appeals Act.—By rule of this court it is provided that where a writ of error is allowed from a circuit court or district court direct to this court under the circuit court of appeals act, in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under §§ 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such a manner as may be fixed.⁸⁸ Having the authority to order bail to be taken, the same justice might either himself approve the bail bond; or he might order that such a bond should be taken in an amount fixed by him, the form of the bond and the sufficiency of the sureties to be passed upon by the court whose judgment was to be reviewed, or by a judge of that court; or he might leave the whole matter of bail to be dealt with by such court or judge.⁸⁹ Under Rule 36, any justice of this court, although not assigned to the particular circuit, would seem to have the power to permit bail to be taken pending the writ of error.⁹⁰

Mandamus.—If the circuit or district judge should decline to admit the prisoner to bail, this court may compel him to do so by writ of mandamus, upon the petitioner giving bond in proper form and with sufficient sureties.⁹¹

C. On Decision of Court Below—1. **VACATION OF JUDGMENT.**—A writ of error to this court does not vacate the judgment below. That continues in force

86. **Construction of act of Feb. 6, 1889.**—Hudson v. Parker, 156 U. S. 277, 286, 39 L. Ed. 424.

87. **The general rule.**—Hudson v. Parker, 156 U. S. 277, 286, 39 L. Ed. 424.

88. **Direct appeals under court of appeals act.**—Rule 36, 139 U. S., appx., 766; Hudson v. Parker, 156 U. S. 277, 283, 39 L. Ed. 424.

"It is quite clear, in view of all the legislation on the subject of bail, that congress must have intended that under the act of 1891, in cases of crimes not capital, and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice or judge. And we are of opinion that any justice of this court, having power, by the acts of congress, to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has the authority, as inci-

dental to the exercise of this power, to order the plaintiff in error to be admitted to bail, independently of any rule of court upon the subject; and that this authority is recognized in the first paragraph of Rule 36." Hudson v. Parker, 156 U. S. 277, 287, 39 L. Ed. 424.

89. Hudson v. Parker, 156 U. S. 277, 287, 39 L. Ed. 424.

By Rule 36, any justice of this court may have the power by the acts of congress, to allow a writ of error, issue a citation, and grant a supersedeas, and has the authority to admit the prisoner to bail pending the writ of error. Hudson v. Parker, 156 U. S. 277, 39 L. Ed. 424, Brewer and Brown, JJ., dissenting.

90. Hudson v. Parker, 156 U. S. 277, 285, 39 L. Ed. 424.

91. **Mandamus.**—Hudson v. Parker, 156 U. S. 277, 39 L. Ed. 424.

until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition.⁹²

Bills to Impeach Judgments at Law.—The superseding of process on a decree dismissing a bill to impeach a judgment at law could not supersede process on the judgment at law, and this is so, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent and not as an original bill.⁹³

2. **APPEALS IN EMINENT DOMAIN PROCEEDINGS.**—An appeal by a landowner from the assessment of damages in condemnation proceedings, vacates the assessment.⁹⁴

3. **AVAILABILITY AS ESTOPPEL PENDING APPEAL.**—A decree of a state court cannot be made available as an estoppel pending an appeal to this court.⁹⁵ It would seem, too, that under the practice in Pennsylvania a decree cannot be used as *res judicata* pending an appeal to a higher court.⁹⁶ A party cannot even plead the pendency of a former suit pending an appeal to a higher court.⁹⁷

D. Trials De Novo—1. **PROCEEDINGS FOR SETTLEMENT OF PRIVATE LAND CLAIMS.**—The proceeding in the district court of the United States in a California land case, on an appeal from the board of land commissioners, is an original suit, and the whole case is open.⁹⁸

Final decrees in private land claims arising by virtue of a right or title derived from the Spanish or Mexican government, whether made by the commissioners or by the district court, are conclusive between the United States and the claimants unless an appeal is taken. But such an appeal does not open the decree of confirmation for revision, because that decree is the foundation of the survey.⁹⁹

2. **APPEALS FROM NEVADA.**—An appeal from an order denying a motion for a new trial does not, under the legislation of Nevada, carry the original judgment and the whole cause before the appellate court, so that the decision upon the appeal operates as a judgment reversing or affirming the judgment below.¹

3. **APPEALS IN ADMIRALTY.**—An appeal in admiralty vacates the decree of the inferior tribunal, and an entirely new trial, with different testimony and pleadings if necessary, will be held in the appellate court, and a new decree will be made and enforced by it.²

4. **APPEALS TO SUPREME COURT OF PHILIPPINE ISLANDS.**—Although on appeal to the supreme court of the Philippine Islands a trial *de novo* is had in that court even in a criminal case, and it has power to re-examine the law and facts,

92. **Vacation of judgment.**—Kansas, etc., *R. Co. v. Twombly*, 100 U. S. 78, 81, 25 L. Ed. 550.

The administratrix of A recovered judgment for damages by reason of his death, caused by the negligence of B, who thereupon sued out of this court a writ of error. During its pendency, the statute authorizing such a suit was repealed. Held, that the judgment was not vacated by the writ, and that it must be affirmed, no error appearing in the proceedings below. Kansas, etc., *R. Co. v. Twombly*, 100 U. S. 78, 81, 25 L. Ed. 550.

93. **Bill to impeach judgments at law.**—Knox County *v. Harshman*, 132 U. S. 14, 17, 33 L. Ed. 249.

94. **Appeals in eminent domain proceedings.**—Baltimore, etc., *R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469, 472. See the title EMINENT DOMAIN.

95. **Availability as estoppel pending appeal.**—Illinois Cent. R. Co. *v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

96. **Pennsylvania practice.**—Bryar *v.*

Campbell, 177 U. S. 649, 654, 44 L. Ed. 926.

97. **Another suit pending.**—Bevar *v. Campbell*, 177 U. S. 649, 44 L. Ed. 926, citing *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983.

98. **Proceedings for settlement of private land claims.**—Grisar *v. McDowell*, 6 Wall 363, 364, 18 L. Ed. 863, citing *United States v. Ritchie*, 17 How. 525, 533, 15 L. Ed. 236.

99. *Higuera v. United States*, 5 Wall. 827, 18 L. Ed. 469.

1. **Appeals from Nevada.**—Sparrow *v. Strong*, 4 Wall. 584, 18 L. Ed. 410.

2. **Appeals in admiralty.**—The *Lucille*, 19 Wall. 73, 22 L. Ed. 64; *Yeaton v. United States*, 5 Cranch 280, 3 L. Ed. 1041; *Pemberton v. Deane*, 3 Hall. 53, 87, 1 L. Ed. 507; *Jennings v. Carson*, 4 Cranch 2, 2 L. Ed. 531; *The Schooner Betsy*, 4 Cranch 443, 2 L. Ed. 673; *The Venus*, 1 Wheat. 113, 4 L. Ed. 49. See the title ADMIRALTY, vol. 1, p. 182.

it does so on the record and does not retry in the fullest sense.³

E. Effect on Liens.—The lien of the decree appealed from is not affected by the appeal, in advance of the hearing of the case on its merits.⁴

F. Effect on Subject Matter or Property in Litigation—1. **IN GENERAL.**—To guard against misconstruction in respect to the powers of a court having jurisdiction over the subject matter, and where a decree has been rendered affecting the property in litigation and an appeal is taken to this court, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, it is agreed that full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss.⁵

In an equity case the res in litigation may be sold by order of the circuit court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court.⁶

Where the subject matter of litigation is funds in the possession of a receiver, the court below may, notwithstanding the supersedeas, give him the requisite orders for their preservation; but it cannot place them beyond the control of a decree that may be made here. Should that court, by mistake or otherwise, proceed to carry its decree into effect, its action may be restrained by the appropriate writ from this court.⁷

Where a railroad is in litigation, there can be no well-founded objection to the running of the road, and the reasonable application and expenditure of its revenues for that purpose. Beyond this, any appropriation of the revenues is not warranted. They should be reserved for such disposition as may be directed by the final decree in the cause.⁸

2. **APPEALS IN ADMIRALTY.**—Where an appeal is taken from the decree of the district court in a proceeding in rem to the circuit court, the property or proceeds thereof follows the cause into the circuit court, where it remains until the litigation is ended, as it does not follow the cause into the supreme court.⁹

Therefore, admiralty bonds and stipulations taken in the district court, inasmuch as they constitute the fund out of which compensation is to be decreed to the libelants, follow the appeal into the circuit court.¹⁰

3. **Appeals to supreme court of Philippine Islands.**—*Serra v. Mortiga*, 204 U. S. 470, 51 L. Ed. 571, citing *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114.

4. **Effect of appeal on liens.**—*The Belgenland*, 108 U. S. 157, 27 L. Ed. 685.

5. **Effect on subject matter or property in litigation in general.**—*Bronson v. La-Crosse, etc., R. Co.*, 1 Wall. 405, 410, 17 L. Ed. 616.

6. **Sale of res in litigation pending appeal.**—*Spring v. South Carolina Ins. Co.*, 6 Wheat. 519, 5 L. Ed. 320.

7. **Funds in custody of receiver.**—*Godard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237.

8. **Operation of railroad pending appeal.**—*Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 410, 17 L. Ed. 616.

9. **Appeals in admiralty.**—*The Collector*, 6 Wheat. 194, 5 L. Ed. 239; *Montgomery v. Anderson*, 21 How. 386, 388, 16 L. Ed. 160; *The Lottawanna*, 20 Wall. 201, 225, 22 L. Ed. 259; *The William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583, citing *Jennings v. Carson*, 4 Cranch 2, 28, 2 L. Ed. 531. See the title **ADMIRALTY**, vol. 1, p. 182.

10. *The Wanata*, 95 U. S. 600, 618, 24 L. Ed. 461.

Where the claimant appeals from the decree of the district court, the bond and other stipulations follow the cause into the circuit court; and, upon the affirmation of the decree the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below, they being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty. *The Wanata*, 95 U. S. 600, 616, 24 L. Ed. 461.

"The rule is universal that an appeal from the district court to the circuit court carries up the whole fund, which in this case consisted only of the stipulation for value and the appeal bond, as the record does not show that any stipulation for costs was given in the district court. Where the appeal is from the circuit court to this court, the fund remains in the custody of the circuit court; but the mandate of the supreme court is sent down, and there operates upon the fund sent up from the district court, just the same as if the execution had been issued there without any appeal to this court." *The Lady Pike*, 96 U. S. 461, 465, 24 L. Ed. 672.

G. Patent Cases.¹¹—When a case is sent to this court under the discretion conferred upon the court below by the seventeenth section of the act of July 4, 1836 (Patent Law), 5 Stat. at Large 124, the whole case comes up, and not a few points only.¹²

H. Power to Issue Writs.—A case being properly in this court by appeal, the court has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual. Accordingly, it will issue the writ of superseadeas if such writ be necessary for that purpose; the circumstances otherwise making it proper. It will issue this writ rather than attain the same end by issuing a mandamus to the court below, in a case where the issuing of a mandamus would control judicial action in a matter apparently one of discretion, as ex. gr. the approval or rejection of a bond offered for the court's approval.¹³ But this court has no jurisdiction to issue a writ of prohibition until an appeal is taken.¹⁴

XIII. Appearance.

A. Necessity for Entering Appearance—1. OF APPELLANT.—Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him.¹⁵

And cross appeals must be prosecuted like other appeals.¹⁶

In Criminal Cases.—Under Rule 16 of this court, where the counsel for plaintiff in error files no brief and makes no argument, in a civil case, the writ of error is dismissed, or the record opened and an affirmance ordered without examination. And in criminal cases of small importance it is probable that the same disposition would be made. But in cases involving the life of the plaintiff in error, this court feels it its duty to carefully examine the record, with all

11. See the title PATENTS.

12. *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505.

Where a case is sent to this court under the discretion conferred upon the court below by the 17th section of the act of July 4th, 1836, 5 Stat. at Large, 124, granting a writ of error from decisions in actions on patents, as in ordinary cases, and adding the privilege of it in all other cases in which the court shall deem it reasonable to allow the same, it was held that the whole case comes up, and not a few points on them. The court said that the word "reasonable" applied to the cases rather than to any discrimination between the different points in the cases, and that the act intended, if the court allowed the writ as reasonable at all, it must be for the whole case, or, in other words, must bring up the whole case for consideration. *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505.

13. **Power to issue writs of superseadeas.**—Ex parte Milwaukee, etc., R. Co., 5 Wall. 188, 18 L. Ed. 676.

14. **Power to issue writ of prohibition.**—Ex parte Warmouth, 17 Wall. 64, 67, 21 L. Ed. 543.

"The writ of inhibition is a proper and necessary writ, not because it suspends the effect of the decree, for that is already done by the appeal; but because it enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt. The appeal has not this effect, because it is the act of the party, and not of the superior court." *Penhallow v. Doane*, 3 Dall. 53, 87, 1 L. Ed. 507.

15. **Necessity for entering appearance of appellant.**—*The S. S. Osborne*, 105 U. S. 447, 451, 26 L. Ed. 1065.

Accordingly where the transcript was filed and the appeal docketed here on the 19th of September, 1879, but the appellant neither enters his appearance in this court, nor does anything to make himself an actor in reference to his own appeal, until March 23d, 1882, the day before the cause was called for hearing, this court will decline to consider his appeal. *The S. S. Osborne*, 105 U. S. 447, 451, 26 L. Ed. 1065, citing *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354.

16. **Cross appeals.**—*Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688; *The S. S. Osborne*, 105 U. S. 447, 26 L. Ed. 1065; *The Tornado*, 109 U. S. 110, 27 L. Ed. 374.

the assignments of error in order to see that no injustice has been done the accused.¹⁷

2. OF APPELLEE.—Under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. "For if he is entitled to his appeal, and has prosecuted it to this court according to law, the refusal or omission of the appellee to appear will not delay the trial, and a judgment against him will be as conclusive as if an appearance for him had been entered on the docket, and the case argued by his counsel."¹⁸

B. Time for Entering Appearance.—The Rule of Court.—Where an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that at which the case is docketed, it shall be dismissed at the costs of the plaintiff.¹⁹ But this rule applies only to regular terms and does not include an adjourned term.²⁰

By Rule 9, the appearance of counsel for the party docketing the case must be entered upon the filing of the transcript. If the plaintiff in error is a member of this bar, and notified the clerk in transmitting the transcript that the case was one of his own, his appearance is properly entered when the record was filed.²¹

The Statutory Rule.—Although the citation was returnable with the writ on the first day of the term, the defendants have thirty days by the statute to appear.²²

C. Authority to Enter Appearance—1. IN GENERAL.—An appeal will not be dismissed because the appearance of counsel for the appellant, which was entered at the time the case was docketed, was unauthorized by such attorney, and made without his knowledge. The appellant should not lose his right to a review of the case by this court through a mistake which not only appears to have been purely accidental, but one which could not possibly have prejudiced the appellee. Even after the case is finally decided the court will not permit an attorney who has appeared at the trial to withdraw his name, and thus to embarrass and impede the administration of justice. While it does not follow that the attorney or solicitor in the court below is presumed to continue as such, after the docketing of the case in this court, the fact that such counsel had charge of the case in the circuit court might have induced the counsel, who entered his appearance in this court, to believe that it was authorized by him.²³

2. OF ATTORNEY GENERAL.—The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the attorney general of the United States. This practice has never been objected to. The practice would

17. *Davis v. United States*, 165 U. S. 373, 41 L. Ed. 750.

18. *Of appellee.*—*United States v. Yates*, 6 How. 606, 12 L. Ed. 575, 576.

19. *Time for entering appearance.*—Rule 54, 8 How. IV; *The Tornado*, 109 U. S. 110, 27 L. Ed. 874.

20. The fifty-fourth rule of this court, requiring an appearance to be entered on or before the second day of the term next succeeding that at which the case is docketed, does not include an adjourned term; but applies only to regular terms. *Larman v. Tisdale*, 11 How. 586, 13 L. Ed. 823.

Although there was no appearance for the plaintiff in error, but appearance of counsel for the defendant in error, a motion to dismiss a writ of error under Rule

54 will nevertheless be denied. Mr. Chief Justice Taney said: "The object of the rule was to embrace a class of cases where there was no appearance, not to lay the foundation for a motion, but for the action of the court. When the case is reached in the regular call of the docket, the counsel of defendant in error may avail himself of the 19th rule if there be no appearance then entered for the plaintiff in error." *Larman v. Tisdale*, 142 U. S. appx., 705, 35 L. Ed. 1174.

21. *Green v. Elbert*, 137 U. S. 615, 622, 34 L. Ed. 792.

22. *Waters v. Barrill*, 131 U. S., appx., lxxxiv, 18 L. Ed. 878.

23. *Authority to enter appearance in general.*—*Davis v. Wakelee*, 156 U. S. 380, 684, 39 L. Ed. 578.

not be conclusive against the attorney general if he should at the first term withdraw his appearance, or move to strike it off. But if he lets it pass for one term, it is conclusive upon him, as to an appearance.²⁴

3. OF PARTNERS.—After the dissolution of a partnership, one partner has no implied authority to cause the appearance of another partner to be entered in a suit brought against the firm.²⁵

4. PROOF OF AUTHORITY.—When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority.²⁶

D. Effect of Failure to Appear—1. FAILURE OF PLAINTIFF IN ERROR.—Where there is no appearance for the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record, and pray for an affirmance.²⁷ A motion to dismiss is the proper remedy where no person appears to prosecute the appeal for the appellant.²⁸

May Render Judgment on the Merits.—In the supreme court of the United States, if one party does not appear to argue a cause, the other has a right to proceed and ask for judgment on the record, and the court will hear him and give it.²⁹

We recognize no pro forma attorneys of record.—Counsel who enter their appearance under the requirements of Rule 9 must understand that the court will hold them responsible for all that such an entry implies until they relieve themselves from the obligation they assume, by substitution or otherwise.³⁰ A cross appeal will be dismissed where the appellant neither enters his appearance in this court, nor does anything to make himself an actor in reference to his own appeal, until the day before the cause is called for hearing.³¹

No notice of the intention of the appellees to enforce Rule 16 is necessary.³²

24. **Of attorney general.**—Farrar v. United States, 3 Pet. 459, 7 L. Ed. 741.

25. **Of partners.**—Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271.

26. **Proof of authority.**—Hill v. Mendenhall, 21 Wall. 453, 454, 22 L. Ed. 616.

27. **Failure of plaintiff in error.**—Rule 16, 21 How. xi; James v. McCormack, 105 U. S. 265, 26 L. Ed. 1044; Montalet v. Murray, 3 Cranch 249, 2 L. Ed. 429; Fitton v. Taylor, 140 U. S. 680, 35 L. Ed. 601; Miller v. Edgerton, 140 U. S. 690, 35 L. Ed. 763; Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002; Baird v. Baldwin, 127 U. S. 779, 32 L. Ed. 332.

By several rules of this court when one party, after an entry of an appeal or writ of error, does not pursue it, the other side is entitled either to have the case dismissed, or to ask an affirmance of the judgment below. Rules 19, 30, 43; 1 How. pref.

On the motion of the attorney general, of counsel for the defendant in error in this cause, the plaintiff in error having been three times solemnly called by the marshal to come into court and prosecute this writ of error and failing to do so, it is thereupon now here considered, ordered and adjudged by this court, that this writ of error to the circuit court of the United States for the district of Missouri be, and the same is, hereby dismissed.

Walsh v. United States, 1 How. 28, 11 L. Ed. 34.

Where it appeared that when the appellant was called, the case had been nearly three years on the docket of this court, and that the appellant had no brief on file, and was not present, either in person or by counsel, under these circumstances the appellees were entitled, under Rule 16, to a dismissal. James v. McCormack, 105 U. S. 265, 26 L. Ed. 1044.

28. Hook v. Linton, 10 Pet. 107, 9 L. Ed. 363.

29. Siglar v. Haywood, 8 Wheat. 675, 677, 5 L. Ed. 713.

Thus it often happens in the supreme court of the United States, on an appeal, that the court, when one side does not appear, proceed to hear the other, and render judgment on the merits. United States v. Palmer, 3 Wheat. 610, 626, 4 L. Ed. 471. And by the 30th rule of that court, either party can claim a hearing and decision on the merits. 1 How. 30, pref.

30. Alvord v. United States, 99 U. S. 593, 25 L. Ed. 399, citing Hurley v. Jones, 97 U. S. 318, 24 L. Ed. 1008.

31. The S. Osborne, 105 U. S. 447, 451, 26 L. Ed. 1065, citing Grigsby v. Purcell, 99 U. S. 505, 25 L. Ed. 354; The Tornado, 109 U. S. 110, 27 L. Ed. 874.

32. James v. McCormack, 105 U. S. 265, 26 L. Ed. 1044.

Reinstatement.—A case which has been dismissed on a former day of the term for want of an appearance of the plaintiffs in error, will be reinstated on motion.³³ But where the appellant has not excused himself for his default, a motion to reinstate will be denied, because this court has announced its intention to enforce rigidly the salutary rule, and not to set aside defaults growing out of the neglect of counsel or parties except for very good cause.³⁴

2. **FAILURE OF DEFENDANT IN ERROR.**—Where the defendant in error fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.³⁵

3. **FAILURE OF BOTH PARTIES.**—When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed, at the costs of the plaintiff.³⁶

E. Effect of Appearance as Waiver.³⁷—The true line of distinction running through cases is between facts which are jurisdictional and those which are not. The issuance of the writ and filing it with the court below within the time prescribed by law are jurisdictional, and cannot be waived, as also, an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal. They are the only means known to the law for bringing up for review cases at law; but any mere irregularity in getting up the record may be waived.³⁸ The appearance of counsel does not preclude a motion to dismiss for the want of jurisdiction, or any other sufficient ground, except the want of a citation.³⁹ Although an irregularity in the citation may be cured by an appearance in court, yet a defect in the writ of error (such as not naming a return day for the writ), or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal, are fatal errors, and the case must be dismissed for want of jurisdiction.⁴⁰

Altering General to Special Appearance.—It is too late after the lapse of a term to alter a general to a special appearance, so as to affect the rights of parties; and no such alteration or any withdrawal of appearance can be allowed in any case, without proper notice, and leave of the court first obtained.⁴¹

F. Withdrawal and Striking Out of Appearance.—**In General.**—The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in a court exercising original jurisdiction do not apply in an appellate court.⁴² Hence, it is usual in this court to grant leave to

33. *Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741.

34. *Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008; *James v. McCormack*, 105 U. S. 265, 26 L. Ed. 1044; *Alvord v. United States*, 99 U. S. 593, 25 L. Ed. 399.

When a cause, reached in its regular order upon the docket, has, under Rule 16, been dismissed by reason of the appellant's nonappearance, for which no just cause existed, it will not, over the objection of the appellee, be reinstated. *Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008.

Where an appeal is dismissed under Rule 16, a motion to reinstate will be denied unless the appellant has excused himself for his default, the court declaring in *Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008, their intention to enforce rigidly the salutary rule and not to set aside defaults growing out of the neglect of counsel or parties, except for very good cause. *James v. McCormack*, 105 U. S. 265, 26 L. Ed. 1044.

35. **Failure of defendant in error.**—Rule 17, 21 How. xi.

36. **Failure of both parties.**—Rule 18, 21 How. xi.

If the counsel on neither side appear when the cause is called, the writ of error will be dismissed. *Radford v. Craig*, 5 Cranch 289, 3 L. Ed. 104.

37. These questions will be treated in connection with the particular sections dealing with the general subject. See ante, "Transfer of Cause," IX.

38. **Effect of appearance as waiver.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *McDonough v. Millaudon*, 3 How. 693, 11 L. Ed. 787.

39. *United States v. Yates*, 6 How. 606, 12 L. Ed. 575.

40. *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

41. *United States v. Armejo*, 131 U. S., appx., lxxxii, 18 L. Ed. 247.

42. **Withdrawal and striking out of appearance.**—*United States v. Yates*, 6 How. 606, 12 L. Ed. 575.

withdraw an appearance whenever asked, saving, however, all the rights of the adverse party.⁴³

Notice and Leave of Court.—But withdrawal of appearance cannot be allowed in any case, without proper notice and leave of the court first obtained.⁴⁴ Therefore, where the defendant is duly served with process, and an appearance is entered in its behalf by a qualified attorney, a subsequent withdrawal of his appearance by the attorney, without leave of the court, leaves the record in a condition in which a judgment by default for want of appearance can be validly entered.⁴⁵

Effect of Withdrawal of Appearance.—Upon the affidavits filed, the court will permit the attorney who has appeared for the appellees to withdraw his appearance. But the leave will not authorize a motion to dismiss for want of a citation, not for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he cannot afterwards withdraw it.⁴⁶ Where the plaintiff in error has withdrawn his appearance, and no one has taken his place when the cause is reached on the call of the docket, this court will affirm the judgment without opening the record.⁴⁷

XIV. Dismissal and Reinstatement.

A. Dismissal—1. **GROUND FOR DISMISSAL**—a. *No Actual Controversy Existing*—(1) *In General*.—It has been the universal practice of this court to dismiss the case whenever it becomes apparent that there is no real dispute remaining between the plaintiff and the defendant, or that the case has been settled or otherwise disposed of by agreement of the parties, and there is no actual con-

43. *McGuire v. Massachusetts*, 3 Wall. 382, 387, 18 L. Ed. 164.

Withdrawal without prejudice.—The leave to withdraw the appearance of the defendant's attorneys was given upon the condition that it should be "without prejudice to the plaintiff." This meant that the position of the plaintiff was not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood. A general appearance waives all question of the service of process. It is equivalent to a personal service. The question of jurisdiction only is saved. *United States v. Yates*, 6 How. 606, 12 L. Ed. 575. If there was error in the commencement of this action by reason of a defective notice or otherwise, it was cured by the appearance. This advantage, among others, was not to be impaired by the withdrawal of the appearance. A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding in rem. This result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. *Creighton v. Kerr*, 20 Wall. 8, 12, 22 L. Ed. 309.

But in a late case the court said: "It has been held that the appearance of a defendant, once regularly entered, cannot be withdrawn without leave of the court. *United States v. Curry*, 6 How. 106, 111, 12 L. Ed. 363; *Dana v. Adams*, 13 Illinois

691. But an examination of those cases discloses that this is a rule designed for the benefit and protection of the plaintiff. Usually the question has arisen where there had been no service of process on the defendant, and where, therefore, a withdrawal of appearance by the attorney would leave the plaintiff without ability to proceed by defaulting the defendant for want of an appearance. It was said by this court in *Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309. 'The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other parties.'" *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603, 606, 43 L. Ed. 1103.

44. **Necessity for notice and leave of court.**—*United States v. Armejo*, 131 U. S., appx., lxxxii, 18 L. Ed. 247.

45. *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603, 43 L. Ed. 1103.

46. *United States v. Yates*, 6 How. 606, 608, 12 L. Ed. 575, 576.

47. *Boston Min. Co. v. Eagle Min. Co.*, 115 U. S. 221, 29 L. Ed. 392.

Where the counsel of a plaintiff in error withdraw their appearance, the defendant in error, under the 16th rule, has the right either to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmance. *McGuire v. Massachusetts*, 3 Wall. 382, 18 L. Ed. 164.

troversy pending.⁴⁸ In other words, whenever it appears, or is made to appear, that there is no actual controversy between the litigants, or that, if it once existed,

48. No actual controversy existing in general.—Lord *v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Gaines v. Hennen*, 24 How. 553, 628, 16 L. Ed. 770; *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 557, 33 L. Ed. 1016; *California v. San Pablo, etc.*, R. Co., 149 U. S. 308, 37 L. Ed. 747; *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. Ed. 949; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293; *American Wood Paper Co. v. Heft*, 131 U. S., appx. xcii, 19 L. Ed. 378; *Meyer v. Pritchard*, 131 U. S., appx. ccix, 23 L. Ed. 961; *South Spring, etc., Min. Co. v. Amador, etc.*, Min. Co., 145 U. S. 300, 301, 36 L. Ed. 712; *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 84, 27 L. Ed. 47; *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 29 L. Ed. 589; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572; *Kimball v. Kimball*, 174 U. S. 158, 163, 43 L. Ed. 932; *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327; *Hooker v. Burr*, 194 U. S. 415, 48 L. Ed. 1046; *American Book Co. v. Kansas*, 193 U. S. 49, 48 L. Ed. 613; *Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913; *In re Lewis*, 202 U. S. 614, 50 L. Ed. 1172; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382; *Codlin v. Kohlhausen*, 181 U. S. 151, 45 L. Ed. 793; *Singer Mfg. Co. v. Wright*, 141 U. S. 696, 35 L. Ed. 906; *Elgin v. Marshall*, 106 U. S. 578, 27 L. Ed. 249.

It is well settled, that when there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed. *Little v. Bowers*, 134 U. S. 547, 557, 33 L. Ed. 1016.

"Federal tribunals are not moot courts, and that parties having substantial rights must when brought before those tribunals present those rights or may lose them." *Riverdale Cotton Mills v. Alabama, etc. Mfg. Co.*, 198 U. S. 188, 202, 49 L. Ed. 1008.

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Cherokee Nation v. Georgia*, 5 Pet. 1, 75, 8 L. Ed. 25.

"Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possibly occur at

some period in the future. And this obvious dictate of ordinary prudence is rigidly obeyed by courts of equity, when acting on subjects like that now before the court." *Florida v. Georgia*, 17 How. 478, 497, 15 L. Ed. 181, 203.

In *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, it was only held that where, after appeal taken, an event occurs which would render it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal—in other words, that the court will not decide moot cases. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 32, 45 L. Ed. 410.

Where, pending an appeal from a decree dismissing a bill to restrain a sale of property of the plaintiff under assessments for street improvements, and to cancel tax lien certificates, the assessments and certificates were quashed and annulled by a judgment in another suit, the appeal was dismissed, without costs to either party. *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572.

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in other case, can enlarge the power or affect the duty of the court in this regard." *California v. San Pablo, etc.*, R. Co., 149 U. S. 308, 314, 37 L. Ed. 747; *Kimball v. Kimball*, 174 U. S. 158, 161, 43 L. Ed. 932.

An appeal upon a bill for the infringement of a patent was dismissed, where it appeared that after the appeal the appellants had purchased a certain patent from the defendants, under which the defendants sought to protect themselves; and that the defendants as compensation had taken stock in the company which had unsuccessfully sought to enjoin them, and was now appellant in the case. The fact that damages for the infringement alleged in the bill had not been compromised, will not affect the propriety of the dismissal. *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379, cited in *Little v. Bowers*, 134 U. S. 547, 557, 33 L. Ed. 1016.

Bail pending appeal.—This court will

it has ceased, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the

not express an opinion as to the right of appellants to give bail pending an appeal, where that is a moot point. *Ah How v. United States*, 193 U. S. 65, 48 L. Ed. 619, reaffirmed in *United States v. Meng*, 196 U. S. 635, 636, 49 L. Ed. 629.

Letters of administration.—In *Kimball v. Kimball*, 174 U. S. 158, 43 L. Ed. 932, the action was begun by a petition of one claiming to be the widow of a deceased, to the surrogate's court of the county of Kings in the state of New York, praying that the letters of administration granted by that court to his next of kin upon a petition representing that he died intestate and unmarried, be revoked, and that the petitioner be appointed administratrix. At the hearing in the surrogate's court, the petition is dismissed on the ground that she was not the widow of the deceased because the marriage to him was void for the reason that the divorce she had obtained from her former husband was void at the time of his death, and was not rendered valid by a subsequent amendment of the decree of divorce. The petitioner appealed from the decree to the appellate division of the supreme court of the state of New York, which affirmed the decree, and this decree of affirmance was likewise affirmed by the court of appeals of the state of New York. It was by this court that a motion to dismiss the writ of error would be granted where it appears that the will of the deceased was proved in the surrogate's court after its judgment dismissing the petition and before an appeal from that judgment pending a writ of error from this court. "The question whether the petitioner was or was not the widow of the deceased, whatever importance it may have in the determination of other controversies in which she may be interested, is a moot question in this case in the present condition of things; for, however that question should be decided, the petitioner cannot obtain letters of administration, and the letters of administration granted to other persons have been revoked." Reaffirmed in *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327.

Injunction against collection of taxes.—An appeal to the supreme court of the United States from a decree of a circuit court denying an injunction against the collection of taxes under a state law will not be dismissed upon the grounds, that after an injunction was refused by the circuit court, the defendant brought suit in the state court and obtained a judgment for the taxes in question from which an appeal is pending and undetermined in the supreme court of the state, and that therefore the appeal from the decree of the circuit court is abortive and improper,

the very things the bill was filed to prevent being accomplished facts, and that the plaintiffs in error cannot be injured inasmuch as they have a complete remedy by writ of error to the supreme court of the state from the supreme court of the United States, if any federal question be involved and decided against them by that court. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410, distinguishing *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

Virginia coupon cases.—It was held in *Marye v. Parsons*, 114 U. S. 325, 29 L. Ed. 205, that the contract right of a coupon holder under the Virginia act of March 30, 1871, whereby his coupons are receivable in payment of taxes, can be exercised only by a taxpayer; and a bill in equity, for an injunction to restrain tax collectors from refusing to receive them, when tendered in payment of taxes, will not lie in behalf of a coupon holder who does not allege himself to be also a taxpayer. Such a bill calls for a decree declaring merely an abstract right, and does not show any breach of the contract, or other ground of relief. The ground of the decision was that no court sits to determine questions of law in these. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description.

Cancellation of permit to foreign corporation.—Where it is made known to this court in an action to cancel the revocation of an annual permit to do business as an insurance company in a state, that such permit has ceased to be of any effect since the filing of the writ of error, and in order for plaintiff to continue business it would be necessary to obtain a new permit, an event has occurred which renders it impossible for this court to grant any effectual relief in favor of plaintiff in error and consequently the writ of error will be dismissed. *Security Mut. Life Ins. Co. v. Prewitt*, 200 U. S. 446, 50 L. Ed. 545; *Travelers' Ins. Co. v. Prewitt*, 200 U. S. 450, 50 L. Ed. 549, reaffirmed in *In re Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

Where the case is one of prohibition, and it appears by conclusive evidence aliunde that since judgment of dismissal in the lower court the thing sought to be prohibited has been done and cannot be undone by any order of court, there is nothing remaining but a moot case and the writ of error will be dismissed. *Jones v. Montague*, 194 U. S. 117, 48 L. Ed. 913, reaffirmed in *Selden v. Montague*, 194

office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and when no relief can be afforded. Only real controversies and existing rights are entitled to invoke the exercise of their powers.⁴⁹

As where an event has occurred which renders it impossible for this court to grant any effectual relief in favor of the plaintiff in error, the writ of error will be dismissed.⁵⁰ And this court will stay its hand, whether the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party.⁵¹

U. S. 153, 48 L. Ed. 915, following *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293; *In re Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

Elections.—*Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, was a suit in equity, alleging the calling of a convention to revise the constitution of South Carolina and seeking to enjoin an alleged illegal, partial and void registration by which the plaintiff, and others like him, would be deprived of the right to vote for delegates to the convention. An injunction was granted by the circuit court, but was dissolved by the circuit court of appeals and the suit dismissed. Thereupon the election was held, the convention met and entered upon the discharge of its duties. An appeal to this court from the order of dismissal made by the circuit court of appeals was dismissed on the ground that the object of the suit could no longer be attained.

A bill filed September, 1902, and alleging the plaintiff's desire to vote at an election coming off in November will not be dismissed on appeal, even though the actual time of the election has passed by, where the principal object of the bill is not to vote at the specific election but to obtain the permanent advantages of registration. *Giles v. Harris*, 189 U. S. 475, 484, 47 L. Ed. 909, distinguishing *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

Mandamus to board since dissolved.—Where a writ of mandamus, directing a board of county commissioners to sign and execute certain bonds, was awarded; the mandate of the writ obeyed, the bonds issued and sold, the proceeds applied to the intended use, and the defendants ceased to be members of the board; an appeal will be dismissed. *Codlin v. Kohlhansen*, 181 U. S. 151, 45 L. Ed. 793, citing and approving *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

Suit to restrain purchase of Panama canal.—Where a bill was filed to restrain the secretary of the treasury from paying out money in the purchase of property for the construction of the canal at Panama, it was held, if the bill was only to restrain the secretary of the treasury from paying the specific sums named therein, to wit, \$40,000,000, to the Panama Canal Company, and \$10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take

judicial notice, that those payments have been made and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question. *Wilson v. Shaw*, 204 U. S. 24, 30, 51 L. Ed. 351, citing *Cheong Ah Moy v. United States*, 113 U. S. 216, 28 L. Ed. 983; *Mills v. Green*, 150 U. S. 651, 40 L. Ed. 293; *American Book Co. v. Kansas*, 193 U. S. 49, 48 L. Ed. 613; *Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913.

Mr. Justice Gray's Statement of Rule.—In *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, Mr. Justice Gray says: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *California v. San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747." *Tyler v. Judges of Registration*, 179 U. S. 405, 408, 45 L. Ed. 252; *Tennessee v. Condon*, 189 U. S. 64, 71, 47 L. Ed. 709; *American Book Co. v. Kansas*, 193 U. S. 49, 51, 48 L. Ed. 613.

49. *Meyer v. Pritchard*, 131 U. S., appx., 209, 23 L. Ed. 961; *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293; *Codlin v. Kohlhansen*, 181 U. S. 151, 45 L. Ed. 793; *Tennessee v. Condon*, 189 U. S. 64, 47 L. Ed. 709; *Jones v. Montague*, 194 U. S. 147, 151, 48 L. Ed. 913; *American Book Co. v. Kansas*, 193 U. S. 49, 48 L. Ed. 613.

50. *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293; *Tennessee v. Condon*, 189 U. S. 64, 47 L. Ed. 709; *Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913; *Security Mut. Life Ins. Co. v. Prewitt*, 200 U. S. 446, 50 L. Ed. 545, reaffirmed in *Re Matter of Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

51. *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293.

Error to State Court.—This rule applies equally to a writ of error to a state court.⁵²

No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief.⁵³

(2) *Fictitious or Frivolous Issues.*—In case of a fictitious suit or feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, no writ of error will lie, and must therefore be dismissed.⁵⁴ Where it is apparent upon the inspection of the record that the appeal is frivolous and

52. Error to state court.—*Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016; *Kimball v. Kimball*, 174 U. S. 158, 43 L. Ed. 932.

Where a mortgagee or his assignee complain that the obligation of his contract has been impaired by subsequent legislation, and it is shown that notwithstanding the subsequent illegal legislation he has suffered no injury, because he had proceeded with the foreclosure of his mortgage and had been paid the full amount of his contract debt, interest and costs, the question becomes a moot one and will be dismissed. *Hooker v. Burr*, 194 U. S. 415, 48 L. Ed. 1046.

53. *Little v. Bowers*, 134 U. S. 547, 358, 33 L. Ed. 1016; *California v. San Pablo, etc.*, R. Co., 149 U. S. 308, 314, 37 L. Ed. 747; *Kimball v. Kimball*, 174 U. S. 158, 163, 43 L. Ed. 932, reaffirmed in *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327.

54. Fictitious or frivolous issues.—*Lord v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L. Ed. 162.

"I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculation of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court." *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L. Ed. 162.

"My objections to hearing this case are so strong, that I deem it proper to state them. This court stands exposed to impositions by fictitious cases more than other courts do, for several reasons. We have adopted it as a rule of practice, that third persons cannot be heard to prove before us that a case pending on our docket is feigned, and a decision sought at our hands intended alone to affect other men's rights, by combination of the parties of record. In the case of *Patterson v. Gaines*, the attempt was made, but refused, because the persons applying to dismiss the case, were no parties of record, and had no right to be heard. This of necessity throws us on the case itself, as here presented by the record, to ascer-

tain whether it is fictitious. It is a case made on a certificate of division; and as those divisions of opinion are usually granted of course, on facts agreed by the parties, and as they have been ordinarily granted without examination on part of the court, by way of concession, if requested by both sides (as is the case here), we are very liable to be imposed on; certainly more so than other judicial tribunals, where certified cases are not allowed; and as the consequences here involved are uncommonly great, it is proper to observe unusual care to guard against imposition." *Moore v. Brown*, 11 How. 414, 429, 13 L. Ed. 751, opinion of Mr. Justice Catron.

Amicable action defined.—"The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be." *Lord v. Veazie*, 8 How. 250, 255, 12 L. Ed. 1067, 1069.

utterly groundless, and was taken for the purposes of delay merely, it will be dismissed.⁵⁵

(3) *Specific Applications of General Rules*—aa. *Controversy between Parties on Same Side*.—Where it appears to this court, from whatever cause, that there is no real dispute between the plaintiff and defendant in the suit, but on the contrary that their interest is one and the same, it will be dismissed by the court even of its own motion.⁵⁶

Sale or Assignment between Parties.—Hence, where it is shown that there is no longer any real controversy between the parties to the suit, because one of the parties has sold out the interest which he had to the other party, who is prosecuting it now, and is dominus litis on both sides, the cause will be dismissed.⁵⁷ If it be made to appear, in the case of an appeal pending in this court, that the appellant has purchased and taken an assignment of all the appellee's interest in the decree appealed from, the appeal will be dismissed.⁵⁸

One party to a suit cannot pay the fees of counsel on both sides. both in the court below and on appeal, without being held to have such control

55. *Nash v. Harshman*, 149 U. S. 263, 37 L. Ed. 727.

56. **Controversy between parties on same side.**—Lord *v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; *American Wood Paper Co. v. Heft*, 8 Wall. 333, 336, 19 L. Ed. 379; *Dakota County v. Glidden*, 113 U. S. 222, 226, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 557, 33 L. Ed. 1016; *South Spring, etc., Min. Co. v. Amador, etc., Min. Co.*, 145 U. S. 300, 301, 36 L. Ed. 712; *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 29 L. Ed. 589; *Mills v. Green*, 159 U. S. 651, 653, 40 L. Ed. 293; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572; *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. Ed. 949; *California v. San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747; *Gaines v. Hennen*, 24 How. 553, 628, 16 L. Ed. 770; *Hatfield v. King*, 184 U. S. 162, 165, 46 L. Ed. 481.

Appeals have been dismissed by this court when the rights of both parties have come under the control of the same persons. Lord *v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 31 L. Ed. 853; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293; *South Spring, etc., Min. Co. v. Amador, etc., Min. Co.*, 145 U. S. 300, 36 L. Ed. 712.

We cannot consent to determine a controversy in which the plaintiff in error has become the dominus litis on both sides. *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; Lord *v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572; *South Spring, etc., Min. Co. v. Amador, etc., Min. Co.*, 145 U. S. 300, 301, 36 L. Ed. 712.

The rule laid down in Lord *v. Veazie*, 8 How. 250, 254, 12 L. Ed. 1067, 1070, where

both parties colluded to get up a case for the opinion of the court, is applicable to a case where the appellant becomes sole party in interest and dominus litis on both sides. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93.

Where it appears to this court, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the circuit court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed. Lord *v. Veazie*, 8 How. 250, 12 L. Ed. 1067.

Where an action is brought by one corporation against another, and when the case comes on for argument in this court, our attention is called to the fact that, since the decision in the circuit court "the control of both the corporations, parties to this suit, had come into the hands of the same persons, but that there was a minority of stockholders in the Amador Medean Gold Mining Company who retained the interest that they had, at the time the decision was rendered—that the two corporations were still in existence and organized—and that the present managers and owners of the properties were anxious that the question should be decided, in order that the minority of the stockholders might receive whatever, by the findings of the court, would be due to them," we will reverse the judgment and remand the case for further proceedings in conformity to law, without considering or passing upon the merits of the case in any respect. *South Spring, etc., Min. Co. v. Amador, etc., Min. Co.*, 145 U. S. 300, 36 L. Ed. 712.

57. *East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 31 L. Ed. 853.

58. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93.

over both the preparation and argument of the cause, as to make the suit merely collusive in both courts.⁵⁹

Evidence.—The third parties, whose rights and interests may be affected by the decision of the court in a dispute alleged to be merely colorable, will be heard on affidavits, or other proofs to show that it is not carried on in good faith between the parties who are nominally the appellant and appellee.⁶⁰

bb. Compromise or Settlement of Controversy—aaa. *Controversies between Private Individuals.*—Appeals have often been dismissed by this court when the matter had been compromised and settled between the parties,⁶¹ although the

59. *Gardner v. Goodyear Dental, etc., Co.*, 131 U. S., appx., ciii, 21 L. Ed. 141.

It cannot be admitted that one party to a suit can pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts. It can make no difference that the counsel fees were charged to the party apparently, though not really, liable to pay them, and payment from the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor. *Gardner v. Goodyear Dental, etc., Co.*, 131 U. S., appx., ciii, 21 L. Ed. 141.

An appellant who becomes the equitable owner of the whole opposing interest, who procures a discontinuance as to his codefendants, against whom no final decree is made, employs counsel on both sides, and makes up a record to suit himself in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy, is justly chargeable with conduct highly reprehensible and a punishable contempt of court. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93.

60. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93.

61. **Compromise of controversies between private individuals.**—*Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293; *American Wood Paper Co. v. Heft*, 131 U. S. appx., xcii, 19 L. Ed. 378; *Addington v. Burke*, 125 U. S. 693, 31 L. Ed. 853.

Where since the judgment was rendered, which plaintiff in error seeks to reverse, the matter in controversy has been the subject of compromise between the parties to the litigation, the writ of error will be dismissed. *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981.

Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. *United States v. Trans-Missouri*

Freight Ass'n, 166 U. S. 290, 309, 41 L. Ed. 1007.

Where it is stated by the counsel for the defendant in error, that the matters in controversy have been agreed and settled between the parties, to which counsel for the plaintiff in error assents, it will be ordered and adjudged by this court that the cause be dismissed with costs. *Cartwright v. Howe*, 1 How. 188, 11 L. Ed. 97; *Peck v. Young*, 1 How. 250, 11 L. Ed. 120.

In the case of the Board of Liquidation *v. Louisville, etc., R. Co.*, 109 U. S. 221, 223, 27 L. Ed. 916, a question arose on the presentation of an order made by the authorities of the city of New Orleans to dismiss a suit in this court in which that city was plaintiff in error. The order was based on a compromise between those authorities and the railroad company, which the board of liquidation intervening here alleged to be without authority and fraudulent. The court here did not disregard the compromise or the order of the city to dismiss the case, but, considering that the question of authority in the mayor and council of the city to make the compromise, and of the alleged fraud in making it, required the power of a court of original jurisdiction to investigate and decide thereon, continued the case in this court until that was done in the proper court. But when this was ascertained in favor of the action of the mayor and council, the suit was dismissed here on the basis of that compromise order.

Compromise or settlement pending appeal.—A suit was brought originally to recover 135 head of Colorado steers alleged to be worth \$6,000. At the time of the judgment only 79 head were in dispute. As to the rest, a settlement had been made during the pendency of the suit. The court has found as a fact that the 79 head were sold in open market the day after they were taken possession of under the writ in this case, and that the net proceeds of the sale only amounted to \$4,526.15. There is nothing to show that they were really any less valuable at the time of the sale than when they were taken. Upon the facts as found the recovery could not have exceeded five thousand dollars if there had been a judgment in favor of Cox, the plaintiff in error. Accordingly

evidence of this compromise is not found in the record of the case in the circuit court, nor in any proceedings in that court.⁶²

Suits Concerning Validity of Tax Assessments.—For example, appeals have been dismissed by this court when pending a suit concerning the validity of the assessment of a tax, the tax was paid,⁶³ or the amount of the tax has been tendered and deposited in a bank which by statute had the same effect as actual payment and receipt of the money,⁶⁴ though it would seem that an involuntary payment or payment under duress would not have this effect.⁶⁵ Appeals have been dismissed by this court when the plaintiff has executed a release of his right to appeal.⁶⁶

bbb. *Criminal Prosecutions.*—While private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action, the rule is different in the case of criminal prosecutions.⁶⁷

cc. *Criminal Prosecutions*—aaa. *In General.*—The rule that this court will dismiss where there is not at the time a bona fide controversy pending, applies in criminal cases.⁶⁸ And writs of error have been dismissed under this rule where the accused had escaped during the pendency of the writ of error here,⁶⁹ and where

the motion to dismiss was granted. *Cox v. Western Land, etc., Co.*, 123 U. S. 375, 31 L. Ed. 178.

62. *Thorp v. Bonfield*, 177 U. S. 15, 19, 44 L. Ed. 652; *Dakota County v. Glidden*, 113 U. S. 222, 223, 28 L. Ed. 981.

63. *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 29 L. Ed. 589; *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016; *Singer Mfg. Co. v. Wright*, 141 U. S. 696, 35 L. Ed. 906; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293.

In *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 29 L. Ed. 589, a writ of error was dismissed where it appeared that the taxes assessed against the company had been paid to the county after the suit had been commenced, the court resting its judgment upon the reason that there was no longer an existing cause of action in favor of the county against the railroad company. *Little v. Bowers*, 134 U. S. 547, 558, 33 L. Ed. 1016.

64. *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016; *California v. San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747; *Thorp v. Bonfield*, 177 U. S. 15, 19, 44 L. Ed. 652; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293.

65. *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016, distinguishing *Robertson v. Bradbury*, 132 U. S. 491, 33 L. Ed. 405.

The voluntary payment of a municipal tax while a suit is pending in this court between the party taxed and the officers of the corporation, to determine whether it was legally assessed, leaves no existing cause of action, and requires the dismissal of the writ of error. *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016, distinguishing *Robertson v. Bradbury*, 132 U. S. 491, 33 L. Ed. 405.

66. *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293.

67. *Criminal prosecutions.*—*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 309, 41 L. Ed. 1007.

Monopolies in restraint of trade.—“Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by the government. That question the government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided. We think, therefore, the first ground urged by defendants for the dismissal of the appeal is untenable.” *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 309, 41 L. Ed. 1007.

68. *Criminal prosecutions in general.*—*Allen v. Georgia*, 166 U. S. 138, 140, 41 L. Ed. 949.

The court said: “We know at present of no reason why the same course may not be taken in criminal cases if the laws of the state or the practice of its courts authorize it.” *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. Ed. 949.

69. *Escape of accused.*—Thus, where it appears that during the pendency of the

a nolle prosequi was entered in the court below, after the writ of error had been taken out to this court.⁷⁰

So also, a question as to bail will not be decided where the accused is no longer in the custody of the marshal or in prison.⁷¹

bbb. *Habeas Corpus Proceedings*.—And these general rules will be applied to the review of habeas corpus proceedings.⁷²

writ of error here, the plaintiff in error has escaped, and is not now within the control of the court below, either actually, by being in custody, or constructively, by being out on bail, the submission of the cause will be set aside, and unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term, the cause will be thereafter left off the docket until directions to the contrary. *Smith v. United States*, 94 U. S. 97, 24 L. Ed. 32; *Bohanan v. Nebraska*, 125 U. S. 692, 31 L. Ed. 854, followed in *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949.

"It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ of error, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case." *Smith v. United States*, 94 U. S. 97, 24 L. Ed. 32.

Writ of error to state court.—After a person had been convicted in a state court of murder, he sued out a writ of error from the supreme court of the state. On the day assigned for its hearing it appeared from affidavit that the accused had escaped from jail, and was at that time a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resented to death, whereupon he sued out this writ of error, assigning as error that the dismissal of his writ of error by the supreme court was a denial of due process of law. Held, that the dismissal of the writ of error by the supreme court of the state was justified by the abandonment of his case by the plaintiff in the writ. *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949.

"It appeared from the record that, after the writ of error had been finally dismissed on May 6, 1895, Allen was subsequently recaptured and, upon April 23,

1896, was resented to death by the court in which he had been convicted. While the precise question here involved has never before been presented to this court, we have repeatedly held that we would not hear and determine moot cases, or cases in which there was not at the time a bona fide controversy pending. In a similar case from the supreme court of Nebraska, *Bohanan v. Nebraska*, 125 U. S. 692, 31 L. Ed. 854, wherein it appeared that, pending the writ of error from this court, the plaintiff in error had escaped, and was no longer within the control of the court below, it was ordered that the submission of the cause be set aside, and unless the plaintiff were brought within the jurisdiction of the court below on or before the last day of the term, the cause should be thereafter left off the docket until directions to the contrary. A like order under similar circumstances was made in *Smith v. United States*, 94 U. S. 97, 24 L. Ed. 32." *Allen v. Georgia*, 166 U. S. 138, 139, 41 L. Ed. 949.

70. Entry of nolle prosequi.—Where, after a writ of error had been taken out to this court, in an indictment found and tried in the circuit court for the eastern district of Pennsylvania, a nolle prosequi was entered in that court, by order of the president of the United States, and a copy of the same having been filed in the office of the clerk of the supreme court, the court, on motion of the attorney general, dismissed the cause. *United States v. Phillips*, 6 Pet. 776, 8 L. Ed. 578.

71. "The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail, it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal or in prison. This court does not sit here to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce. The writ of error is dismissed." *Cheong Ah Moy v. United States*, 113 U. S. 216, 218, 28 L. Ed. 983.

72. Habeas corpus proceedings.—*Cheong Ah Moy v. United States*, 113 U. S. 216, 28 L. Ed. 983.

"It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate. And although (an application for a writ of habeas corpus) has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which

dd. *Surrender of Letters Patent*.—If there is a surrender of letters patent for an invention after an appeal to this court, there is no longer any real or substantial controversy between those who appear as parties to the suit upon the issues which have been joined, and for that reason the appeal will be dismissed.⁷³

ee. *Reversal of Decree Pending Appeal*.—Where appeals were taken from a decree of foreclosure and sale, and also from decrees made in execution of that decree, and the principal decree was reversed, it was held that the later appeals having been annulled by operation of law, their subject matter was withdrawn, and they must be dismissed for lack of anything on which they could operate.⁷⁴

ff. *Suit to Try Title to Office*.—Where a writ of error is brought to this court to review the judgment of a state court, in an action for usurpation of office, the writ will be dismissed where it shows that the terms of office of all the parties to the suit both relators and defendants, have expired, because there no longer exists any controversy between the parties.⁷⁵

gg. *Dissolution of Corporations*.—The appellate jurisdiction of this court is not ousted by a simple dissolution of the defendant in error, a corporation, by a vote of its members, effected subsequently to the entry of judgment in the suit in the court below. "Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties

petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition. * * * In arriving at this conclusion we are not to be understood as intimating in any degree an opinion on the question of jurisdiction or other questions pressed on our attention." *Ex parte Baez*, 177 U. S. 378, 390, 44 L. Ed. 813.

Where it appears from the application to this court for a writ of habeas corpus, that the sixty days named as the term of imprisonment had expired before the case was submitted, and indeed had almost expired before the application was made for the writ, and there is nothing to show whether the fine and costs have been collected upon execution, as the sentence authorizes, but if not so collected, and if they cannot be collected, then, though possibly still in jail, he can shortly be discharged by taking the poor debtor's oath, the case has become a moot one, and should not be considered in accordance with the well settled rule in that regard. *In re Lincoln*, 202 U. S. 178, 50 L. Ed. 984, citing *Ex parte Baez*, 177 U. S. 378, 44 L. Ed. 813, which was an application for a writ of habeas corpus, in which it appeared that before a return to the writ could be made, or other action taken, the restraint of which the petitioner complained would terminate, and it was held that the application for the writ should be denied. The court said: "Indeed, the case at bar in principle is not unlike *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293; *Board of Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382; *Kimball v. Kimball*, 174 U. S. 158, 43 L. Ed. 932; and *Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913, in each of which, intermediate the ruling below and the time for decision here, events had happened which prevented the granting of

the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time in deciding a moot case."

Error to supreme court of Philippine Islands.—Where an application for a writ of habeas corpus was made to the supreme court of the Philippine Islands seeking a discharge from an alleged illegal detention in one of the provinces of that island, but the application was denied on the ground that the writ of habeas corpus has been suspended and that the action of the Philippine authorities in that regard is not open to judicial review, a writ of error from this court to review that decision will be dismissed where it is shown that a subsequent proclamation has been made by the governor general of the Philippine Islands revoking an order suspending the writ, because: "This proclamation wiped out the basis of the decision sought to be reviewed on the day when the copy of the petition for writ of error was served on opposing counsel, and more than two months before the writ of error was issued. The question ruled by the court below and solely argued before us became in effect a moot question, not calling for determination here. *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293." *Fisher v. Baker*, 203 U. S. 174, 181, 51 L. Ed. 142.

73. Surrender of letters patent.—*Meyer v. Pritchard*, 131 U. S., appx. ccix, 23 L. Ed. 961, citing *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93; *Lord v. Veazie*, 8 How. 250, 12 L. Ed. 1067.

74. Reversal of decree pending appeal.—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 84, 27 L. Ed. 47; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293.

75. Suit to try title to office.—*Tennessee v. Condon*, 189 U. S. 64, 47 L. Ed. 709.

have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit."⁷⁶

hh. *Compliance with Judgment Pending Appeal.*—Where it appears that the judgment sought to be reviewed had been complied with pending the appeal, the writ of error will be dismissed. And it makes no difference that the defendant "felt coerced" into complying. The judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate.⁷⁷

ii. *Failure to Mature Cause or Perfect Appeal.*—Where it appears that the decree of the circuit court was entered against the appellants, without any hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance, failed to take the proper steps for the protection of their rights, a motion to dismiss on the ground that there was no real controversy between the parties, nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff, will be sustained.⁷⁸

jj. *Proceedings to Test Constitutionality of Statutes.*—This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.⁷⁹ Therefore, where a bill shows no equity in the complainant, and contains no averment that he has been injured by certain statutes of a state, this court will not pass upon an abstract question the object of which is plainly to obtain a decision touching their constitutionality, but will dismiss the bill without prejudice.⁸⁰

kk. *Repeal of Statute Pending Appeal.*—An appeal from a decree enjoining the enforcement of an act of the legislature, will be dismissed where the act is repealed pending the appeal.⁸¹

76. Dissolution of corporations.—United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 309, 41 L. Ed. 1007.

77. Compliance with judgment pending appeal.—American Book Co. *v.* Kansas, 193 U. S. 49, 52, 48 L. Ed. 613.

Although the judgment of the highest court of a state ousting a foreign corporation from doing business in such state until it complies with the requirements of the state laws as to such corporation, is pleaded in another similar suit, as decisive of its issues or some of its issues, the supreme court of the United States cannot on a writ of error to the state court review such judgment after compliance with it by such foreign corporation. American Book Co. *v.* Kansas, 193 U. S. 49, 48 L. Ed. 613.

78. Failure to mature cause or perfect appeal.—Hatfield *v.* King, 184 U. S. 162, 46 L. Ed. 481.

In *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387, the question was as to the validity of a judicial sale, and it appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvert-

ently and without authority, and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry, must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

"Before any proceedings could rightfully be taken against the defendants, it was essential that either they be brought into court by service of process or that a lawful appearance be made in their behalf." Hatfield *v.* King, 184 U. S. 162, 166, 46 L. Ed. 481.

79. Proceedings to test constitutionality of statutes.—White *v.* Dowley, 94 U. S. 527, 534, 24 L. Ed. 181.

80. Williams *v.* Hagood, 98 U. S. 72, 25 L. Ed. 51; Hagood *v.* Southern, 117 U. S. 52, 64, 29 L. Ed. 805.

81. Repeal of statute pending appeal.—Board of Flour Inspector *v.* Glover, 160 U. S. 170, 40 L. Ed. 382; New Orleans

(4) *Stipulations*.—The duty of this court, as of every tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard.⁸²

(5) *Contempt of Court*.—It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.⁸³

Flour Inspectors v. Glover, 161 U. S. 101, 40 L. Ed. 632, both following *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

Where a suit was brought against the Southern Express Company to prevent the enforcement of an order of the railroad commission based upon its construction of an act of congress called the war revenue act, requiring that adhesive stamps be placed on bills of lading, etc., but pending an appeal to this court an act is passed declaring what companies, corporations and persons shall attach the required stamp to bills of lading manifests and receipts for goods or property to be transported, and distinctly excluding express companies, as no actual controversy now remains or can arise between the parties, the cause will be dismissed. *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111, citing *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49; *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293; *Board of Flour Inspector v. Glover*, 160 U. S. 170, 40 L. Ed. 382.

82. Stipulations.—*Tyler v. Judges of Registration*, 179 U. S. 405, 409, 45 L. Ed. 252, citing *California v. San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747; *Kimball v. Kimball*, 174 U. S. 158, 161, 43 L. Ed. 932.

In a comparatively recent case, pending a writ of error to reverse a judgment for a railroad corporation in an action against it by a state to recover sums of money for taxes, it was shown that the defendant had made a tender of those sums to the state, and a deposit of them in a bank to its credit, which by statute had the same effect as actual payment and receipt of the money. Stipulations had been made in other similar cases that they should abide the judgment of this court in this case; and the attorney general of the

state contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the state. But this court dismissed the writ of error, saying: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard." *California v. San Pablo, etc., R. Co.*, 149 U. S. 308, 314, 37 L. Ed. 747; *Kimball v. Kimball*, 174 U. S. 158, 161, 43 L. Ed. 932, reaffirmed in *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327.

83. Contempt of court.—*Lord v. Veazie*, 8 How. 250, 255, 12 L. Ed. 1067, 1069, followed and approved in *Cleveland v. Chamberlain*, 1 Black 419, 426, 17 L. Ed. 93.

"In *Cleveland v. Chamberlain*, it was said, quoting from *Lord v. Veazie*: 'Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a pun-

(6) *Practice and Procedure*—aa. *Rule to Show Cause*.—The better practice in cases of this nature is to move in the first instance upon affidavits for a rule to show cause why the suit should not be dismissed.⁸⁴

bb. *Parties to Motion*.—A stranger may be allowed to intervene and move to dismiss on this ground.⁸⁵ The third parties, whose rights and interests may be affected by the decision of the court in a dispute alleged to be merely colorable, will be heard on affidavits or other proofs to show that it is not carried on in good faith between the parties who are nominally the appellant and appellee.⁸⁶

(7) *Hearing and Determination*—aa. *Evidence in Support of Motion*—aaa. *In General*.—No writ of error will lie to this court where it appears from the record that the suit in the court below was an amicable or fictitious suit. And a suit may be shown to be fictitious, either by an inspection of the record, or by evidence aliunde.⁸⁷

bbb. *Extrinsic Evidence*—aaaa. *In General*.—And the fact that no actual controversy exists, when not appearing on the record, may be proved by extrinsic evidence.⁸⁸ From the necessity of the case, this court is compelled, as all other

ishable contempt of court.” *Hatfield v. King*, 184 U. S. 162, 165, 46 L. Ed. 481.

“If it be true, as claimed by some of the moving parties, that this is a collusive suit, that there is no real controversy between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which, as stated, courts of justice have always reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand.” *Hatfield v. King*, 184 U. S. 162, 165, 46 L. Ed. 481.

In *Cleveland v. Chamberlain*, the court reviews *Lord v. Veazie* as follows: “There is no material difference between this case and that of *Lord v. Veazie*, 8 How. 250, 254, 12 L. Ed. 1067, when the whole proceeding was justly rebuked by the court as ‘in contempt of the court, and highly reprehensible.’ That case originated in a collusion between the parties. In this case the appellee, who was a judgment creditor of the La Crosse and Milwaukee railroad, filed his bill to set aside a fraudulent conveyance of the debtors’ property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respondent. The case was prosecuted with vigor by the complainant till a decree was obtained (on the 11th of February, 1859), setting aside the various assignments, and the case ‘committed to a master to ascertain and report the annual income of the several lots described in the bill,’ etc. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on the 12th of February, 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the de-

cree was entered, Chamberlain became the equitable owner of Cleveland’s judgment, and the ‘dominus litis’ on both sides. He then agreed to pay counsel who appeared for Cleveland, the appellee, but, for anything that appears, without the knowledge of the counsel, who, in July, 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.” *Cleveland v. Chamberlain*, 1 Black 419, 425, 17 L. Ed. 93.

“It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that there both parties colluded to get up an agreed case for the opinion of this court; here, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy.” *Cleveland v. Chamberlain*, 1 Black 419, 426, 17 L. Ed. 93.

84. *Rule to show cause*.—*American Wood Paper Co. v. Heft*, 131 U. S., appx. xcii, 19 L. Ed. 378.

85. *Parties to motion*.—*American Wood Paper Co. v. Heft*, 131 U. S., appx. xcii, 19 L. Ed. 378.

86. *Cleveland v. Chamberlain*, 1 Black 419, 17 L. Ed. 93.

87. *Evidence in support of motion in general*.—*Lord v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016.

When it appears either on the record, or by extrinsic evidence, that the judgment sought to be reviewed has, pending the appeal, and without fault of the defendant in error, been complied with, this court will not proceed to final judgment but will dismiss the appeal or writ of error. *American Book Co. v. Kansas*, 193 U. S. 49, 48 L. Ed. 613.

88. *Extrinsic evidence in general*.—*Lord v. Veazie*, 8 How. 250, 251, 12 L.

courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence.⁸⁹ Where the motion to dismiss is on the ground that the matter in controversy has been the subject of compromise between the parties to the litigation, the writ of error will be dismissed although the evidence of this compromise is not found in the record of the case in the circuit court, nor in any proceeding in that court.⁹⁰

bbbb. *Affidavits*.—It is well settled that questions of this kind may be examined, upon motion, supported by affidavits, and that it is the duty of a court to make such inquiry, in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties.⁹¹ An appeal will be dismissed upon motion where the court is satisfied, by the affidavits produced, that the suit is fictitious and collusive.⁹²

ccc. *Time of Introducing Evidence*.—The fact that there is no controversy between parties to the record ought, in the interest of a pure administration of justice, to be allowed to be shown at any time before the decision of the case. Any other rule would put it in the power of designing persons to bring up a feigned issue in order to obtain a decision of this court upon a question involving the rights of others who have had no opportunity to be heard. It may be shown after the argument on the merits.⁹³

ddd. *Weight and Sufficiency of Evidence*.—The circumstance that no appearance was entered in this court for the appellees is of weight in deciding upon this motion.⁹⁴ Where there is a motion for leave to intervene and to dismiss the appeal, on the ground that the suit of the appellant is merely fictitious, there having been a settlement of the matter in litigation between the parties, and upon the further ground that the suit is now prosecuted, not to determine any real controversy between the parties to the record, but to obtain a decree on which to found an application for an injunction against persons really interested adversely to the appellants, but not parties to the record and among them against the person in whose behalf the motion is made, if the affidavits in support of the motion do not show that there was no real controversy in the circuit court, but are introduced for the purpose of satisfying the court that since the decree in that court the matters there litigated had been settled in such manner that the appellees have no further interest in the cause, but an affidavit against the motion is filed by the appellant in which the affiant denies that the matters in litigation upon appeal have been settled, but avers on the contrary that the appeal is prosecuted in good faith and for the determination of the real controversy, it was held that as the affidavits leave it doubtful whether the suit was merely fictitious or not,

Ed. 1067; *California v. San Pablo, etc.*, R. Co., 149 U. S. 308, 37 L. Ed. 747; *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

89. *Dakota County v. Glidden*, 113 U. S. 222, 225, 28 L. Ed. 981; *Mills v. Green*, 159 U. S. 651, 653, 40 L. Ed. 293; *Kimball v. Kimball*, 174 U. S. 158, 162, 43 L. Ed. 932, reaffirmed in *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327.

90. *Thorp v. Bonfield*, 177 U. S. 15, 19, 44 L. Ed. 652; *Dakota County v. Glidden*, 113 U. S. 222, 223, 28 L. Ed. 981.

91. *Affidavits*.—*Shelton v. Tiffin*, 6 How. 163, 186, 12 L. Ed. 387; *Lord v. Veazie*, 8 How. 250, 251, 12 L. Ed. 1067; *Cleveland v. Chamberlain*, 1 Black 419, 426, 17 L. Ed. 93; *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 31 L. Ed. 853; *South Spring, etc., Min. Co. v. Amador*,

etc., Min. Co., 145 U. S. 300, 36 L. Ed. 712; *California v. San Pablo, etc.*, R. Co., 149 U. S. 308, 37 L. Ed. 747; *Hatfield v. King*, 184 U. S. 162, 164, 46 L. Ed. 481; *Board of Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382; *Codlin v. Kohlhansen*, 181 U. S. 151, 45 L. Ed. 793; *American Book Co. v. Kansas*, 193 U. S. 49, 52, 48 L. Ed. 613.

92. *Lord v. Veazie*, 8 How. 250, 254, 12 L. Ed. 1067; *Cleveland v. Chamberlain*, 1 Black 419, 425, 17 L. Ed. 93; *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L. Ed. 162; *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379.

93. *Time of introducing evidence*.—*Little v. Bowers*, 134 U. S. 547, 558, 33 L. Ed. 1016.

94. *Weight and sufficiency of evidence*.—*American Wood Paper Co. v. Heft*, 131 U. S., appx. xcii, 19 L. Ed. 378.

the court will issue a rule against the appellant to show cause why the appeal should not be dismissed.⁹⁵

bb. Evidence in Rebuttal.—After the appellant has filed affidavits in support of his motion to dismiss on the ground that there is no real controversy between the parties, counter affidavits may be filed by the appellant.⁹⁶ Where the imputation is made that the action is a mere fiction, the parties and their counsel may file affidavits and statements in rebuttal.⁹⁷ But it is no defense to a motion to dismiss on the ground that there is no actual controversy, that the case was selected by the plaintiff in error and agreed to by the defendant in error before the writ of error was prosecuted on the ground that the question involved was identical with that of a number of other causes pending in the court below; because in such case it is all the more important that it should not be decided in any case where there is nothing in dispute; besides it is well understood that consent does not confer jurisdiction.⁹⁸

(8) *Rehearing.*—Where a writ of error has been dismissed, after full argument, as being a moot case, but the dismissal was ordered on a mistaken assumption of fact, justified by the record, the judgment of dismissal will be set aside and a rehearing granted upon a proper showing being made.⁹⁹

b. Want of Jurisdiction.—**In General.**—A writ of error may be dismissed for want of jurisdiction,¹ unless the question of jurisdiction is so involved with other questions that it cannot be decided without an examination of a voluminous record and a review of the merits of the case, in which case it will be reserved until the case is heard on the final argument on the merits.² But a motion to dismiss a suit for want of jurisdiction applies solely to cases where this court has not jurisdiction of the cause, and not where the circuit court has exceeded its proper jurisdiction in the particular case.³

A failure to annex to or return with a writ of error an assignment of errors, as required by § 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, Rule 21, it will ordinarily be enough.⁴

On Court's Own Motion.—If on looking into the record, this court finds that it has no jurisdiction, it will dismiss on its own motion without waiting the action of the parties;⁵ hence, it is of no importance that the motion to dismiss

95. *American Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379.

96. *Evidence in rebuttal.*—*American Wood Paper Co. v. Heft*, 131 U. S., appx. xcii, 19 L. Ed. 378.

97. *Dubruque, etc., R. Co. v. Litchfield*, 23 How. 66, 90, 16 L. Ed. 500.

98. *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016.

99. *Rehearing.*—*Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 545, 1013.

1. **Dismissal for want of jurisdiction.**—*Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134; *California v. Holladay*, 159 U. S. 415, 40 L. Ed. 202; *Hoadley v. San Francisco*, 94 U. S. 4, 24 L. Ed. 34; *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111; *Beatty v. Benton*, 135 U. S. 244, 34 L. Ed. 124; *San Francisco v. Itself*, 133 U. S. 65, 33 L. Ed. 570; *Central Trust Co. v. Bacon*, 136 U. S. 633, 34 L. Ed. 549; *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 35 L. Ed. 715.

Where the case is one not within the jurisdiction of the court the writ of error or appeal may be dismissed on motion,

and certain defects in removing the cause from the subordinate court into this court entitle the party who prevailed in the court below to the same remedy. The *Eutaw*, 12 Wall. 136, 139, 20 L. Ed. 278.

If it is apparent from the record that this court has not acquired jurisdiction of a case for want of a proper appeal or writ of error, it will be dismissed, although neither party ask it. *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91.

2. **Examination of merits on motion to dismiss.**—*Semple v. Hager*, 4 Wall. 431, 18 L. Ed. 402; *Lynch v. De Bernal*, 131 U. S., appx. xciv, 19 L. Ed. 395.

3. *Canter v. American, etc., Ins. Co.*, 2 Pet. 554, 7 L. Ed. 517.

4. *Ackley School District v. Hall*, 106 U. S. 428, 27 L. Ed. 237.

5. **Dismissal ex mero motu.**—*Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688.

The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462, "which requires this court, of its own motion, to deny its own jurisdiction and, in the ex-

is made by a party after he has parted with his interest in the decree.⁶

Examination of Merits.—When the question of jurisdiction cannot be determined without opening the record and looking into the merits of the controversy, a motion to dismiss for want of jurisdiction will be denied, but may be argued upon the hearing of the cause.⁷

Legal presumptions being in favor of a judgment of the court below, the court, where it does not reverse, nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when in fact they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this court on the case as, by common consent, they presented it, the court benignantly “dismissed” it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be reviewed here.⁸

Effect of Dismissal.—A dismissal solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constitutes no bar to a new appeal at any time within two years, even if a general dismissal might.⁹

Reversal.—And where a bill of which a circuit court of the United States did not have jurisdiction was dismissed by that court, but not for want of jurisdiction, the decree will be reversed by the supreme court of the United States in order that the case may be disposed of on that ground, at the cost of the appellant who takes nothing by the appeal.¹⁰

c. *Premature Appeals.*—**In General—No Final Judgment or Decree.**—The practice of this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in.¹¹ If the original complainants appeal from a

exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it.” *Morris v. Gilmer*, 129 U. S. 315, 325, 32 L. Ed. 690; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. Ed. 70.

If the record discloses a controversy of which the circuit court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Blacklock v. Small*, 127 U. S.

96, 105, 32 L. Ed. 70; *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690.

6. *Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688.

7. *Lynch v. De Bernal*, 131 U. S., appx. xciv, 19 L. Ed. 395.

8. *Burr v. Des Moines, etc., R. Co.*, 1 Wall. 99, 17 L. Ed. 561, distinguished in *Pomeroy v. Bank*, 1 Wall. 603, 17 L. Ed. 638.

9. *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531, opinion of Mr. Justice Story.

10. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 195, 48 L. Ed. 140.

11. **Premature appeals in general.**—The *Charles Carter*, 4 Dall. 22, 1 L. Ed. 724; *Houston v. Moore*, 3 Wheat. 433, 4 L. Ed. 428; *Evans v. Phillips*, 4 Wheat. 73, 74, 4 L. Ed. 516; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *United States v. Girault*, 11 How. 32, 13 L. Ed. 587; *Fossat v. United States*, 2 Wall. 649, 17 L. Ed. 739.

Where the circuit court had no jurisdiction of a case, because there was no final decree in the lower court, the appeal ought to be dismissed for want of jurisdiction, and their judgment affirming the decree is erroneous. *Montgomery v. Anderson*, 21 How. 386, 16 L. Ed. 160, citing *Mordecai v. Lindsay*, 19 How. 199, 200, 15 L. Ed. 624.

decree not final on the ground that it is unjust to them, the appeal must be dismissed as premature.¹²

Where a case is brought up by appeal upon exceptions to a master's report, the appeal is not premature, and will not be dismissed, if the court receive it toward final decree whilst claims independent and not necessary to be decided before a final decision on the rest were held under consideration; but it is otherwise if such claims are so connected that a decision on them was proper at the same time.¹³

Practice in Mississippi.—Where a case is brought up before all the matters between all the parties to the record have been finally disposed of, the rule in Mississippi is to reverse the judgment on error in the appellate court. But according to the practice of this court, the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction, and remanded to the court below to be proceeded in and finally disposed of.¹⁴

d. *Want of Prosecution.*—**In General.**—Where an appeal to this court is prayed for and allowed; but it is never prosecuted, no bond is given, no citation issued, and no return of the record is made to this court at the ensuing term, the appeal ceases to have any operation or effect, and cannot avail the appellants.¹⁵ So also, where a party appeals from a decree, but the appeal is dismissed, under the 9th rule for want of prosecution, the case stands in this court as though no such appeal had been taken. The appellant therefore can only be heard in support of the decree as it stands. Because an appeal brings up for review only that which was decided adversely to the appellant.¹⁶

Certificate of Clerk.—An equity suit, where an appeal has been taken from the circuit court to this court, but not prosecuted, will be dismissed upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.¹⁷

And this rule applies to suits in admiralty.¹⁸

A petition for a writ of mandamus may be dismissed for the want of prosecution.¹⁹

12. *Ogilvie v. Knox Ins. Co.*, 2 Black 539, 17 L. Ed. 349.

13. *West v. Smith*, 8 How. 402, 12 L. Ed. 1130, citing *Perkins v. Fourniquet*, 6 How. 206, 12 L. Ed. 406; *Michoud v. Girod*, 4 How. 503, 524, 11 L. Ed. 1076.

14. *United States v. Girault*, 11 How. 22, 13 L. Ed. 587.

By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below, with respect to all the parties upon the record, before it is carried up to the appellate court, otherwise it is error. Where this error occurs, the practice of this court is to dismiss the case for want of jurisdiction, and remand it to the court below to be proceeded in and finally disposed of. *United States v. Girault*, 11 How. 22, 13 L. Ed. 587, cited, with approval, in *Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262, 264, 37 L. Ed. 443.

15. **Want of prosecution in general.**—*Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Steamer Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *The Tornado*, 109 U. S. 110, 27

L. Ed. 874; *State v. Demarest*, 110 U. S. 400, 28 L. Ed. 191; *Killian v. Clark*, 111 U. S. 784, 28 L. Ed. 599; *Credit Co. v. Arkansas, etc., R. Co.*, 128 U. S. 258, 259, 32 L. Ed. 448.

Although the writ of error be sued out apparently on behalf of all the defendants below, yet where no cost bond appears to have been furnished by some of them, and they have not appeared at the bar by counsel and no brief has been filed, and on the contrary, in the brief of the defendants in error it is stated that the persons named did not prosecute error, this court will assume that such parties have abandoned the prosecution of the writ. *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002.

16. *Loudon v. Taxing District*, 104 U. S. 771, 774, 26 L. Ed. 923, citing *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266.

17. *Randolph v. Barbour*, 6 Wheat. 128, 5 L. Ed. 223.

18. *The Jonquille*, 6 Wheat. 452, 5 L. Ed. 303.

19. *In re Grant*, 127 U. S. 783, 32 L. Ed. 325.

The Motion.—The dismissal may be of the court's own motion.²⁰

e. *Failure to Take Appeal.*—The appeal will be dismissed where it does not appear that an appeal was taken below, nor will it be reinstated under an agreement between the parties, consenting to reinstate the case, and to waive all irregularities, because this court has no jurisdiction where an appeal is not taken.²¹

f. *Failure to Specify Errors on Record.*—It is well settled that it is no ground to dismiss the writ of error because there is no bill of exceptions, agreed statements of facts, or material demurrer in the record presenting any question of law for the decision of the appellate court, as the absence of every such question is good cause for affirming the judgment, but it is not a good ground for dismissing the writ of error.²² And appeals in this respect are subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error.²³

g. *Failure to Annex Bill of Exceptions or Statement of Facts.*—Where a case is brought here upon a writ of error issued under the 22d section of the judiciary act, and there is neither bill of exceptions, agreed statement, nor special verdict brought up, the judgment, generally speaking, will be affirmed.²⁴ Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument.²⁵

h. *Double Appeals.*—**In General.**—Where on an examination of the transcript this court finds that it is the same case as another in which the opinion had already been delivered, by mistake two transcripts of the record being taken out in the court below, and each being docketed in this court, the case will be dismissed.²⁶

Dismissal without Prejudice.—Where two writs of error are sued out,

20. **Dismissal ex mero motu.**—*Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688.

21. **Failure to take appeal.**—*Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143.

22. **Failure to specify errors on record.**—*Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134; *Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Cook v. Burnley*, 11 Wall. 672, 677, 20 L. Ed. 84; *The Eutaw*, 12 Wall. 136, 141, 20 L. Ed. 278.

The court will not dismiss a writ of error to the circuit court on the ground that there is no error apparent on the face of the record. *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45. The court said: "It is not necessary, by the practice of this court, for the party who brings a cause here to specify upon the record, the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal."

23. "Appeals are subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error, and it is well-settled law that it is no sufficient cause to dismiss a writ of

error that the record does not present any question of law for the revision of this court, as the writ of error when sued out under the twenty-second section of the judiciary act brings up the whole record, and it is the right of the plaintiff in error to be heard and have an opportunity to show, if he can, that there is error in any part of the record. *Minor v. Tillotson*, 1 How. 287, 288, 11 L. Ed. 134, 2 Stat. at Large 244." *The Eutaw*, 12 Wall. 136, 141, 20 L. Ed. 278.

24. **Failure to annex bill of exceptions or statement of facts.**—*Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Minor v. Tillotson*, 1 How. 287, 289, 11 L. Ed. 134; *Kelsey v. Forsyth*, 21 How. 85, 16 L. Ed. 32; *Guild v. Frontin*, 18 How. 135, 15 L. Ed. 290; *Stevens v. Gladding*, 19 How. 64, 15 L. Ed. 569; *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *Pomeroy v. State Bank*, 1 Wall. 592, 17 L. Ed. 638, distinguishing *Burr v. Des Moines, etc., R. Co.*, 1 Wall. 99, 17 L. Ed. 561, where the case was "dismissed," simply, was special in its circumstances.

25. *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134.

26. **Double appeals in general.**—*United States v. Osio*, 154 U. S., appx., 535, 16 L. Ed. 462.

and one is defective, as for example in incorrectly describing the date on which the judgment appealed from was entered below, but the latter correctly describes it, the former may be dismissed without prejudice to proceedings on the other.²⁷

i. *Hearing and Determination of Post Bellum Transactions.*—A motion to dismiss a case brought up under statutes relating to the Civil War, upon the ground that the war having ceased, the effect of that fact is the same which would have followed the repeal of the statutes upon which the prosecution is founded, will be denied.²⁸

Printing Record.—A motion to dismiss a cross appeal will be denied where the record has not been printed, it appearing from the motion papers that the appellant had pleaded some pleas which were not sustained, and by his other defenses he defeated the claim in part. The court will therefore postpone a further consideration of the motion until the hearing on the merits.²⁹

2. **DISMISSAL OF CROSS APPEALS.**—**Grounds.**—A cross appeal will be dismissed if it was not diligently prosecuted.³⁰

3. **DISMISSAL BY AGREEMENT OR STIPULATION.**—**The Rule of Court.**—Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court.³¹

The competent parties to agree that a case shall be settled, and the writ of error dismissed, are usually the parties upon the record. If either of them has assigned his interest, and it be made known to the court, the interest of such assignee would be protected. But where there was a judgment for costs in the court below, and the attorney claimed to have a lien upon such judgment for his fees, it is not a sufficient reason for this court to prevent the parties from agreeing to dismiss the case.³²

Vacating Dismissal.—The dismissal of a case under Rule 29 of this court is not to be vacated on the application of parties whose names do not actually ap-

27. **Dismissal without prejudice.**—Northern Pac. R. Co. v. Ely, 197 U. S. 1, 49 L. Ed. 639, citing Wheeler v. Harris, 13 Wall. 51, 20 L. Ed. 531; Silsby v. Foote, 20 How. 290, 15 L. Ed. 822.

28. In *The Tornado*, 109 U. S. 110, 27 L. Ed. 874, a libel was filed in the district court against the ship *Tornado* to recover for salvage services, and an appeal was taken by the salvors to the circuit court, and a final decree of the circuit court was entered on the 24th of May, 1880. On the 26th of June following, the underwriters on the cargo filed a petition in the circuit court praying a cross appeal from the decree, and it was allowed, returnable at the October term 1880. On the 5th of July following the bond on the cross appeal was filed in the circuit court. But as the appellants in the cross appeal did not docket it or enter their appearance on it in this court, until September 27th, 1883, the cross appeal was dismissed on the motion of the appellees. Citing *Grigsby v. Purcell*, 99

U. S. 505, 25 L. Ed. 354; *The S. S. Osborne*, 105 U. S. 447, 26 L. Ed. 1065.

29. **Hearing and determination of post bellum transactions.**—*Duvall v. United States*, 154 U. S., appx., 548, 18 L. Ed. 252, citing *The Schooner Reform*, 3 Wall. 617, 18 L. Ed. 105.

30. **Dismissal of cross appeals.**—*The S. S. Osborne*, 105 U. S. 447, 26 L. Ed. 1065; *Hilton v. Dickinson*, 108 U. S. 165, 168, 27 L. Ed. 688; *The Tornado*, 109 U. S. 110, 27 L. Ed. 874; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662; *Mayer v. Walsh*, 108 U. S. 17, 27 L. Ed. 635.

31. **Dismissal by agreement or stipulation.**—Rule 29, 21 How. xvi; *United States v. Estudillo*, 1 Wall. 710, 717, 17 L. Ed. 702; *Woodman v. Missionary Society*, 124 U. S. 161, 163, 31 L. Ed. 352; *Steamboat Niagara v. Van Pelt*, 154 U. S., appx., 533, 15 L. Ed. 152.

32. *Platt v. Jerome*, 19 How. 384, 15 L. Ed. 623.

pear in the record as having an interest in the case.³³ Thus, an appeal of a case originating below under the statute of June 14, 1860, relating to surveys of Mexican grants in California, and in which the appellants appear on the record as the United States simply (no intervenors being named), remains within the control of the attorney general; and a dismissal of the case under the 29th rule of this court is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case, even although it is obvious that below there were some private owners contesting the case under cover of the government name, and that some such were represented by the same counsel who now profess to represent them here.³⁴

But the court may amend an order dismissing a cause under this rule.³⁵

Enforcement of Stipulation.—And where the parties have compromised the suit and stipulated that the plaintiff in error shall dismiss it, the court will make an order to enforce the stipulation, unless cause to the contrary be shown.³⁶

4. **RIGHT OF COURT TO ANNEX CONDITIONS.**—This court sometimes refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings.³⁷

5. **SIMULTANEOUS DISMISSAL AND AFFIRMANCE.**—It is error and ground of reversal for a circuit court to affirm a decree in admiralty of the district court, and at the same time to dismiss the appeal.³⁸

6. **THE MOTION**—a. *Uniting Motion to Affirm with Motion to Dismiss*—(1) *In General.*—Rule 6, par. 4, as amended Nov. 4, 1878, 97 U. S. vii, provides that there may be united with a motion to dismiss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous

33. *United States v. Estudillo*, 1 Wall. 710, 17 L. Ed. 702.

34. *United States v. Estudillo*, 1 Wall. 710, 17 L. Ed. 702; *Swayne and Davis, JJ.*, dissenting; *Taney, C. J.*, and *Grier, J.*, absent.

35. *Woodman v. Missionary Society*, 124 U. S. 161, 31 L. Ed. 352.

Upon the application of a party interested to vacate the entry of an order dismissing a cause made in vacation pursuant to Rule 28, and after hearing both parties, the court may amend the entry by adding "without prejudice to the right of 'the petitioner' to proceed as he may be advised in the court below for the protection of his interest." *Woodman v. Missionary Society*, 124 U. S. 161, 31 L. Ed. 352.

36. *Addington v. Burke*, 125 U. S. 693, 31 L. Ed. 853; *Dakota County v. Glidden*, 113 U. S. 222, 28 L. Ed. 981.

In *New Orleans v. New Orleans, etc.*, R. Co., 108 U. S. 15, 27 L. Ed. 635, the appellee presented a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans, pursuant to the terms of a compromise of the matter in dispute made with the city council, and asked to have the appropriate order entered upon the stipulation. The board of liquidation of the city debt of New Orleans comes to resist the entry

of any such order, on the ground that, during the pendency of the appeal in this court, authority over the subject matter of the controversy had been transferred from the city council to that board, and that the compromise which has been effected is not binding. It was held that although the city council made the compromise which is claimed, and that the appellee is entitled to a dismissal of the appeal if the council had authority to do what it has done and the compromise is fairly made, yet the dispute as to the authority of the council presents questions too important to be settled summarily on those motions. It is therefore ordered "that the cause and pending motions be continued until the next term, and that the appeal be then dismissed, in accordance with the stipulation on file, unless the board of liquidation begin and prosecute, without unnecessary delay, in some court of competent jurisdiction, an appropriate proceeding to set aside the compromise which has been made with the city council."

37. **Right of court to annex conditions.**—*Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *O'Reilly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659.

38. **Simultaneous dismissal and affirmance.**—*The Lottawanna*, 20 Wall. 201, 22 L. Ed. 259.

as not to need further argument. This is a modification of the rule as originally promulgated, May 8, 1876, 91 U. S. vii, when it was confined to motions to dismiss writs of error to a state court.³⁹

Color for Motion to Dismiss.—Under this rule it is settled that there must appear on the record at least some color of right to a dismissal, before this court will entertain the motion to affirm.⁴⁰

The Rule of Precedents.—There is sufficient color for a motion to dismiss to warrant us in entertaining a motion to affirm on the ground that the appeal was taken for delay, where the case is clearly governed by a prior decision of this court,⁴¹ and this rule has been applied to writs of error to state courts.⁴²

39. Uniting motion to affirm with motion to dismiss in general.—*Hinckley v. Morton*, 103 U. S. 764, 765, 26 L. Ed. 458.

Subdivision 5 of Rule 6 of this court (108 U. S. 575) was first promulgated November 4, 1878, 97 U. S. vii. It reads as follows: "There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." *Chanute City v. Trader*, 132 U. S. 210, 212, 33 L. Ed. 345.

Error to state court.—Under rule 6, § 5, upon error to a state court, there may be united with a motion to dismiss the writ of error because no federal question was raised or decided, a motion to affirm. *Palmer v. Hussey*, 119 U. S. 96, 30 L. Ed. 362. This question is treated at length ante, p. 784.

40. Must be color for motion to dismiss.—*Whitney v. Cook*, 99 U. S. 607, 25 L. Ed. 446; *Ackley School District v. Hall*, 106 U. S. 428, 27 L. Ed. 237; *Hinckley v. Morton*, 103 U. S. 764, 765, 26 L. Ed. 458; *Davies v. United States*, 113 U. S. 687, 28 L. Ed. 1149; *Micas v. Williams*, 104 U. S. 556, 26 L. Ed. 842; *The Alaska*, 130 U. S. 201, 208, 32 L. Ed. 923; *The S. C. Tyron*, 105 U. S. 267, 26 L. Ed. 1026; *Chanute City v. Trader*, 132 U. S. 210, 213, 33 L. Ed. 345; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. Ed. 92; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 32 L. Ed. 607; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97; *Davies v. United States*, 113 U. S. 687, 28 L. Ed. 1149, 1150; *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506, 510, 28 L. Ed. 809; *Eureka Lake, etc., Canal Co. v. Superior Court of Yuba County*, 116 U. S. 410, 416, 29 L. Ed. 671; *Stuart v. Boulware*, 133 U. S. 78, 81, 33 L. Ed. 568.

In order for this court to entertain with a motion to dismiss a motion to affirm in accordance with the provisions of rule 6, par. 5, there must appear on the record at least sufficient color of right to justify a dismissal at the time when the motion

was filed. *Micas v. Williams*, 104 U. S. 556, 26 L. Ed. 842.

Before a motion to affirm may be united with a motion to dismiss a writ of error or appeal, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends was so frivolous as not to need further argument, there must be a motion to dismiss and at least some color of right to a dismissal. *Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 458.

"The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8, 1876, 91 U. S. vii, and in *Whitney v. Cook*, 99 U. S. 607, 25 L. Ed. 446, decided during the October term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record at least some color of right to a dismissal. This practice has been steadily adhered to ever since, and, in our opinion, prevents our entertaining the motion to affirm in this case. That motion is consequently denied." *Davies v. United States*, 113 U. S. 687, 689, 28 L. Ed. 1149.

Under amended Rule 6 the plaintiff in error, or the appellant, may, with a motion to dismiss the writ of error or the appeal, unite a motion to affirm the judgment or the decree; but where there is no color of right to a dismissal, the case being clearly within the jurisdiction of this court, a motion to affirm merely will not be sustained. *Whitney v. Cook*, 99 U. S. 607, 25 L. Ed. 446.

Where one of the grounds alleged in the motion to dismiss is, that this court has no jurisdiction of the case, because of informalities in the bill of exceptions, the only exception presented thereby being alleged errors in rulings admitting evidence, there is sufficient color for the motion to dismiss, to warrant us in considering the motion to affirm. *Sire v. Ellithorpe Air Brake Co.*, 137 U. S. 579, 34 L. Ed. 801.

41. *The Alaska*, 130 U. S. 201, 32 L. Ed. 923.

42. *Lowe v. Williams*, 94 U. S. 650, 24 L. Ed. 216; *Palmer v. Hussey*, 119 U. S. 96, 30 L. Ed. 362; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544.

(2) *When Proper.*—**Frivolous Appeals.**—Where a motion to affirm is united with a motion to dismiss under Rule 6, if on looking into the record this court finds that the case was manifestly brought here for delay only, and that the questions presented are frivolous, a motion to affirm will be granted.⁴³

Appeals Taken for Delay.—Where there is a motion to dismiss an appeal, with which is united a motion to affirm, although the motion to dismiss is overruled, the judgment will be affirmed if the court on looking into the record is satisfied that the appeal was taken for delay.⁴⁴

Review of Interlocutory Decisions.—Under Rule 6, § 5, there may be united with a motion to dismiss because the appeal was “taken from an interlocutory decree or order of sale and not a final decree,” a motion to affirm.⁴⁵

Defects in Appeal Bond.—An appellee cannot couple with a motion to dismiss an appeal and vacate the supersedeas because of an alleged defect in the form of the condition of the bond, a motion, under Rule 6, to affirm because it is manifest that the appeal was taken for delay only.⁴⁶

(3) *Printing the Record.*—Where a motion to affirm the judgment of the court below, to strike out assignments of error, and to advance the causes on the docket, are united with motions to dismiss the writ of error, they will all be denied where the records have not been printed.⁴⁷ But it is only necessary to print enough of the record to allow the court to act intelligently without reference to the transcript; and where an opposing party objects that it is insufficient, he must specify the essential parts omitted.⁴⁸

Sufficiency of Motion Papers.—The motion papers should contain, in themselves, so much of the record as to enable the court to act understandingly.⁴⁹

b. *Time of Making Motion.*—(1) *Before or after Return Day of Writ.*—According to the old practice, a motion to dismiss could not be entertained until the

43. When frivolous appeals proper.—*Evans v. Brown*, 109 U. S. 180, 27 L. Ed. 898.

In *Swope v. Leffingwell*, 105 U. S. 3, 26 L. Ed. 939, there was a motion to affirm united with a motion to dismiss a writ of error to a state court. The motion to dismiss was made on the ground that there was no federal question involved. The court held that it had jurisdiction, but affirmed the judgment on the ground that the case on the merits was governed by previous decisions.

44. *The S. C. Tryon*, 105 U. S. 267, 26 L. Ed. 1026; *Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 36 L. Ed. 506.

The S. C. Tryon, 105 U. S. 267, 26 L. Ed. 1026, there was a motion to affirm a decree united with a motion to dismiss the appeal in an admiralty suit. The ground for making the motion to dismiss was that there was no bill of exceptions but only a finding of facts and conclusions of law. The court overruled that ground, but it is difficult, from the report of the case, to see what color of right there was to a dismissal. Yet it affirmed the decree on a consideration of the findings of fact.

In *Micas v. Williams*, 104 U. S. 556, 26 L. Ed. 842, there was a motion to affirm united with a motion to dismiss a writ of error. The affidavits in opposition to the latter motion showed jurisdiction, as to the amount involved, though on the record as it stood when the motion was made there was color of right to a dis-

missal. But the court affirmed the judgment on the ground that the writ was taken for delay only.

Failure to annex assignment of errors.—Where there was on the record, at the time when a motion to dismiss was made, with which was united a motion to affirm, at least sufficient color of right to a dismissal to justify this court in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5, the motion to affirm will be granted where the court on looking into the record is satisfied that the writ was taken for delay only, as for example where no assignment of error has been annexed to or returned with the writ as required by § 997 of the Revised Statutes; and every question presented by the bill of exceptions or suggested upon the argument appears to this court so frivolous as to make it improper to keep the case here for any further consideration. *Micas v. Williams*, 104 U. S. 556, 26 L. Ed. 842.

45. *First Nat. Bank v. Shedd*, 121 U. S. 74, 85, 30 L. Ed. 877.

46. *Gav v. Parpart*, 101 U. S. 391, 25 L. Ed. 841.

47. Printing the record.—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 27 L. Ed. 630.

48. *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. Ed. 406; *Callan v. Bransford*, 139 U. S. 197, 35 L. Ed. 144.

49. *Texas, etc., Cattle Co. v. Scott*, 137 U. S. 436, 34 L. Ed. 730.

return day of the writ.⁵⁰ But the rule now is that this court, where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss the writ of error before the return day thereof.⁵¹

The proper course in a case where the court of claims, improperly (from supposed want of jurisdiction) refused to grant to the United States a motion for a new trial, made under the act of 1868, and the United States appealed, stated to be, for one or the other party to move to dismiss the appeal, and then for the United States to ask for a distinct mandamus on the court of claims to proceed; this court stating that the motion to dismiss might be made at any time when the court was in session, and that it was not necessary to await the arrival of the term to which the record ought to be returned.⁵²

(2) *After Entering Appearance.*—It is the practice of this court to receive motions to dismiss for want of jurisdiction after an appearance has been entered.⁵³ And in accordance with the general rule of this court that where there is a substantial defect in the appeal, or writ of error, the objection may be taken at any time before the judgment, a motion to dismiss, though not made at the first term, or at the time of the appearance in this court, but after the case has been depending here for two years, is in time.⁵⁴

(3) *Before Regular Call of Docket.*—Motions to dismiss are nonenumerated motions, and they may be filed by leave of court in any case on the calendar before the case is reached in the regular call of the docket, and they are entitled to preference on Friday in each week during the sitting of the court, as provided in the twenty-seventh rule, but they do not give either party any right to be heard upon the merits of the controversy.⁵⁵ When a case is within the jurisdiction of the court, and there has been no defect in removing it from the subordinate court to this, the court will not dismiss the case on motion made out of the regular call of the docket.⁵⁶

(4) *Want of Citation or Irregularities Therein.*—A motion to dismiss a writ of error for defects or irregularities in the citation, or for lack of service, must

50. Before or after return day of writ.—Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a procedendo. *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

51. "It is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice; but in *Ex parte Russell*, 13 Wall. 664, 671, 20 L. Ed. 632, and *Thomas v. Wooldridge*, 23 Wall. 283, 288, 23 L. Ed. 135, the rule was changed." *Clark v. Hancock*, 94 U. S. 493, 24 L. Ed. 146.

It is suggested that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the term to which the record ought to be returned, which occasions great delay. But as the case is virtually in the possession and subject to the control of this court as soon as the appeal is effectively taken, we see no reason why the appellee should not at any time when the court is in session, apply to have the appeal dismissed, provided the question can be properly presented to

the court. Of course the court would not hear the motion without having the record before it; but that could be procured and presented by the appellee as is done where the appellant has failed to have the record filed in due time. In many cases the court might decline to hear the motion until the records were printed; but that could also be done by the appellee, if he desired to have a speedy hearing of the matter. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice. *Ex parte Russell*, 13 Wall. 664, 671, 20 L. Ed. 632.

52. *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632.

53. After entering appearance.—*United States v. Yates*, 6 How. 606, 12 L. Ed. 575; *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803.

54. *Wilson v. Life, etc., Ins. Co.*, 12 Pet. 110, 9 L. Ed. 1032.

55. Before regular call of docket.—*The Eutaw*, 12 Wall. 136, 139, 20 L. Ed. 278.

56. *The Eutaw*, 12 Wall. 136, 20 L. Ed. 278.

be made, at the same term; it comes too late at a subsequent term.⁵⁷

(5) *At Hearing on the Merits.*—A motion to dismiss the writ of error, although submitted to the court at the same term comes too late if it is postponed until the hearing on the merits.⁵⁸

Since the failure to join necessary parties on an appeal is jurisdictional, a motion to dismiss on that ground may be entertained at any time before final disposition of the appeal.⁵⁹

(6) *Laches.*—Where suit was brought in the district court, and a decree is entered in favor of the complainant, and an appeal is taken to the circuit court by the defendant, but the plaintiff without pressing the appeal brings a new action in the state court against the defendant who recovers judgment, it was held that the complainant after a lapse of sixteen years, cannot move this court to dismiss the appeal of the circuit court, after having abandoned the suit in the district court.⁶⁰

c. *Notice of Motion.*—(1) *Necessity for.*—In order to prevent surprise upon the plaintiff in error, or appellant, the court have always, where the motion to dismiss for want of jurisdiction is made in advance of the regular call, directed notice to be given to him or his counsel, and required proof that it was served long enough before the motion is heard to give him an opportunity of contesting the motion if he desires to do so. And the time required must depend upon the distance of the counsel or the party from the place of holding the court, and must be sufficient not only to enable him to make the journey, but to arrange business in which he may be engaged when he receives the notice. For, when a case stands so late on the docket of this court as to give no reasonable hope of reaching it during the term, it cannot be expected that distant counsel will leave their usual place of business, and attend here to guard against the possibility of a motion to dismiss.⁶¹ For example, where the defendant in error or on appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.⁶² Where there has been no notice of a motion to dismiss, this court may allow a resubmission of the cause, and an additional brief to be filed.⁶³

57. Want of citation or irregularities therein.—McDonough v. Millaudon, 3 How. 693, 707, 11 L. Ed. 787; Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90.

Where a cause has been pending in this court for two terms, a writ of certiorari sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a state court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late. McDonough v. Millaudon, 3 How. 693, 11 L. Ed. 787, cited in Buckingham v. McLean, 13 How. 150, 151, 14 L. Ed. 90.

58. At hearing on the merits.—Renaud v. Abbott, 116 U. S. 277, 29 L. Ed. 629.

For example, an alleged irregularity in the service of the citation of the writ of error from this court to a state court which consists in the service upon the defendant in error in another suit and into which the writ is directed, by the marshal of such other state, can only be taken advantage of by a motion to dis-

miss, made promptly on an appearance limited to that special purpose, and is cured by a general appearance. If the motion to dismiss, is submitted to the court at the same term, but is postponed until the hearing on the merits, it comes too late. Renaud v. Abbott, 116 U. S. 277, 29 L. Ed. 629, citing United States v. Yates, 6 How. 606, 12 L. Ed. 575; Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90.

59. Wilson v. Life, etc., Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; Estes v. Trabue, 128 U. S. 225, 32 L. Ed. 437; Mason v. United States, 136 U. S. 581, 34 L. Ed. 545; Dolan v. Jennings, 139 U. S. 385, 35 L. Ed. 217; Hardee v. Wilson, 146 U. S. 179, 36 L. Ed. 933.

60. Laches.—Bryar v. Campbell, 177 U. S. 649, 44 L. Ed. 926.

61. Necessity for notice of motion.—Davidson v. Lanier, 131 U. S., appx. lxxii, 16 L. Ed. 796.

62. Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90, citing McDonough v. Millaudon, 3 How. 693, 707, 11 L. Ed. 787.

63. Caldwell v. Texas, 141 U. S. 209, 35 L. Ed. 718.

(2) *Requisites and Sufficiency.*—The notice of motion is insufficient and irregular, if it does not specify the time when such motion will be made or heard,⁶⁴ but an appeal dismissed on such a motion will be reinstated.⁶⁵

(3) *Briefs of Counsel.*—Though a failure of the party making a motion to dismiss an appeal, to send a copy of his brief to the counsel of the other side within the time required by the amendment made at December term, 1871, to Rule 6, would entitle such counsel of the other side to ask to postpone the hearing in order to give time for further preparation, yet if he have himself before the hearing filed a full argument upon the merits of the motion, the failure of his opposing counsel to have complied with the amendment to the rule would hardly warrant an objection that the notice of the motion was insufficient.⁶⁶

d. *Parties to Motion.*—(1) *Who May Make Motion.*—The motion to dismiss must be made by a party to the cause; it will not be dismissed on the motion of a stranger.⁶⁷ But it is a matter of no importance that a motion to dismiss an appeal is made by a party after he has parted with his interest in the decree, for, if on looking into a record we find that we have no jurisdiction, it is our duty to dismiss on our own motion without awaiting the action of the parties.⁶⁸

One of Several Appellees.—A motion to dismiss an appeal in equity may properly be made by one of several appellees, he being the only one who has any interest in the suit, and the only one who filed an answer below.⁶⁹

The counsel for executors of a deceased appellee may suggest the appellee's death on the record, enter the executor's appearance, and move to dismiss.⁷⁰

(2) *Persons Opposing Motion.*—An appellant undoubtedly has the right to dismiss his appeal with the leave of the court,⁷¹ notwithstanding the opposition

64. Requisites and sufficiency.—Where a party prosecutes a suit as a representative creditor, and the other creditors, until notice to the contrary, have the right to rely upon him to protect their interest in the subject matter of the litigation, a notice by the appellees of a motion to dismiss an appeal where he is the appellant, served upon counsel representing him and the other creditors, is insufficient and irregular, if it does not specify the time when such motion will be made, although he may have entered into a stipulation with the appellees consenting to a dismissal of the appeal on their paying the costs. *Glenny v. Langdon*, 94 U. S. 604, 24 L. Ed. 237.

65. *Glenny v. Langdon*, 94 U. S. 604, 24 L. Ed. 237.

66. Briefs of counsel.—*Thomas v. Wooldridge*, 23 Wall. 283, 23 L. Ed. 135.

67. Who may make motion.—*Moore v. Brown*, 11 How. 414, 429, 13 L. Ed. 751.

Where the trustees or directors of a corporation have appealed from a decree, and directed their counsel to prosecute the appeal, this court will not dismiss it on the motion of strangers to the decree who, since it was rendered, have become the owners of a majority of the stock of the corporation. Such trustees or directors are in law the managers of the property and affairs of the corporation. As such they, in all litigation involving its action, represent it, its stockholders and creditors. If they violate their trust, the remedy must be sought in some court of original jurisdiction. *Denver, etc., R. Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438.

Suit to vacate patent.—Thus, when the United States retires from the prosecution of a suit instituted to vacate a patent of public land, without causing the appeal to be dismissed, and another party, claiming the same land under another patent, is in court to prosecute the appeal, this court will not dismiss it on the motion of the appellee as of right, but will look into the case, and if the circumstances require it, will hear argument on the case and decide it. *United States v. Marshall Silver Min. Co.*, 129 U. S. 579, 32 L. Ed. 734.

Purchaser at foreclosure sale.—So, also, where a railroad company, at different times, executed two mortgages on distinct portions of its road, to secure the debts of separate creditors, a purchaser, at a foreclosure sale, of part of the road, including stock, machinery, franchises, etc., of the entire road, under the elder mortgage, will not be permitted to intervene, and move the dismissal of an appeal taken by the junior mortgagee, though he show an agreement between the appellant and the appellee to increase the amount of the decree one hundred per cent. above what was found to be due in the court below. *Bronson v. Railroad Co.*, 2 Black 524, 17 L. Ed. 359.

68. *Hilton v. Dickinson*, 108 U. S. 165, 27 L. Ed. 688.

69. *Thomas v. Wooldridge*, 23 Wall. 283, 23 L. Ed. 135.

70. *Hook v. Linton*, 10 Pet. 107, 9 L. Ed. 363.

71. Motion by appellant to dismiss.—*United States v. Griffith*, 141 U. S. 712, 35 L. Ed. 719.

of the other side,⁷² though if the other appellants oppose a motion, made by one of several appellants, to dismiss an appeal on the ground that, since it was taken, the supreme court of a state has enjoined all the appellants from enforcing the claims which form the subject matter of the appeal, it will be denied,⁷³ but the appellant's motion should not be accompanied by papers and correspondence stating the grounds on which the motion is made.⁷⁴

e. *Hearing of Motion*—(1) *Time for Hearing*.—It is the practice of this court to receive and hear motions to dismiss for want of jurisdiction on the day assigned for business of that description, before the case is reached in the regular call of the docket. And the rule has been adopted, because it would be unjust to the parties to delay the decision until the case is called for trial, if the court are satisfied that they have not jurisdiction, and that the case must be ultimately dismissed without deciding any of the matters in controversy between the parties.⁷⁵ This court, where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss the writ of error before the return day thereof.⁷⁶

(2) *Scope of Review*—aa. *Matters of Fact Alleged in Motion*.—Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court.⁷⁷

bb. *Regularity of Writ and Fact of Jurisdiction*.—It has been repeatedly held that on a motion to dismiss, the court will look to the regularity of the writ, and the fact of jurisdiction. Other questions must, in general, await final hearing.⁷⁸

cc. *Consideration of Merits of Controversy*.—**In General**.—Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the

72. *Latham v. United States*, 9 Wall. 145, 19 L. Ed. 771.

73. *Marsh v. Nichols, etc., Co.*, 120 U. S. 595, 30 L. Ed. 794.

All that was held in *Marsh v. Nichols, etc., Co.*, 120 U. S. 595, 30 L. Ed. 794, was that one of several appellants cannot dismiss an appeal to this court, if the other appellants oppose such dismissal, though after the appeal was taken, the supreme court of the state had enjoined all the appellants from enforcing their claims. Motion was denied upon the grounds that one appellant cannot control the appeal as against his coappellants. Distinguished in *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 32, 45 L. Ed. 410.

74. **Grounds of motion not to be stated**.—*United States v. Griffith*, 141 U. S. 212, 35 L. Ed. 719.

75. **Time for hearing motion**.—*Davidson v. Lanier*, 131 U. S., appx. lxxii, 16 L. Ed. 796.

76. *Clark v. Hancock*, 94 U. S. 493, 24 L. Ed. 146. In this case Mr. Chief Justice Waite, delivering the opinion of the court, said: "It is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice; but in *Ex parte Russell*, 13 Wall. 664, 671, 20 L. Ed. 632, and *Thomas v. Wooldridge*, 23 Wall. 283, 288, 23 L. Ed. 135, the rule was changed."

The court will not, generally speaking, refuse to hear a motion to dismiss an appeal, before the term to which, in regular order, the record ought to be returned, if the record be printed and the

rules of court about motions of that sort have been complied with by the party making the motion. Unless some unforeseen inconvenience should arise from the practice, we would not refuse to hear a motion to dismiss before the term in which, in regular order, the record ought to be returned, "if the record was actually brought here and printed. Such a practice will be likely to prevent great delays and expense and further the ends of justice." *Thomas v. Wooldridge*, 23 Wall. 283, 288, 23 L. Ed. 135; *Ex parte Russell*, 13 Wall. 664, 671, 20 L. Ed. 632.

77. **Matters of fact alleged in motion**.—*United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, 269.

78. **Regularity of writ and fact of jurisdiction**.—*Sparrow v. Strong*, 3 Wall. 97, 105, 18 L. Ed. 49; *Minor v. Tillotson*, 1 How. 287, 288, 11 L. Ed. 134; *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45.

Where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45.

When a want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an examination of the questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction. *Semple v. Hagar*, 4 Wall. 431, 18 L. Ed. 402.

merits of the case.⁷⁹ Accordingly it is held that questions affecting the merits of the controversy will not be considered on a motion to dismiss.⁸⁰ If this court

79. Consideration of merits of controversy in general.—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 38, 45 L. Ed. 410.

It has been repeatedly decided that on a motion to dismiss, the court will look only to the regularity of the writ and the fact of jurisdiction. Other questions must in general await final hearing. *Sparrow v. Strong*, 3 Wall. 97, 18 L. Ed. 49, citing *Minor v. Tillotson*, 1 How. 287, 288, 11 L. Ed. 134; *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45.

80. The Eutaw, 12 Wall. 136, 20 L. Ed. 278; *Lynch v. De Bernal*, 131 U. S., appx. xciv, 19 L. Ed. 395.

The supreme court will not decide the whole legal merits of the case, on a motion to dismiss or quash the writ of error. *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45.

The court will not consider the merits of the question involved in a case, on a motion to dismiss unaccompanied by a motion to affirm. *Bohanan v. Nebraska*, 118 U. S. 231, 30 L. Ed. 71.

Want of proper parties.—Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter. "The record, indeed, suggests many points connected with the real merits of the controversy, and others in respect to proper pleadings in equity, which cannot be considered and determined upon a motion to dismiss the appeal summarily for any irregularities in the process by which it has been brought to this court. We therefore refuse the motion for the dismissal of the appeal, allowing it, however, to be brought to the notice of the court again, when the case shall be argued upon its merits." *Day v. Washburn*, 23 How. 309, 312, 16 L. Ed. 551.

Defense of res adjudicata.—Assuming that a decree in an equity cause in a state court can be set up as res adjudicata pending an appeal from such decree to the supreme court of the state, it is no ground for the dismissal of an appeal to the supreme court of the United States

from a decree of a circuit court of the United States. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

In the case of *Huntington v. Laidley*, 176 U. S. 668, 44 L. Ed. 630, *Huntington*, as a receiver of the Central Land Company, on February 28, 1891, filed a bill in the circuit court of the United States against Laidley and other defendants, to set aside certain deeds which were claimed to be in fraud of the rights of the land company and a cloud upon its title. Defendants answered and set up by way of estoppel certain judgments in the state courts rendered before the bill was filed, in favor of Laidley and against the Central Land Company in an action of ejectment, and also in a suit in equity between them. The circuit court upon this state of facts certified to this court whether that court was without jurisdiction, because of the pendency in the state court, prior to the suit, of the action of ejectment begun by Laidley against the Central Land Company, and also of the suit in chancery brought in the state court prior to the commencement of the case. It was held by this court that the question "whether the proceedings in any or all of the suits, at law or equity, in the state courts, afforded a defense, either by way of res adjudicata, or because of any control acquired by the state court over the subject matter to this bill in the circuit court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction." "The circuit court of the United States," said Mr. Justice Gray, "cannot, by treating a question of merits as a question of jurisdiction, enable this court (upon a direct appeal on the question of jurisdiction only) to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case." *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 31, 32, 45 L. Ed. 410.

The authority of a city council was held to present questions too important to be settled summarily on a motion to dismiss an appeal. *New Orleans v. New Orleans, etc.*, R. Co., 108 U. S. 15, 27 L. Ed. 635.

Supersedeas.—The propriety or impropriety of an order granting a supersedeas cannot be considered on a motion to dismiss. *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

Form and requisites of record.—Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law

has no jurisdiction to review the judgment below, the writ of error should be dismissed without considering the merits of the case.⁸¹

Illustrative Cases.—Thus, an objection that a third opposition cannot be availed of by a defendant in execution under the Louisiana practice, cannot be properly disposed of on a motion to dismiss.⁸²

Questions of reversal or affirmance appertain to the merits of the controversy, and will not be determined upon a motion to dismiss.⁸³

Writ of Error for Delay.—This court cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. Both parties have the right to be heard on the merits; and one party cannot require the other to come to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits.⁸⁴

Writ of Error to State Court.—On a motion made to dismiss a writ of error to a state court under the 25th section of the judiciary act for want of jurisdiction, the merits of the controversy cannot be revised by this tribunal. The only inquiry here is, whether the record shows that the constitution or a treaty, or a law of the United States, has been violated by the decision of that court.⁸⁵

Finality of Decision.—It is not proper, on a motion to dismiss an appeal from a decree, to decide whether a prior decree was a final decree, or what orders and decrees made by the court below in the cause prior to the making of the decree appealed from can be reviewed here on the appeal. "Those questions can only be considered when that appeal shall come up for hearing on its merits."⁸⁶

Dismissal for Want of Jurisdiction.—A motion to dismiss for want of jurisdiction will be denied where it involves looking into the merits.⁸⁷ This court can-

is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument. *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134.

Effect of discharge in bankruptcy.—On a motion to dismiss an appeal prosecuted in the name of a bankrupt, this court on overruling the motion on the ground that the judgment was rendered after the adjudication in bankruptcy, will not undertake to decide whether his discharge operates to release him from all liability growing out of the judgment. *Hill v. Harding*, 131 U. S., appx. cc, 26 L. Ed. 310.

Suits against state.—A motion in the supreme court of the United States to dismiss an appeal from a circuit court on the ground that a suit against a state officer is in effect a suit against the state within the eleventh amendment of the constitution will be overruled. The objection goes to the merits of the case, but whether it be a question of jurisdiction or not it should be raised by demurrer to the bill, or by other pleadings in the regular progress of the case and not by mo-

tion. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

^{81.} *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. Ed. 385; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119.

^{82.} *New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 32 L. Ed. 607.

^{83.} *New Orleans, etc., R. Co. v. Morgan*, 10 Wall. 256, 262, 19 L. Ed. 892.

^{84.} *Amory v. Amory*, 91 U. S. 356, 23 L. Ed. 436.

^{85.} *New Orleans v. De Armas*, 9 Pet. 224, 9 L. Ed. 109.

Denial of right to remove causes.—Where a motion was made, under the 12th section of the judiciary act, to remove a cause from a state court to the circuit court of the United States, notwithstanding which the state court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the judiciary act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case. *Kanouse v. Martin*, 14 How. 23, 14 L. Ed. 310.

^{86.} *Hill v. Chicago, etc., R. Co.*, 129 U. S. 170, 174, 32 L. Ed. 651.

^{87.} *Lynch v. De Bernal*, 131 U. S., appx. xciv, 19 L. Ed. 395.

When the question of jurisdiction cannot be determined without opening the record and looking into the merits of the controversy, the motion to dismiss for want of jurisdiction will be denied, but

not dismiss a case for want of jurisdiction here because the court below ought to have dismissed it. That is a question which goes to the merits of the appeal.⁸⁸

(3) *Sufficiency of the Motion Papers.*—Motion papers should contain in themselves so much of the record as to enable the court to act understandingly.⁸⁹ When the motion papers are not such that we can pass upon a motion to dismiss without referring to the transcripts on file, which we ought not to be obliged to do, the motion to dismiss will be denied but without prejudice.⁹⁰ A motion by the appellant for leave to dismiss should not be accompanied by papers which are referred to as stating the grounds on which the motion is made.⁹¹

(4) *The Record*—aa. *Necessity for.*—This court cannot hear a motion to dismiss without having the record before it, but that can be procured and presented by the appellee as it is done where the appellant has failed to have the record filed in due time.⁹²

bb. *Printing the Record.*—In many cases the court might decline to hear a motion to dismiss until the record is printed; but that can be done by the appellee if he desires to have a speedy hearing of the matter.⁹³ To get a decision on a motion to dismiss before printing the record, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file.⁹⁴

A motion to dismiss a cross appeal will be denied where the record has not been printed, it appearing from the motion papers that the appellant had pleaded some pleas which were not sustained, and by his other defenses he defeated the claim in part. The court therefore postponed a further consideration of the motion until the hearing on the merits.⁹⁵

How Much to Be Printed.—On motion to dismiss or affirm, it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript.⁹⁶

may be argued upon the hearing of the cause. *Lynch v. De Bernal*, 131 U. S., appx. xciv, 19 L. Ed. 395.

88. *Lanier v. Nash*, 122 U. S. 630, 30 L. Ed. 1244.

89. *Sufficiency of the motion papers.*—*Texas, etc., Cattle Co. v. Scott*, 137 U. S. 436, 34 L. Ed. 730.

90. *Callan v. Bransford*, 139 U. S. 197, 35 L. Ed. 144.

91. *United States v. Griffith*, 141 U. S. 412, 35 L. Ed. 719.

92. *Necessity for the record.*—*Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632.

93. *Printing the record.*—*Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632.

94. *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. Ed. 406, following *St. Louis Nat. Bank v. United States Ins. Co.*, 100 U. S. 43, 25 L. Ed. 547; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. Ed. 1083; *Texas, etc., Cattle Co. v. Scott*, 137 U. S. 436, 34 L. Ed. 730; *Callan v. Bransford*, 139 U. S. 197, 35 L. Ed. 144; *Vicksburg, etc., R. Co. v. Smith*, 122 U. S. 638, 30 L. Ed. 1251.

"This record has not been printed and the motion papers do not present the case in a way to enable us to act understandingly, without reference to the transcript on file. *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. Ed. 406. The motion is therefore overruled, without prejudice to its renewal after the record is printed, or so much thereof as may be necessary for the determination of the

questions of jurisdiction." *Maag v. Hyde*, 122 U. S. 632, 30 L. Ed. 1250.

"We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file." *St. Louis Nat. Bank v. United States Ins. Co.*, 100 U. S. 43, 25 L. Ed. 547.

95. *Mayer v. Walsh*, 108 U. S. 17, 27 L. Ed. 635.

96. *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *Carey v. Houston, etc., R. Co.*, 150 U. S. 170, 179, 37 L. Ed. 1041; *Texas, etc., Cattle Co. v. Scott*, 137 U. S. 436, 34 L. Ed. 730.

"We only require the printing of so much of the record as will enable us to act understandingly without referring to the transcript; and if, in the judgment of counsel opposing the motions, more in that respect was needed, he might have made such specific reference thereto as would have enabled counsel for the moving parties to have supplied it." *Walston v. Nevin*, 128 U. S. 578, 579, 32 L. Ed. 544.

Appellees have printed the original and amended bills; the answers and replications; the opinion of the circuit judge in disposing of the case; the final decree; the two appeals and proceedings thereon; and the assignments of errors in both courts. This was quite sufficient for the

7. **WAIVER OF RIGHT TO DISMISS.**—An appearance does not preclude the party from afterwards moving to dismiss for want of jurisdiction, or upon any other sufficient ground, except the want of a citation.⁹⁷

8. **THE ORDER OF DISMISSAL.**—**Entry of Order.**—Where the appellee in a motion to dismiss an appeal has died since the day the motion was argued, the order to be made will be entered nunc pro tunc as of the date of the argument.⁹⁸

The reversal of an order of dismissal by this court reinstates the proceeding in the trial court as of the date of the order of dismissal.⁹⁹

9. **PROCESS.**—In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.¹

B. Reinstatement.²—1. **DISTINCTION BETWEEN NEW APPEAL AND REINSTATEMENT.**—The difference between a new appeal, and a reinstatement of the old appeal, after a dismissal from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators or sureties in an admiralty appeal.³

2. **DISCRETION OF COURT.**—A motion to reinstate an appeal is addressed to the sound discretion of the court, and care will always be taken, in granting the rule, that no injustice is done to the opposite party.⁴

3. **WHEN ALLOWED.**—**In General.**—Where a writ of error is dismissed on motion because the judgment is not properly described in the writ of error; or because the bond is given to a person who is not a party to the judgment; or because the citation issued is issued to a person who is not a party, leave will be given to counsel for the plaintiffs to move for its reinstatement during the present term.⁵

Dismissed by Mistake.—This court possesses the power to reinstate any cause dismissed by a mistake.⁶

Want of Appearance.—A motion to reinstate an appeal, which had been dismissed under Rule 16, will be denied, where the appellant has not excused himself for his default.⁷

Appeal Dismissed on Irregular Motion.—An appeal dismissed upon a motion, the notice of which was insufficient and irregular in that it designated no time for the hearing, will be reinstated on motion.⁸

purposes of the motion. *Carey v. Houston, etc.*, 150 U. S. 170, 179, 37 L. Ed. 1041.

97. **Waiver of right to dismiss.**—*Carroll v. Dorsey*, 20 How. 204, 207, 15 L. Ed. 803; *United States v. Yates*, 6 How. 606, 12 L. Ed. 575.

98. **The order of dismissal.**—*Richardson v. Green*, 130 U. S. 104, 32 L. Ed. 872.

99. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 542, 46 L. Ed. 315.

1. **Process.**—Rule No. 24, § 5, 21 How. xiii.

2. **Reinstatement.**—The various particular sections throughout this title must be consulted for exemplifications of this question in specific cases. For example, reinstatement of appeals dismissed for want of the required amount is treated in this title, vol. 1, p. 919.

3. **Distinction between new appeal and reinstatement.**—*The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531.

4. **Discretion of court.**—*Deming's Appeal*, 10 Wall. 251, 19 L. Ed. 893; *Gwin*

v. Breedlove, 15 Pet. 284, 10 L. Ed. 740.

5. **When allowed.**—*Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879, citing *Smyth v. Strader*, 12 How. 327, 13 L. Ed. 1008.

6. **Reinstatement of appeal dismissed by mistake.**—*The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531.

Where a dismissal is ordered on a mistaken assumption of fact, an application for rehearing will be granted and the judgments of dismissal set aside, and the case decided upon the arguments already made by counsel for both parties. *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 248, 50 L. Ed. 1013.

7. *James v. McCormack*, 105 U. S. 265, 26 L. Ed. 1044. In this case, when the appellant was called and his appeal dismissed, the case had been nearly three years on the docket of this court. But he had no brief on file, and was not present, either in person or by counsel.

8. **Appeal dismissed on irregular motion.**—*Glenny v. Langdon*, 94 U. S. 604, 24 L. Ed. 237.

4. **STIPULATION OF PARTIES.**—Where an appeal had been taken and dismissed, and a motion made to reinstate the case, and a stipulation to that effect signed and filed by the parties, the motion will be denied because consent cannot give jurisdiction where the law does not.⁹

5. **AT WHAT STAGE OF PROCEEDINGS.**—An appeal may be reinstated at a term subsequent to the term at which it was dismissed, if sufficient cause be shown.¹⁰

Hence a cause dismissed by mistake may be reinstated at a subsequent term.¹¹

Laches.—But a motion to reinstate may be denied on the ground of laches; notwithstanding consent of the other side.¹²

Amendment and Reinstatement.—After a case has been dismissed for want of jurisdiction, the pleadings having been technically defective, the court will not, at a subsequent term, allow them to be amended, and the case to be reinstated on the docket. It would be, in effect, a reversal of the former decree, after the case had been finally disposed of in this court. There will be no difficulty in making the amendment in the circuit court, in such a case, if that court shall see fit, in its discretion, to allow it to be done, and the cause may then be reheard there; and on a decree, newly rendered, may be brought up on appeal to this court; or a decree may be there rendered, by consent of parties, in order to bring up the case without delay.¹³

6. **THE MOTION.—Time of Making Motion.**—While as a general rule, the motion to reinstate must be made at the same term at which the motion to dismiss was granted, the circumstances may afford a sufficient excuse for the delay.¹⁴

7. **REVIEW OF REFUSAL TO REINSTATE.**—The refusal of the court below to reinstate a cause of which has been legally dismissed, is no ground for a writ of error. The nominal plaintiff may dismiss a suit brought in his name by a creditor who has not an assignment of the cause of action.¹⁵ Nor is it ground for a writ of error that the judge below refused to reinstate a cause after nonsuit.¹⁶

9. **Stipulation of parties.**—*Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143.

10. **At what stage of proceedings.**—*Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721; *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531.

An appeal from California dismissed at the last term for apparent want of a citation, now reinstated, it appearing that a citation had in fact been signed, served and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence. *Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721, citing *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531.

11. *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.

12. *Deming's Appeal*, 10 Wall. 251, 19 L. Ed. 893.

13. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502.

Want of finality in judgment.—Where a common-law case was dismissed at the last term for want of jurisdiction (the record showing that no final judgment was given in the court below), an affidavit setting forth that the final judgment was accidentally omitted from the record,

and the production of a correct record, are not sufficient to sustain a motion to annul the order of dismissal, and reinstate the case upon the docket. After the judgment of this court was passed upon the case, and the term was closed, the function of the writ of error was over, and it cannot now be revived. *Rice v. Minnesota*, etc., R. Co., 21 How. 82, 16 L. Ed. 31, distinguishing *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531; *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731.

14. **The motion.**—*United States v. Vigil*, 10 Wall. 423, 19 L. Ed. 954.

Cause dismissed for want of jurisdictional amount.—Where a cause is dismissed because the value of the matter in dispute did not exceed the jurisdictional amount, a motion to reinstate accompanied by affidavits not filed until the expiration of more than three months from the time the court entered the order of dismissal, comes too late. Unless the parties act promptly after they have actual notice of what is required of them, they will not be heard. *Johnson v. Wilkins*, 118 U. S. 228, 30 L. Ed. 210.

15. **Review of refusal to reinstate.**—*Welch v. Mandeville*, 7 Cranch 152, 3 L. Ed. 299.

16. *United States v. Evans*, 5 Cranch 280, 3 L. Ed. 101.

8. **MANDAMUS.—In General.**—Mandamus will lie to compel an inferior court to reinstate an appeal, on the ground that mandamus lies where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion.¹⁷

But a writ of mandamus will not lie to compel the reinstatement of a case by the court of appeals of the District of Columbia where such appeal has been dismissed for lack of jurisdiction, even though such decree of dismissal cannot be reviewed on appeal or writ of error.¹⁸

XV. Presumptions on Appeal.¹⁹

A. In Support of Proceedings Below—1. **IN GENERAL.**—The rule is axiomatic that this court will presume that all things were rightfully and regularly done by the court below, and that the parties were fully heard upon all the matters properly in judgment,²⁰ unless the contrary clearly and distinctly appears by

17. **Mandamus.**—In *re Parker*, 131 U. S. 221, 33 L. Ed. 123, citing *Ex parte Parker*, 120 U. S. 737, 30 L. Ed. 818; *Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135; In *re Chateaugay Co.*, 128 U. S. 544, 557, 32 L. Ed. 508, and distinguishing *Ex parte Brown*, 116 U. S. 401, 29 L. Ed. 676.

In the case of *Ex parte Bradstreet*, 7 Pet. 634, 647, 18 L. Ed. 810, this court decided, Marshall, C. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars, and that the court in such case will issue the writ to a circuit court or a district court exercising circuit court powers, in a case where the subordinate court had improperly dismissed the case, requiring the court to reinstate the case and to proceed to try and adjudge the issues between the parties. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270, 21 L. Ed. 493.

Mandamus will lie to compel an inferior court to reinstate an appeal, although the court that dismissed the appeal is composed of different members from those by whom the appeal was dismissed. In *re Parker*, 131 U. S. 221, 33 L. Ed. 123, citing *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521.

Jurisdiction over territorial courts.—It has been held that a writ of mandamus would lie from this court to the supreme court of the territory to reinstate an appeal to that court. In *re Parker*, 131 U. S. 221, 33 L. Ed. 123, distinguishing *Ex parte Brown*, 116 U. S. 401, 29 L. Ed. 676. 18. In *re Key*, 189 U. S. 84, 47 L. Ed. 720.

19. The various specific titles should also be consulted in this connection.

20. **In support of proceedings below in general.**—*Lutz v. Linthicum*, 8 Pet. 165, 180, 8 L. Ed. 904; *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96; *Carson v. Hood*, 4 Dall. 108, 1 L. Ed. 762; *Collins v. Riley*, 104 U. S. 322, 26 L. Ed. 752; *Bagnell v. Broderick*, 13 Pet. 436, 10 L.

Ed. 235; *Boley v. Griswold*, 20 Wall. 486, 22 L. Ed. 375; *Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713; *Jackson v. Huntington*, 5 Pet. 402, 8 L. Ed. 170.

When a case is heard in an appellate court on a writ of error, it is a principle equally well settled in law and necessary in the administration of justice, that only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court. *Loring v. Frue*, 104 U. S. 223, 224, 26 L. Ed. 713.

This court is bound to presume that the court below will do whatever may be right in the premises, if the subject is properly brought before it. *Wylie v. Coxe*, 14 How. 1, 14 L. Ed. 301.

This court will presume that the action of the trial court was in accordance with the law, in the absence of a bill of exceptions to negative this presumption. *Loring v. Frue*, 104 U. S. 225, 26 L. Ed. 713; *Royal Ins. Co. v. Miller*, 199 U. S. 353, 359, 50 L. Ed. 226.

Averments not contradicted on the record are presumed correct, in absence of a showing to the contrary. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

There is always a presumption in favor of that which has once been decided, and that presumption is often relied upon to justify an appellate court in sustaining the decision below. *Morgan v. Daniels*, 153 U. S. 120, 123, 38 L. Ed. 657.

Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers. *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Voorhees v. Bank*, 10 Pet. 449, 9 L. Ed. 490; *Nations v. Johnson*, 24 How. 195, 203, 16 L. Ed. 628.

When bill of exceptions regularly taken.—Where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record. *United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

Although the certificate of the attorney general is a prerequisite to the recovery

the record.²¹

Illustrative Cases.—And this rule has been applied to sales of a decedent's estate by order of court,²² to the abrogation of limitations in a decree of foreclosure as to the time for presentation of claims to the receiver,²³ to judgments in ejectment,²⁴ to decrees in admiralty²⁵ especially where two lower courts have found the same way on questions of fact,²⁶ to allowances to receivers,²⁷

of an extra compensation by the district attorney under the Revised Statutes, § 365, yet this court will assume that the allowance was made in such a way as to secure to the plaintiff the compensation to which he was entitled, although there is in the record no finding that the particular certificate was ever made, where on the other hand there is nothing to suggest that it was not made, and where neither in the assignment of errors made when the case was taken to the court of appeals, nor in those filed when the case was brought here, is there a suggestion that any certificate is lacking or deficient. *United States v. Winston*, 170 U. S. 522, 42 L. Ed. 1130, distinguishing *United States v. Crosthwaite*, 168 U. S. 375, 42 L. Ed. 507.

21. *Settlemyer v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110.

"Although the presumption of law is in favor of the correctness of the court below where no reasons appear, yet in this case, the record itself shows the error. If there was any fact which made the copy of the bond inadmissible, it ought to have been shown by the defendants, and set forth in the exception." *United States v. Wilkinson*, 12 How. 246, 13 L. Ed. 974.

22. **Judicial sales.**—Where a county court having jurisdiction to authorize a sale of a decedent's estate for his debts does authorize it, and the sale is made, the sale must be presumed in this court to have been regularly made. In the absence of fraud, the question of its propriety is not open to examination otherwise than in an appellate court in a proceeding had directly for that purpose. *Nash v. Williams*, 20 Wall. 226, 22 L. Ed. 254, citing *McNitt v. Turner*, 16 Wall. 352, 366, 21 L. Ed. 341.

23. **Time for presentation of claims to a receiver.**—Where the record does not show on what grounds the court below acted, in abrogating a six-months' limitation in a decree of foreclosure and sale made by the circuit court, on a railroad mortgage, providing that the purchaser should pay off all claims incurred by the receiver, and that all such claims should be barred unless presented within six months after the confirmation of the sale, the presumption must be that it properly exercised its discretion. *Olcott v. Headrick*, 141 U. S. 543, 35 L. Ed. 851.

24. **Judgment in ejectment.**—This court will presume that the premises awarded in the judgment rendered in an action of

ejectment are the same as those described in the complaint. *Morgan v. Eggers*, 127 U. S. 63, 32 L. Ed. 56.

25. **Decrees in admiralty presumed correct.**—The Schooner *S. B. Wheeler*, 20 Wall. 385, 22 L. Ed. 385; The Ship *Marcellus*, 1 Black 414, 17 L. Ed. 217.

In appeals to this court from final decrees rendered in the circuit court in admiralty cases, considerable weight should be given to the decree of the subordinate court, and hence the well-settled rule is that the burden is on the appellant to show that the decree of the subordinate court is erroneous. The *Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; The Ship *Potomac*, 2 Black 581, 17 L. Ed. 263.

But it is a mistake to suppose that this court will not re-examine the whole testimony in the case, as the express requirement of the act of congress is that the supreme court shall hear and determine such appeals, and it is as much the duty of the court to reverse the decree from which the appeal is taken for error of fact, if clearly established, as for error of law. The *Baltimore*, 8 Wall. 377, 19 L. Ed. 463; The *Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; The *Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; The *City of Hartford* and the *Unit*, 97 U. S. 323, 328, 24 L. Ed. 930.

26. **Concurrent findings of admiralty courts.**—See the title APPEAL AND ERROR, vol. 1, p. 1012.

The doctrine is well settled that when in admiralty cases involving questions of fact alone, the district and circuit courts have both found in one way, every presumption is in favor of the decrees, and that there will be no reversal here unless for manifest error. The *Schooner S. B. Wheeler*, 20 Wall. 385, 22 L. Ed. 385.

Where the district and the circuit court concur in their view of facts in a collision case in admiralty, the case will come before this court with every presumption in favor of the correctness of the decision appealed from. The *Quickstep*, 9 Wall. 665, 19 L. Ed. 767.

27. **Allowances to receivers.**—Like all questions of costs in courts of equity, allowances to receivers are largely discretionary, and the action of the court below is treated as presumptively correct, "since it has far better means of knowing what is just and reasonable than an appellate court can have," as was remarked by Mr. Justice Bradley in *Trustees v. Greenough*, 105 U. S. 527, 537, 26 L. Ed. 1157; *Stuart v. Boulware*, 133 U. S. 78, 82, 33 L. Ed. 568.

to orders granting rehearings,²⁸ and to orders granting change of venue.²⁹

The amount of the judgment below is attended with the same presumption of correctness as other matters.³⁰

Arbitrators as well as courts are presumed to decide correctly until the contrary appears, and if the party desires that the decision of such a tribunal shall be re-examined by an appellate court, he must see that the means for such a review is embodied in the record.³¹ Accordingly it is presumed that an award made is correctly made,³² and that the court was warranted in entering judgment on the award.³³

The house of representatives is not presumed to have issued a warrant of arrest without probable cause, where there is nothing on the face of the record, from which it can appear on what evidence it was issued.³⁴

Compliance with Uniformity Act.—It will be presumed by this court that a lower federal court has complied with a practice act in a state.³⁵

28. Where a petition and motion for a rehearing is filed at the term at which the decree is rendered, and at the succeeding term an order is entered granting the rehearing, but the record contains no order showing the continuance of the motion and a petition for rehearing to the succeeding term, the presumption must be indulged, "in support of the action of a court having jurisdiction of the parties and the subject matter—nothing to the contrary affirmatively appearing—that the facts existed which justified its action; and, therefore, that the court granted the application for a rehearing at the term at which the first decree was rendered. *Stockton v. Bishop*, 4 How. 155, 167, 11 L. Ed. 918; *Townsend v. Jemison*, 7 How. 706, 718, 12 L. Ed. 880." *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 394, 35 L. Ed. 786, reaffirmed in *Fowler v. Equitable Trust Co.*, 141 U. S. 408, 35 L. Ed. 793.

29. Change of venue.—Where a warrant for the removal of a defendant to a district in another state for trial is issued by the district judge after a finding of probable cause by the commissioner and its approval by the district judge, the question as to whether or not there was sufficient evidence of probable cause is not before the supreme court upon an appeal from the judgment of the circuit court dismissing a petition for habeas corpus, but, in the absence of the evidence taken before the commissioner and approved by the district judge, it will be assumed that their finding of probable cause was sustained by the evidence. *Greene v. Kenkel*, 183 U. S. 249, 46 L. Ed. 177; *Green v. MacDougall*, 199 U. S. 601, 50 L. Ed. 328.

30. In respect to amount of judgment.—"We must presume that the judgment of the circuit court, in respect to its amount, as well as in other respects, was right, unless the contrary is shown. *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382; *Townsend v. Jemison*, 7 How. 706, 714, 12 L. Ed. 880; *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263." *Sturges v.*

Carter, 114 U. S. 511, 522, 29 L. Ed. 240.

31. *Reedy v. Scott*, 23 Wall. 352, 367, 23 L. Ed. 109.

32. Where in a pending suit a patentee and a party charged with infringing agree to refer the question of infringement to a third person as arbitrator, and to be bound by his award, this court will presume, until the contrary is shown, that an award made is correctly made, and must so presume if, disregarding the award, the complainant goes on with his suit, and the case on coming here, comes with a record that exhibits neither the patent of the complainant nor any description of the machine which is alleged to infringe it. *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109.

33. Judgment on award.—Where it does not appear from the record that the defendant had refused or failed to do everything which the law required him to perform to entitle him to the judgment of the court, this court must presume that no delinquency on his part was shown by the plaintiff; "that if it was necessary for him to prepare and tender the deed such as the law required, he did so to the satisfaction of the court. If he failed to do that which would warrant the court in entering judgment on the award, it was the duty of the plaintiff to have shown this as cause against entering the judgment, and to have spread all the facts upon the record, which might enable this court to decide whether the court below acted correctly or not." *Thornton v. Carson*, 7 Cranch 596, 601, 3 L. Ed. 451, 452.

34. National house of representatives.—*Anderson v. Dunn*, 6 Wheat. 204, 234, 5 L. Ed. 242.

35. Reference.—Where under the practice act in a state, an action cannot be referred without the written consent of the parties, and the cause was referred by consent, this court will assume that a consent was given in such form as to authorize what was done under it. *Boogher v. New York Life Ins. Co.*, 103 U. S. 90, 26 L. Ed. 310.

Execution of Mandate.—Where no application has been made to the circuit court to carry its decree into execution, a motion for a mandate from the court below will be denied, because this court is bound to presume that the court below will do whatever may be right in the premises, if the subject is properly brought before it.³⁶

Construction of Lower Court's Findings.—In reviewing a judgment, it is not proper to place any narrow, strained or strict construction on the language with which the court describes its findings of fact, in order to sustain the contention that they do not support the conclusions of law and the judgment. On the contrary, if any reasonable and fair construction thereof will sustain the judgment, such construction should be recognized and adopted by the appellate court as the true construction.³⁷

2. **DUTY OF PLAINTIFF IN ERROR TO SHOW ERROR.**—Error must appear affirmatively before there can be a reversal. It is not to be presumed, and will not be inferred from a doubtful statement in the record;³⁸ indeed, the presumption is the other way,³⁹ and it lies on the plaintiff in error to show it.⁴⁰

Sufficiency of Appellant's Showing.—The rule is also well settled that only such errors as are plainly made to appear can be grounds of reversal;⁴¹

36. *Wyle v. Cox*, 14 How. 1, 14 L. Ed. 301.

37. *Casement & Co. v. Brown*, 148 U. S. 615, 625, 37 L. Ed. 582.

38. **Duty of plaintiff in error to show error.**—*Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306, 51 L. Ed. 811; *Bechtel v. United States*, 101 U. S. 597, 601, 25 L. Ed. 1019; *Boley v. Griswold*, 20 Wall. 486, 22 L. Ed. 375; *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; *Wiggins v. Burkham*, 10 Wall. 129, 132, 19 L. Ed. 884.

We can only reverse a judgment for error actually appearing. *Jones v. Grover and Baker Sewing Machine Co.*, 131 U. S., appx. cl, 24 L. Ed. 925.

When a case is heard in an appellate court on a writ of error, it is a principle equally well settled in law and necessary in the administration of justice, that only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court. *Loring v. Frue*, 104 U. S. 223, 224, 26 L. Ed. 713.

This court can only reverse a judgment for error actually appearing. Every presumption is in favor of the correctness of the ruling below, and until this court knows from the record what a paper offered in evidence but rejected was, we cannot say that the court improperly excluded it. *Jones v. Grover and Baker Sewing Machine Co.*, 131 U. S., appx. cl, 24 L. Ed. 925.

The order of court refusing the complainant the privilege of amending his bill after a demurrer thereto has been sustained, cannot be reviewed here, especially if the record does not show what amendment he desired to make. Error must be shown affirmatively. It cannot be presumed. *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815.

39. *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116.

We will not indulge in any presumptions unfavorable to the judgment and for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 25, 41 L. Ed. 327.

Where the bill of exceptions does not purport to set out all the evidence given in a case below, and it does not appear what other evidence, if any, was there given, a court of error will not reverse for an instruction whose correctness or want of it depends upon the state of the evidence; the terms of the instruction not necessarily implying that there were not facts in proof bearing upon the subject besides those of which the instruction was expressly predicated; and error not being matter to be presumed, but contrariwise. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884.

40. *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235; *Carroll v. Peake*, 1 Pet. 18, 23, 7 L. Ed. 34.

Where the appeal of cases of admiralty and maritime jurisdiction involve questions of fact, the burden is on the appellant to show that the decree in the subordinate court was erroneous. *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463.

41. *Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713.

Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. *The Schooner S. B. Wheeler*, 20 Wall. 385, 386, 22 L. Ed. 385.

Where it appears from the whole record that the judgment below in favor of the plaintiff is probably correct, the judgment should not be reversed on a

in other words, to secure a reversal, the plaintiff in error must always make out his case clearly and satisfactorily, as every reasonable intendment should be in favor of a judgment already rendered.⁴² A record showing that the decision below may possibly be erroneous, or raising a doubt upon conflicting evidence, is not enough to reverse it,⁴³ and where it is of a kind that ought not to carry a reversal of the whole judgment because of it, he should in that case show the amount of the error and extent to which it affected the judgment.⁴⁴ Nor will this court reverse a decree, merely upon a doubt created by conflicting testimony as to damages.⁴⁵

3. AS TO INSTRUCTIONS.—**In General.**—Before this court can adjudge that the trial court erred in instructing the jury, error must clearly and affirmatively appear on the record,⁴⁶ as where it is contended that there was no evidence to support the charge.⁴⁷

Where the record does not contain the whole charge, it will be presumed that the court properly charged upon every branch of the case, and it will be presumed that further instructions were given to correctly modify erroneous instructions shown by the record, if it is very clear that these could have been so corrected and the record is incomplete.⁴⁸

writ of error. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

To obtain a reversal of a judgment it is necessary that the fact, upon which such reversal is claimed, should appear, from the record, sufficiently to be passed upon. *New York, etc., Min. Co. v. Fraser*, 130 U. S. 611, 620, 32 L. Ed. 1031.

Where there is nothing in the bill of exceptions which enables a revising court to say that questions objected to have exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, no error is shown. *Nailor v. Williams*, 8 Wall. 107, 19 L. Ed. 348.

42. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880, citing *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

It is incumbent on a plaintiff in error to make out an alleged error, clearly and satisfactorily. Every reasonable intendment should be in favor of a judgment of a court. *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

43. *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

44. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 24, 41 L. Ed. 327.

45. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 16 L. Ed. 433.

This court will not reverse a decree of the circuit court, merely upon a doubt created by conflicting testimony. *Morewood v. Enequist*, 23 How. 491, 16 L. Ed. 516.

46. **Presumptions as to the instructions.**—*Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884; *Barrow v. Reab*, 9 How. 366, 13 L. Ed. 177; *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100.

"The presumptions are all in favor of the rulings of the trial court. And before it can be adjudged that it erred in instructing that the plaintiff had failed in its proof of title, the record must affirm-

atively show that the title was in fact proved, and that, as we have seen, includes proof that the lands were not within the exceptions named in the statute." *Corinne Mill Canal, etc., Co. v. Johnson*, 156 U. S. 574, 577, 39 L. Ed. 537.

47. This court will assume that there was evidence tending to show the facts set out in the charge to the jury where the bill of exceptions, not purporting to contain all the evidence before the jury, itself states that there was evidence tending to show the facts set forth in the charge. *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. Ed. 111; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525.

Where the bill of exceptions does not embody all that a witness said, this court, according to a well-known rule, under such condition of the record, is bound to presume that there was that in the testimony which justified the instructions. *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258.

48. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. Ed. 1046.

In the absence from the record of the entire charge, this court will presume that the law was fully given by the court to the jury, and that it was correctly stated, from the fact that the plaintiffs in error took no exceptions to it. *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892.

Where a complaint is made that the court failed to give defendant's requests for instructions, but the instructions actually given by the court are not disclosed by the record, this court will presume that such instructions covered the defendant's requests so far as they stated the law correctly. This is especially true where no exception is taken to the action of the court in refusing or in giving instructions. *Andrews v. United States*, 162 U. S. 420, 40 L. Ed. 1023, citing *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892.

A request for instructions, being necessary to entitle the accepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions.⁴⁹

Compliance with Statutes.—Where a statute provides that the jury, when it retires shall take the instructions to its room, it is too much to expect this court to conjecture that they were not taken, in the absence of any such statement in the record.⁵⁰

4. AS TO EVIDENCE—*a. Admission or Rejection.*—This court will presume that the lower court properly admitted or excluded evidence, unless the contrary is made to appear clearly from the record;⁵¹ for example, the refusal of the trial court to admit evidence of a conversation will not be presumed to be erroneous,⁵² and the rule is especially applicable to all kinds of documentary evidence,⁵³ such as letters.⁵⁴

Further Proof in Admiralty Proceedings.—Thus, in the absence of any formal order or objection appearing on the record, this court will presume that further proof in an admiralty case was introduced by consent of parties.⁵⁵

b. Loss or Destruction of Documentary Evidence.—Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents.⁵⁶

c. Execution and Proof of Documents.—If the execution of an important exhibit of the complainant's be not admitted by the defendant in his answer, who calls upon the complainant to make full proof thereof in the court below, this court will not presume that any other proof was made than appears in the transcript of the record.⁵⁷

d. Witnesses.—It is incumbent on those who seek to show that the examination of a witness has been improperly rejected, to establish their right to have the evidence admitted; for the court will be presumed to have acted correctly, until the contrary is established.⁵⁸ But where the trial court rejects oral proof

49. Texas, etc., R. Co. v. Volk, 151 U. S. 73, 78, 38 L. Ed. 78; Goldsby v. United States, 160 U. S. 70, 40 L. Ed. 343.

50. That jury were allowed to take instructions with them on retiring, see Cunningham v. Springer, 204 U. S. 647, 657, 51 L. Ed. 662.

51. Admission or rejection of evidence presumed proper.—Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535.

If it is not specified wherein evidence offered is improper and irrelevant to prove the issue, we are bound to presume that the court committed no error in this respect. Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 128, 35 L. Ed. 961; Royal Ins. Co. v. Miller, 199 U. S. 353, 359, 50 L. Ed. 226.

52. Conversations with plaintiff's agent.—Home Benefit Ass'n v. Sargent, 142 U. S. 691, 35 L. Ed. 1160.

53. In accordance with the general rule that every presumption is in favor of the correctness of the ruling below, unless this court knows what a paper offered in evidence but excluded is, it cannot say that the court below improperly excluded it. Jones v. Grover and Baker Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925.

Model and plats.—This court will not presume that a model was incorrectly rejected, where there is no copy of the model, no description of it, and the witness producing it does not swear to its correctness. Patrick v. Graham, 132 U. S. 627, 630, 33 L. Ed. 460.

54. Letters.—Hoyt v. Hanbury, 128 U. S. 584, 32 L. Ed. 565.

55. Further proof in admiralty.—The Pizarro, 2 Wheat. 227, 4 L. Ed. 226. See the title ADMIRALTY, vol. 1, p. 197.

Where further evidence was taken after the appeal to this court was entered, under the authority of an act of congress passed in 1803 (2 Stat. at L. 244), the issuing of the commission by the clerk of the circuit court, and the uniting by both parties in its execution, furnish a presumption that the proper order was given. If not, the parties have waived all objection. Rich v. Lambert, 12 How. 347, 3 L. Ed. 1017.

56. Loss or destruction of documentary evidence.—Carroll v. Peake, 1 Pet. 18, 7 L. Ed. 34.

57. Execution and proof of documents.—Drummond v. Magruder & Co., 9 Cranch 122, 3 L. Ed. 677.

58. Witnesses.—Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535.

and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.⁵⁹

e. *Sufficiency of Evidence*.—Where there is nothing in the record to show that there was a lack of evidence to support the verdict and judgment, the legal presumption is that there was.⁶⁰

5. AS TO JURISDICTION⁶¹—a. *Of Trial Court*—(1) *Distinction between Courts of General and Limited Jurisdiction*.—The true line of distinction between courts of limited jurisdiction, where the record must show that jurisdiction was rightfully exercised; and courts of general jurisdiction, where the record being silent upon the subject, it will be presumed that jurisdiction existed is this; a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description: there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities.⁶²

(2) *Courts of General Jurisdiction*.—**In General**.—Where jurisdiction is assumed by a court possessing general jurisdiction, it will be presumed that all facts necessary to vest jurisdiction existed.⁶³

Where a case has been decided in an inferior court of a state on a single point which would give this court jurisdiction, it will not be presumed here that the supreme court of the state decided it on some other ground not found in the record, or suggested in the latter court.⁶⁴ As for example, where a cause is removed from a state to federal court, that the citizenship requisite to give the court jurisdiction was shown,⁶⁵ that the court had jurisdiction to order a sale of

59. *Scotland County v. Hill*, 112 U. S. 183, 28 L. Ed. 692.

60. **Sufficiency of evidence**.—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485.

In the absence of a request to direct a verdict, this court must assume that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced from the evidence in the case, especially where the bill of exceptions filed in the record does not purport to contain all the evidence. *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746.

Legality of call on stockholders.—Where in an action by a corporation against a stockholder to recover an assessment made by such corporation in pursuance of its charter and by-laws upon the defendant's subscription to its stock, the bill of exceptions contains nothing to indicate that the call for assessments was not properly made, and does not say that it contained all the evidence in the case, this court is at liberty, if the circumstances of the case require it, to infer that there was other evidence to supply any defect in respect to the legality of the call. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U.

S. 221, 47 L. Ed. 782, citing *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *Gardner v. Babcock*, 3 Wall. 240, 18 L. Ed. 31.

61. See the title JURISDICTION.

62. **Distinction between courts of general and limited jurisdiction**.—*Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

63. **Courts of general jurisdiction**.—*Pennington v. Gibson*, 16 How. 65, 14 L. Ed. 847.

64. *Keith v. Clark*, 97 U. S. 454, 457, 24 L. Ed. 1071.

Jurisdiction upon special counts.—Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial. *Bank v. Moss*, 6 How. 31, 12 L. Ed. 331.

65. **Removal of causes**.—Where the statutes of the United States authorizing a removal into the circuit court of the United States, of a cause brought originally in the courts of a state, require that the parties to the suit shall be citizens of

a decedent's estate,⁶⁶ or a sale under a foreclosure.⁶⁷

Limitation of General Rule.—It is true that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record gives the evidence or makes an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred.⁶⁸

(3) *Courts of Limited or Special Jurisdiction.*—There is no presumption in favor of the jurisdiction of a court of inferior or limited jurisdiction,⁶⁹ nor does any presumption exist in favor of the jurisdiction of even a court of general jurisdiction, where it is exercising a special statutory authority.⁷⁰ But it is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority.⁷¹

Jurisdiction of Circuit Court.—Unless it affirmatively appears from the

different states, and where a cause has been removed from a state court to a circuit court, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the circuit court, admit that the cause was brought to the circuit court by transfer from the state court, in accordance with the statutes in such case provided, and—being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed—in such case this court will in the absence of all proof to the contrary, presume that the citizenship requisite to give the circuit court jurisdiction was shown in some proper manner; though it be not apparent on the mere pleadings, *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823. See the title REMOVAL OF CAUSES.

66. By a law of Michigan, passed in 1818, the county courts had power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies. Held, that it was for that court to decide upon the existence of the facts which gave jurisdiction; and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved. *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

67. **Seizure and sale in Louisiana.**—For example, wherever a judgment is given by a court having jurisdiction of

the parties and of the subject matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. Therefore, the circuit court of the United States, having jurisdiction over the parties and subject matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts. *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655, citing *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

68. *Settlemier v. Sullivan*, 97 U. S. 444, 448, 24 L. Ed. 1110.

69. **Courts of limited or special jurisdiction.**—*Den v. Turner*, 9 Wheat. 541, 549, 6 L. Ed. 155.

Therefore, where the jurisdiction is special, the judgment of such court may be inquired into whether the special authority has been strictly pursued. There is no limit to this revising except the jurisdiction and judgment of the court. *Williamson v. Berry*, 8 How. 495, 565, 12 L. Ed. 1170; *Williamson v. Ball*, 8 How. 566, 12 L. Ed. 1200.

70. *Williamson v. Berry*, 8 How. 495, 12 L. Ed. 1170; *Williamson v. Ball*, 8 How. 566, 12 L. Ed. 1200; *Williamson v. Irish Presbyterian Congregation*, 8 How. 565, 12 L. Ed. 1200.

71. *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34.

record in this court that the circuit court had jurisdiction, the presumption, upon appeal or writ of error, is that the court below was without jurisdiction.⁷²

(4) *Service of Process*.—The result of the authorities is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid.⁷³ But where the record shows service upon one person in the case, and not upon another,⁷⁴ or where it appears that the summons was served at a particular place and there is no averment of any other service,⁷⁵ such defects cannot be supplied by presumption.

b. *Of Appellate Court*.—On a writ of error, many things will always be presumed or intended, in law as well as fact, to have happened, which are not *ipsisimis verbis* or substantively so set out on the record, but are plainly to be inferred to have happened from what is set out.⁷⁶

Allowance of Appeal, Bond and Bill of Exceptions.—It will be presumed in this court that an appeal was actually allowed,⁷⁷ and that it was not allowed until after the judgment was rendered and entered;⁷⁸ that a bond was taken,⁷⁹ that it was not approved until after the judgment was rendered and entered,⁸⁰

72. *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623, citing *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Bors v. Preston*, 111 U. S. 252, 28 L. Ed. 419; *Continental Life Ins. Co. v. Rhoades*, 119 U. S. 237, 30 L. Ed. 380.

Where it does not appear that the circuit court had jurisdiction of the action, this court will presume that that court was without jurisdiction. And it will be for the court below to determine whether an amendment of the pleadings upon the point of jurisdiction will be proper. *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623.

73. **Service of process.**—*Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 270, 29 L. Ed. 892.

74. Where the record shows service upon one person in the case, and not upon another, in the absence of any finding of the court that other service was made, or the finding of a fact from which other service must necessarily be inferred, none will be presumed. Other service will not be presumed from its assumption in a recital in the entry of a default. *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110.

75. So, also, where it appears from the return of the officer or the proof of service that the summons was served at a particular place and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a particular person other than the defendant, it will not be presumed in the silence of the record, that it was made

upon the defendant also. *Galpin v. Page*, 18 Wall 350, 366, 21 L. Ed. 959.

76. **Of appellate court.**—*Townsend v. Jemison*, 7 How. 706, 719, 12 L. Ed. 880, citing *Stockton v. Bishop*, 4 How. 135, 166, 11 L. Ed. 918.

So in *Stockton v. Bishop*, 4 How. 153, 167, 11 L. Ed. 918, in a writ of error, where a verdict appeared and a judgment, but not for any particular sum, with several other important omissions, this court, by Catron, J., remarked: "Still we are bound to presume, in favor of proceedings in a court having jurisdiction of the parties and subject matter, that justice was administered in the ordinary form when so much appears as is found in this imperfect record." *Townsend v. Jemison*, 7 How. 706, 719, 12 L. Ed. 880.

77. **Presumption that appeal was allowed.**—*Washington, etc., R. Co. v. Bradleys*, 7 Wall. 575, 19 L. Ed. 274.

78. *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

79. **Bond taken as the statute requires.**—*Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97.

80. **Approval of bond.**—Where it is objected that this court has no jurisdiction, because the writ of error, the citation and the bond all of them bear date the day before the judgment sought to be reviewed was rendered, but the record distinctly states that after such judgment was rendered, the plaintiff presented to the court a writ of error, a citation and a bond, and that the court allowed the writ of error, and the citation was signed by the judge, and the bond was approved and ordered to be filed as part of the record, this court must presume that all these things, including the filing, took place after the

and that it is sufficient in amount;⁸¹ that the citation was properly signed and by the proper judge;⁸² that the recitals in the bill of exceptions are correct,⁸³ and that it was properly signed.⁸⁴ All material evidence is presumed to have been included in the bill of exceptions, or so much as was necessary.⁸⁵ This court cannot presume that any material part of the evidence was omitted from the bill of exceptions. It is conclusive upon this court.⁸⁶

Statement of Facts.—Where a case comes up on writ of error to this court from the circuit court for the district of Louisiana, upon a statement of facts by the judge, if the judge files the statement after the trial, *nunc pro tunc*, it is but reasonable to presume that he had been so requested at the trial by the counsel.⁸⁷

6. AS TO THE PLEADINGS—*a. In General.*—Although necessary allegations in a pleading, cannot be supplied by presumption,⁸⁸ yet where only one count in a declaration is good,⁸⁹ or where a count in a declaration is defective,⁹⁰ the presumption is that the judgment was based on the good counts, and this is the rule in criminal cases.⁹¹

In a case having long and complicated pleadings, where a second count of a declaration has been left by the withdrawal of a plea without an answer, so that judgment might have been had on it by *nil dicit*, a superior court will not, on error, infer, as of necessity, that a judgment below for the plaintiff was thus given; the case being one where, after such withdrawal, there were numerous demurrers, pleas, replications and rejoinder, arising from a first count, and the proceedings showing that these were the subject of controversy. The second count will be taken to be waived.⁹²

b. Plea.—**General or Special Pleas.**—If the record does not show what the

judgment was rendered and entered; and that whatever discrepancy appears must be attributed to clerical errors, and that the matter is not open to the objection made that the writ of error was brought, the citation signed, and the bond given, before the judgment was entered, even if that fact would have been available as an objection, if it existed. *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262, citing *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

81. **Amount of bond.**—*French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

82. **Signing of citation.**—*Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Butler v. Gage*, 138 U. S. 52, 34 L. Ed. 869; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

83. **Recitals in bill of exceptions.**—Where a bill of exceptions is signed during the term, purporting to contain a recital of what transpired during the trial, it will be assumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed. *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 23, 35 L. Ed. 919.

84. **Signing of bill of exceptions.**—*United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

Where the absence of the signature of the judge of the court to bill of exceptions is not made the subject of objection by the parties, this court must infer that its omission was a mere clerical error. *Christy v. Pidgeon*, 4 Wall. 196, 18 L. Ed. 322.

Where a bill of exceptions is signed by the district judge, but it does not appear

from the record that the justice and circuit judge were present at the trial, this court will assume that the trial was had before the district judge alone. *Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209.

85. **All evidence that is material presumed to be included in bill of exceptions.**—*Arthurs v. Hart*, 17 How. 6, 15 L. Ed. 30; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485.

86. *Bingham v. Cabbot*, 3 Dall. 19, 38, 1 L. Ed. 491; *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027.

87. *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884.

88. **As to the pleadings in general.**—*Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401.

89. **Where there is one good count in the declaration**, and the record contains no bill of exceptions incorporating the evidence adduced on the trial, the legal presumption is that it is sufficient to sustain the judgment on that count. And this is the rule in criminal cases. *United States v. Furlong*, 5 Wheat. 184, 5 L. Ed. 64.

90. Where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect. *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918.

91. **Rule in criminal cases.**—*United States v. Furlong*, 5 Wheat. 184, 5 L. Ed. 64.

92. *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42.

pleadings were, it will be presumed that the general issue was pleaded, rather than that special pleas were put in.⁹³

Trial of Issues.—Where there is a plea, amounting to the general issue, or containing what is admissible under it, and it does not appear distinctly to have been disposed of, but the general issue is tried, it will be presumed that the defendant had the full benefit of the objection on the trial, and error will not lie.⁹⁴

c. *Demurrers.*—Where in an equity case a demurrer is filed to the complaint and the record does not disclose what disposition was made of it, and an answer is subsequently filed, upon which the parties proceed to a hearing, it will be presumed on appeal that the demurrer was abandoned.⁹⁵

d. *Replication.*—Where the replication filed in the case is not copied in the record sent up, it may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.⁹⁶ The filing of replications to pleas, during the progress of the trial, and without leave of the court, is, of course, improper and irregular. But it must be presumed that the fact of their having been so filed was known to the defendant before the trial was concluded, or before the judgment was entered.⁹⁷

7. **AS TO THE VERDICT.**—Where the bill of exceptions does not purport to contain all the evidence on trial, nor even the substance of it, every presumption is in favor of the verdict, and that it was supported by the evidence on the trial.⁹⁸ Thus, where the verdict was amendable in the court below, this court will regard the amendment as made, and will refuse to send the case back for another trial merely because of amendable defects.⁹⁹

8. **REFERENCE.**—The rule in relation to the findings and conclusions of a master, concurred in by the circuit court, is that they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.¹ But this rule is subject

93. **Plea.**—*Moses v. National Bank*, 149 U. S. 298, 37 L. Ed. 743.

94. *Townsend v. Jemison*, 7 How. 706, 719, 12 L. Ed. 880.

95. **Demurrers.**—*Bailey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452.

Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of this case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

96. **Replication.**—*Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 506, 35 L. Ed. 1092.

97. *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 436, 36 L. Ed. 495.

98. **As to the verdict.**—*Gardner v. Babcock*, 3 Wall. 240, 244, 18 L. Ed. 31.

Where, on a feigned issue directed to a jury, both of the necessary facts, namely, that the assignee "should establish the act of the bankrupt, not only of which he complains, but also that it was done with a view to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent," have been found against the as-

signee, and this court has not the evidence before it, it must assume that the verdict of the jury is right. *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389.

This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings in rem after a final decree by a court of competent jurisdiction over the subject matter. *Grignon v. Astor*, 2 How. 319, 339, 11 L. Ed. 283.

99. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

1. **Reference.**—*Crawford v. Neal*, 144 U. S. 585, 596, 36 L. Ed. 552; *Furrer v. Ferris*, 145 U. S. 132, 36 L. Ed. 649; *Fisher v. Shropshire*, 147 U. S. 133, 146, 37 L. Ed. 109.

Thus, in *Crawford v. Neal*, 144 U. S. 585, 596, 36 L. Ed. 552, it was said: "The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the

to some exceptions.²

B. Presumptions as to the Record.—See ante, "The Record or Transcript," IX, H.

XVI. Reversible Error.

A. Right to Complain of Error—1. PARTIES NOT APPEALING—*a. In General.*—Where each party appeals, each may assign error;³ but where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.⁴ In other words, a party who does not take out a

application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." See, also, *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363, and *Furrer v. Ferris*, 145 U. S. 132, 36 L. Ed. 649; *Morgan v. Daniels*, 153 U. S. 120, 124, 38 L. Ed. 657; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 32 L. Ed. 764; *Evans v. State Nat. Bank*, 141 U. S. 107, 35 L. Ed. 654.

In cases referred to a master to state an account, depending, as they do, upon an examination of books, upon the oral testimony of witnesses, and, perhaps upon the opinions of an expert, "his conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." This was the rule laid down by this court in *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664, and approved in *Callaghan v. Myers*, 128 U. S. 617, 666, 32 L. Ed. 547, and in *Kimberly v. Arms*, 129 U. S. 512, 32 L. Ed. 764. *Camden v. Stuart*, 144 U. S. 104, 118, 119, 36 L. Ed. 363.

2. "This is not a case for the application of the principle of the acceptance by an appellate court of the conclusions of a master, concurred in by the trial court, when depending on conflicting testimony. We cannot permit our views to be overcome by presumptions in favor of this second report and decree." *Latta v. Granger*, 167 U. S. 81, 86, 42 L. Ed. 85.

3. **Parties not appealing in general.**—*The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251.

4. **Only parties appealing can allege error.**—*The William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583; *The Quickstep*, 9 Wall. 665, 19 L. Ed. 767; *The Maria Martin*, 12 Wall. 31, 40, 20 L. Ed. 251; *The Mary Ford*, 3 Dall. 188, 193, 1 L. Ed. 563; *Mackall v. Mackall*, 135 U. S. 167, 34 L. Ed. 84; *The Des Moines*, 154 U. S., appx., 584, 20 L. Ed. 821; *United States v. Blackfeather*, 155 U. S. 180, 39 L. Ed. 114; *The Chatahoochee*, 173 U. S. 540, 43 L. Ed. 801; *Malarin v. United States*, 1 Wall. 282, 287, 17 L. Ed. 594; *Harrison v. Nixon*, 9 Pet. 483, 484, 9 L. Ed. 201; *Canter v. American Ins. Co.*, 3 Pet. 307, 318, 7 L. Ed. 688; *Stratton v. Jarvis*, 8 Pet. 4, 8 L. Ed. 846;

Buckingham v. McLean, 13 How. 150, 14 L. Ed. 90; *Compton v. Jesup*, 167 U. S. 1, 42 L. Ed. 55; *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 66, 42 L. Ed. 355.

This court cannot take notice of the interests of parties in a cause, who have not appealed from the decision of the inferior court. *The Mary Ford*, 3 Dall. 193, 198, 1 L. Ed. 563.

Objections taken in this court by parties who did not appeal will not be noticed. *Board of County Commissioners v. Wilson*, 109 U. S. 621, 27 L. Ed. 1053.

Parties who have not appealed are not entitled to be heard in this court, except in support of the decree in the court below. *The Slavers (Reindeer)*, 2 Wall. 383, 394, 17 L. Ed. 911.

Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree when the cause is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants. *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583; *Harrison v. Nixon*, 9 Pet. 483, 494, 9 L. Ed. 201; *Canter v. American Ins. Co.*, 3 Pet. 307, 318, 7 L. Ed. 688; *The Stephen Morgan*, 49 U. S. 599, 24 L. Ed. 266; *Groves v. Sentell*, 163 U. S. 465, 38 L. Ed. 785.

Where a party takes an appeal from a decree which gives the appellant affirmative relief, but that appeal is dismissed, under the ninth rule, for want of prosecution, the case stands here as though no such appeal has been taken, and the appellant can only be heard in support of the decree as it stands. An appeal brings up for review only that which was decided adversely to the appellant. *Loudon v. Taxing District*, 104 U. S. 771, 774, 26 L. Ed. 923, citing *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *The Stephen Morgan*, 49 U. S. 599, 24 L. Ed. 266.

Although a person is dissatisfied with a decree for the distribution of a trust fund, if he does not appeal, according to the well-settled rule of this court he cannot

writ of error, cannot be heard to complain of any adverse rulings in the court

go beyond supporting the decree and opposing every assignment of error. *Landram v. Jordan*, 203 U. S. 56, 51 L. Ed. 88.

Where the owner of a steamer does not appeal, he cannot be heard, except in defense of the decree. *Airey v. Morrill*, 2 Curt. C. C. 8; *Allen v. Hatch*, 2 Curt. C. C. 147; *Chittenden v. Brewster*, 2 Wall. 191, 196, 17 L. Ed. 839; *The Quickstep*, 9 Wall. 665, 672, 19 L. Ed. 767. *The Stephen Morgan*, 94 U. S. 599, 604, 24 L. Ed. 266.

Counterclaims.—Where one party has not appealed from the judgment below, this court will not consider any question raised by a counterclaim put in by such party. *Dunwoody v. United States*, 143 U. S. 578, 584, 36 L. Ed. 269.

Suit to quiet title.—Where the plaintiff alone appeals from a decree entered in a suit to set aside a deed on the ground that it was procured by undue influence, the defendant taking no appeal, he cannot be heard in this court attacking its validity. *Mackall v. Mackall*, 135 U. S. 167, 34 L. Ed. 84.

Where purchasers in suit for the foreclosure of a mortgage prayed no appeal from the decree entered therein, they cannot be heard in this court, and their appeal must be dismissed. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97.

The United States cannot object to the correctness of a boundary line in an approved survey, if they have not appealed from the decree approving the survey. *Alviso v. United States*, 8 Wall. 337, 19 L. Ed. 305, citing *Fossat v. United States*, 2 Wall. 649, 17 L. Ed. 739.

Want of proof of facts alleged in bill.—A party not appealing from a decree cannot take advantage of an error committed against himself; as, for example, that the appellant had omitted to prove certain formal facts averred in his bill, and which were prerequisites of his case. But where—assuming the fact averred, but not proved to be true—a decree given against a party in the face of such want of proof is reversed in his favor, it may be reversed with liberty given to the other side to require him to prove that same fact which the appellee, when seeking here to maintain the decree, was not allowed to object that the appellant had failed, below, to prove. *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839.

Proceeding for settlement of private land claims.—If no appeal from a decree of the district court for California, in a proceeding under the act of 14th of June, 1860 (12 Statutes at Large 33), commonly called the survey law, be taken by the United States, they may appear in this court as appellees, but cannot demand a reversal or change of the decree. *Fossat*

v. United States, 2 Wall. 649, 17 L. Ed. 739.

When only one party appeals from a decree in a California land case, the other party cannot urge an objection to the decree, or insist upon its modification. *Malarin v. United States*, 1 Wall. 282, 17 L. Ed. 594; *United States v. Halleck*, 1 Wall. 439, 17 L. Ed. 664. But these cases were distinguished in *Grisar v. McDowell*, 6 Wall. 363, 376, 18 L. Ed. 863.

Settlement of decedent's estate.—Where A filed a bill for himself and other creditors against B, executor of C, and the devisees of the latter alleged that C was indebted to him, that the personal assets were insufficient to pay the debts, and that B was paying some of them in full and leaving others unsatisfied, it was held that where the executor alone appealed from the decree of the court refusing to dismiss the bill, that the objection that the bill was not dismissed as to the devisees cannot be raised here by the executor. *Kennedy v. Creswell*, 101 U. S. 641, 25 L. Ed. 1075.

Salvage.—Where the decree was in favor of the libellant in the district court for a salvage service in saving goods at sea, this court held, on appeal here by the owners of the goods, that the decree was conclusive upon the libellant as to the amount of salvage awarded; that he could not, in the appellate court, claim anything beyond that amount, since he had not, by any appeal on his part, controverted its sufficiency. *Stratton v. Jarvis*, 8 Pet. 4, 8 L. Ed. 846, cited in *The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266.

Some doubts have been entertained by the court, whether on the principles of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants, or at least, a greater portion of it, by the way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause. *M'Donough v. The Ship, Mary Ford*, 3 Dall. 189, 196, 1 L. Ed. 563, 568.

Cross appeal.—A party to a suit in a territorial court, who did not appeal from the decree of the trial court, cannot have a provision thereof reviewed by the supreme court of the United States, by taking a cross appeal from the decree of the territorial supreme court, which affirmed the decree of the trial court. *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478.

Where a territorial supreme court, in affirming a decree for the recovery by an administrator of funds of the estate which had been converted by the defendant, modified such decree by charging the cost against the fund recovered, instead of against the defendant personally, it was

below.⁵

Rule in Admiralty.—But the strictness of this rule has been somewhat relaxed in admiralty.⁶

b. *The Appellee.*—According to the rule of this court, the appellee can ask nothing here but what the decree gave him. It is the appellants who complain. The position of an appellee in this court is simply defensive. It is only where both parties appeal, that a case is open here for examination as it was in the court below;⁷ the appellee must file a separate or cross appeal.⁸

Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit and comply with the conditions prescribed by law.⁹

held that, on a cross appeal by the administrator, this modification, being against his interest, was subject to review by the federal supreme court. *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478.

5. *Bolles v. Outing Co.*, 175 U. S. 262, 44 L. Ed. 156, citing *Canter v. American Ins. Co.*, 3 Pet. 307, 318, 7 L. Ed. 688; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *The Maria Martin*, 12 Wall. 31, 40, 20 L. Ed. 251; *The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266; *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607; *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923; *Cherokee Nation v. Blackfeather*, 155 U. S. 218, 39 L. Ed. 126; *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 33 L. Ed. 473.

6. Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared—the suit below being a libel for collision against a tug and her tow—that an appeal from the district court to the circuit court had been taken from the entire decree by the owners of the tow who had ordered the tug, and who had undertaken her defense as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the circuit court to this court was entertained here, though the court observes that doubt might perhaps exist as to the regularity of the proceeding. *The Mabey and Cooper*, 14 Wall. 204, 20 L. Ed. 881. Compare *The Chattahoochee*, 173 U. S. 540, 43 L. Ed. 801.

7. **The appellee.**—*South Fork Canal Co. v. Gordon*, 6 Wall. 561, 568, 18 L. Ed. 894.

Where the appeal prayed by the appellees in the court below has never been perfected, this court cannot notice the errors assigned by the appellees. *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607.

If no appeal from a decree of the district court for California, in a proceeding in the act of 14th of June, 1860 (12 Statutes at Large 33), commonly called the Survey Law, be taken by the United States, they may appear in this court as appellees, but cannot demand a reversal or change of the decree. *Fossat v. United States*, 2 Wall. 649, 17 L. Ed. 739.

8. *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607.

This court is not called upon to consider errors assigned in the brief of an appellee who has taken no appeal from the judgment below. *United States v. Blackfeather*, 155 U. S. 180, 39 L. Ed. 114, citing *The Steven Morgan*, 94 U. S. 599, 24 L. Ed. 266; *Cherokee Nation v. Blackfeather*, 155 U. S. 218, 39 L. Ed. 126.

The libelants, in their original libel in the district court of the United States for the district of South Carolina, prayed that certain bales of cotton might be decreed to them with damages and costs. Canter, who also claimed the cotton, prayed the court for restitution, with damages and costs. The district court decreed restitution of part of the cotton to the libelants, and dismissed the libel, without any award of damages on either side. Both parties appealed from this decree to the circuit court, where the decree of the district court was reversed, and restitution of all the cotton was decreed to Canter, with costs; without any award of damages, or any express reservation of that question in the decree. From this decree the libelants in the district court appealed to this court. No appeal was entered by Canter. Held, that the question of a claim of damages by Canter is not open before this court. The decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages. It was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution and costs only. *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688.

9. *The William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583; *Chittenden v. Brewster*, 2 Wall. 191, 196, 17 L. Ed. 839; *Harrison v. Nixon*, 9 Pet. 483, 484, 9 L. Ed. 201; *Stratton v. Jarvis*, 8 Pet. 4, 8 L. Ed. 846; *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 90; *Canter v. American Ins. Co.*, 3 Pet. 307, 318, 7 L. Ed. 688; *New Orleans, etc., Mail Co. v. Fernandez*, 12 Wall. 130, 135, 20 L. Ed. 249.

Appellees are always heard in support of the decree, but they cannot have any

2. **ERRORS AFFECTING COPARTY.**—The party appealing cannot allege error in the decree against the party not appealing.¹⁰

3. **THE PARTY WHO RECOVERED JUDGMENT.**—A decree sustaining the defendant's contention will not be reversed at his instance on appeal,¹¹ but the plaintiff may bring error to reverse his own judgment where injustice has been done him, or where it is for a less sum than he claims; but he, like the defendant, is required to give bond to answer for costs.¹²

B. Statement of General Principles—1. **ERROR MUST BE PREJUDICIAL**—a. *In General.*—A party cannot be allowed to complain of an error which has done him no harm.¹³ Accordingly the rule is well settled that no judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the

greater damages than were assessed in the court of subordinate jurisdiction. *The William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583.

The settled practice of this court is, that whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal or cross appeal to sustain that claim. *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688, 689.

For example, where a party appeals from a decree, but the appeal is dismissed, under Rule 9, for want of process, the case stands in this court as though no such appeal had been taken. The appellant therefore can only be heard in support of the decree as it stands, because an appeal brings up for review only that which was decided adversely to the appellant. *Loudon v. Taxing District*, 104 U. S. 771, 774, 26 L. Ed. 923, citing *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *The Stephen Morgan* 94 U. S. 599, 24 L. Ed. 266.

10. **Errors affecting coparty.**—*Goodwin v. Fox*, 129 U. S. 601, 32 L. Ed. 805; *Case v. Kelly*, 133 U. S. 21, 29, 33 L. Ed. 513.

The rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing. *Kelsey v. Weston*, 2 Comstock 505; *Norbury v. Meade*, 3 Bligh 261; *Mapes v. Coffin*, 5 Paige 296; *Idley v. Bowen*, 11 Wendell 227. If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing. *Chittenden v. Brewster*, 2 Wall. 191, 196, 17 L. Ed. 839.

11. **The party who recovered judgment.**—*New Orleans v. Emsheimer*, 181 U. S. 153, 45 L. Ed. 794.

Defendant demurred to a bill on the grounds that the circuit court had no jurisdiction as such for want of proper averments of diverse citizenship; and that the remedy was at law, and not in equity. The circuit court held that the averments in respect of citizenship were sufficient, but sustained the demurrer on the second ground, and dismissed the bill "for want of equity with full reservation of complainant's right to sue and proceed at law." Subsequently an appeal was granted to the supreme court of the United States, on application of the defendant, for the sole and exclusive purpose of having a review of the decree of the court overruling the first ground of the demurrer. It was held that the appeal must be dismissed, because the decree did not injure defendant but sustained his contention. *New Orleans v. Emsheimer*, 181 U. S. 153, 154, 45 L. Ed. 794, citing and approving *United States v. Jahn*, 155 U. S. 109, 39 L. Ed. 87, and *Smith v. McKay*, 161 U. S. 355, 40 L. Ed. 731.

Therefore if a judgment in an action of trespass be rendered against one defendant by default, and in favor of the other defendant upon a plea, the former alone may bring a writ of error. *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515.

12. *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268, 269, 270.

When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor—if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff—and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the circuit court to dismiss the case for want of jurisdiction. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

13. **Error must be prejudicial in general.**—*Johnston v. Jones*, 1 Black 209, 222, 17 L. Ed. 117.

ruling was made,¹⁴ as where the error becomes wholly immaterial in the progress

14. *Deery v. Cray*, 5 Wall. 795, 803, 18 L. Ed. 653; *Gregg v. Moss*, 14 Wall. 764, 569, 20 L. Ed. 740; *Lucas v. Brooks*, 18 Wall. 436, 454, 21 L. Ed. 779; *Allis v. Northwestern, etc., Ins. Co.*, 97 U. S. 144, 145, 24 L. Ed. 1008; *Cannon v. Pratt*, 99 U. S. 619, 623, 25 L. Ed. 446; *Union, etc., Min. Co. v. Taylor*, 100 U. S. 37, 42, 25 L. Ed. 541; *Hornbuckle v. Stafford*, 111 U. S. 389, 394, 28 L. Ed. 468; *Lancaster v. Collins*, 115 U. S. 222, 227, 29 L. Ed. 372; *West v. Camden*, 135 U. S. 507, 522, 34 L. Ed. 254; *Lazarus v. Phelps*, 156 U. S. 202, 206, 39 L. Ed. 397; *Randon v. Toby*, 11 How. 493, 13 L. Ed. 784; *Thomas v. Lawson*, 21 How. 331, 343, 16 L. Ed. 82; *Chandler v. Von Roeder*, 24 How. 224, 225, 16 L. Ed. 633; *The Water Witch*, 1 Black 494, 17 L. Ed. 155; *McMichen v. Webb*, 6 How. 292, 12 L. Ed. 443; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 301, 22 L. Ed. 560; *Lazarus v. Phelps*, 156 U. S. 202, 39 L. Ed. 397; *Bamberger v. Schoolfield*, 160 U. S. 149, 169, 40 L. Ed. 374; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 135, 22 L. Ed. 827; *Royal Ins. Co. v. Miller*, 199 U. S. 353, 369, 50 L. Ed. 226; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Minneapolis, etc., R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376; *Eastern Transportation Line v. Hope*, 95 U. S. 297, 303, 24 L. Ed. 477; *Barth v. Clise*, 12 Wall. 400, 20 L. Ed. 393; *Meguire v. Corwine*, 101 U. S. 108, 112, 25 L. Ed. 899; *Mexia v. Oliver*, 148 U. S. 664, 673, 37 L. Ed. 602; *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050; *Blackburn v. Crawford*, 3 Wall. 175, 18 L. Ed. 186; *Deery v. Cray*, 10 Wall. 263, 19 L. Ed. 887.

It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action. *Brobst v. Brock*, 10 Wall. 519, 528, 19 L. Ed. 1002.

If for any reason appearing in the record it is clear that a plaintiff in error, who was also plaintiff below, cannot recover in the action, the court will not determine whether error was committed in instructions given to the jury respecting other parts of the case. To warrant the reversal of a judgment, there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002, citing *Greenleaf v. Birth*, 5 Pet. 132, 135, 8 L. Ed. 72; *Campbell v. Pratt*, 2 Pet. 354, 7 L. Ed. 449.

In *Greenleaf v. Birth*, 5 Pet. 132, 135, 8 L. Ed. 72, it was stated to be "a general rule that where there are various bills of exceptions filed according to the local practice, if, in the progress of the cause, the matters of any of those exceptions

become wholly immaterial to the merits as they are finally made out at the trial, they are no longer assignable as error, however, they may have been ruled in the court below. There must be some injury to the party to make the matter generally assignable as error." *Brobst v. Brock*, 10 Wall. 519, 528, 19 L. Ed. 1002.

Where it plainly appears on the face of the record that the judgment of the circuit court was right, it would not be reversed for an error which could not possibly have worked an injury to the plaintiff in error. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 22 L. Ed. 560; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527.

The settled doctrine is that even if error has been committed, yet if it appears clearly from the record that such error was not prejudicial, the judgment cannot be disturbed. *Origet v. Hedden*, 155 U. S. 228, 235, 39 L. Ed. 130; *Fidelity Mutual Life Ass'n v. Mettler*, 185 U. S. 308, 46 L. Ed. 922; *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 351, 46 L. Ed. 1193, reaffirmed in *Cherry v. Fidelity & Deposit Co.*, 205 U. S. 537, 51 L. Ed. 920.

Accession, accretion and reliction.—Where a lot had no water front, and the plaintiff who was the owner of it had therefore no right to any part of the accretions for which he was suing, and it is apparent from the record that the fact was so found by the jury, this court will not reverse for an error committed by the court below with respect to the rule by which the alluvium should be divided among those who are owners. "A party cannot be allowed to complain of an error which has done him no harm." *Johnston v. Jones*, 1 Black 209, 17 L. Ed. 117.

Issuance of execution pending motion for new trial.—Where, after judgment for a certain sum, execution is allowed, during a motion for a new trial, to issue for a part of the sum, which part is admitted to be due, this, though anomalous, is not a ground for reversal, where no objection appears to have been made, and it is not shown that the defendants have sustained any injury in consequence of its issue, and where, a new trial being afterwards granted, it was limited to a trial as to the excess of the claim above the amount for which the execution was issued. *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473.

Dismissal instead of affirmance.—If the court of appeals of the district erred in declining jurisdiction of an appeal from an order overruling a motion to vacate a judgment of dismissal for want of prosecution, made after the term, at which that judgment was entered, had expired, when if it had entertained jurisdiction, the result would have been an affirmance, the

of the cause.¹⁵ The excepting party should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict.¹⁶

Although there may be a technical error in the ruling of the court, yet if this court cannot see that it wrought any prejudice to the substantial rights of the plaintiff in error, and upon all the facts in the case, the judgment was one which must necessarily have been rendered, it will be affirmed.¹⁷ A decree will not be reversed for an immaterial departure from technical rules where no harm has been done.¹⁸

Mere technical errors in the decree of a court of admiralty, not injuriously affecting the rights of the parties, do not present sufficient grounds for reversing.¹⁹

Error to State Court.—Where the case is brought here by a writ of error to a state court for re-examination, the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted.²⁰

Limitation of Rule.—While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting.²¹

b. *Illustrative Cases*—(1) *Miscellaneous Cases.*—The general rule has been applied to exceptions to rulings excluding answers to interrogatories,²² to rulings on abstract questions of law,²³ to rulings upon the effect of a discharge in bankruptcy,²⁴ to rulings of the court upon a motion for a

difference between dismissing the appeal and affirming the order does not require reversal or modification in the supreme court of the United States on error to the circuit court of appeals. *Tubman v. Baltimore & Ohio R. Co.*, 190 U. S. 33, 47 L. Ed. 946.

15. Where an exception becomes wholly immaterial in the progress of the cause, it cannot be assigned for error, even if the ruling was erroneous. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 367, 333, 14 L. Ed. 157, citing *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72.

16. *Cunningham v. Springer*, 204 U. S. 647, 652, 51 L. Ed. 662.

17. *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 36 L. Ed. 214.

18. *Rice v. Edwards*, 131 U. S., appx. clxxv, 25 L. Ed. 976, citing *Allis v. Northwestern, etc., Ins. Co.*, 97 U. S. 144, 145, 24 L. Ed. 1008.

19. *The Wanata*, 95 U. S. 600, 24 L. Ed. 461.

20. *Pugh v. McCormick*, 14 Wall. 361, 374, 20 L. Ed. 789.

21. *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U. S. 47, 28 L. Ed. 62; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 337, 39 L. Ed. 1006.

Error in refusing to entertain an appeal from the denial of a motion to set aside a verdict as against the weight of evidence cannot be said to have been non-prejudicial because the court necessarily passed upon the same matter in sustaining the ruling of the trial court in re-

fusing to direct a verdict in appellant's favor. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022.

22. **Objections to interrogatories.**—According to this rule that to render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case, it is held that if the exception is to the refusal of an interrogatory, not objectionable in form, put to a witness on the taking of his deposition, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513, citing *Northwestern, etc., Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406.

23. **It has long been settled that abstract questions of law**, which may or may not have been ruled in a way to affect the defendant injuriously, will not be considered here on writ of error unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried. *New York, etc., R. Co. v. Madison*, 123 U. S. 524, 526, 31 L. Ed. 258.

24. **Effect of discharge in bankruptcy.**—"The ruling of the circuit court upon the question, stated in the bill of exceptions and principally argued at the bar, of the effect of the discharge in bankruptcy, is

new trial,²⁵ to exceptions to the action of the court in submitting questions of law to the jury,²⁶ and to exceptions to a master's report.²⁷

Where No Benefit Would Accrue from Reversal.—This court will refuse to reverse a decree though erroneous, where no benefit would result to the appellant from a reversal.²⁸

Resale.—The appellant cannot justly complain of a decree for a resale on the ground that it was rendered upon a rule to show cause, if it does not appear that he was or could have been prejudiced by the summary nature of the procedure.²⁹

Where a marshal's sale is declared void by a state court on one of several grounds, judgment will not be reversed because an error had been committed on some other ground; such error is harmless, as, on the cause being remanded, the state court should simply pronounce the deed void a second time on the true ground.³⁰

Where parties, by agreement, dispense with the usual formalities, and no injustice results from the mode adopted, the court should not, on slight ground, set aside the proceeding.³¹

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them. Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.³²

Expressions of Opinion by Court.—The fact that a court, after giving its decision upon an issue, gives its opinion upon the manner in which it would have decided the issue under other circumstances, does not constitute an error to be reviewed in this court.³³

(2) *Defects and Irregularities in the Pleadings*—aa. *In General.*—Objections to the form of the action,³⁴ to the granting of leave to amend,³⁵ to defects in the statement of the case in a bill in equity which are rendered immaterial by the

wholly immaterial, and cannot have prejudiced the plaintiff, for, however that question should be decided, the defendant would be entitled to judgment upon the verdict. *Evans v. Pike*, 118 U. S. 241, 30 L. Ed. 234; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. Ed. 870. *Glenn v. Sumner*, 132 U. S. 152, 157, 33 L. Ed. 301.

25. Rulings on motion for new trial.—Where the court, in passing upon a motion for a new trial, based its finding as to the amount of damages which plaintiff was entitled to recover, solely upon the evidence of defendant, and required a remittitur of a part of the judgment which was in excess of this amount, held, that its refusal to consider certain affidavits filed by defendant, and relating to newly-discovered evidence, which tended to impeach plaintiff's testimony as to larger damages, was immaterial. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 39 L. Ed. 889.

26. The submission of a question of law to the jury is no ground of exception if they decide it aright. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Minneapolis, etc., R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 152, 30 L. Ed. 376.

27. To make an exception to a master's report available on appeal, it must appear of record that there was a ruling by the

court in some way affecting the decision appealed from. *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

28. *Campbell v. Pratt*, 2 Pet. 354, 7 L. Ed. 449; *Brobst v. Brock*, 10 Wall. 519, 528, 19 L. Ed. 1002.

29. *Stuart v. Gay*, 127 U. S. 518, 526, 32 L. Ed. 191.

30. *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655, following *Collier v. Stanbrough*, 6 How. 14, 12 L. Ed. 324.

31. *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398.

32. *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 152.

33. *Central Pacific R. Co. v. California*, 162 U. S. 91, 115, 40 L. Ed. 903.

34. Defects and irregularities in the pleadings in general.—An objection to the form of the action or other defect in the pleadings will not be noticed in this court, when it appears from the undisputed facts of the case that the plaintiff is not entitled to recover in any form of action. *Turner v. Ogden*, 1 Black 450, 17 L. Ed. 203.

35. The granting leave to amend an affidavit in an attachment proceeding, by adding a new ground for the attachment, cannot be assigned for error, where it does not appear that the defendant was prejudiced thereby. *Fitzpatrick v. Flanagan*, 106 U. S. 648, 27 L. Ed. 211.

statements of the answer,³⁶ to the failure of the court below to dispose of all the issues raised,³⁷ and to orders sustaining³⁸ or overruling demurrers,³⁹ do not justify a reversal where the rights of the other party are not prejudiced thereby.

bb. *Striking Out Pleadings.*—**In General.**—Since a motion to strike out pleadings does not involve an inquiry into the sufficiency of the pleadings, as where irrelevant or redundant matter is objected to, the overruling of such motion is harmless error.⁴⁰ But it is reversible error to strike out an answer filed by the defendant, which constitutes a good defense, and on which he relied as a defense to the charge made against him by the complaining party.⁴¹

36. Defective statements in bill in equity.—*Cavender v. Cavender*, 114 U. S. 464, 471, 29 L. Ed. 212, citing *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72.

37. Failure to dispose of the issues raised.—A motion to dismiss a writ of error on the ground that one of the matters put in issue in the court below did not appear, by the record, to have been decided, will be refused where the issue which was found by the jury made the plea, upon which no issue appears to have been decided, immaterial. *Dufau v. Coupfrey*, 6 Pet. 170, 8 L. Ed. 359, approved in *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

38. Where an order of the court sustaining a demurrer, does not prejudice the rights of the other party, such action of the court is no ground for reversal even if erroneous. *Moses v. National Bank*, 149 U. S. 298, 37 L. Ed. 743.

In Alabama, when a defendant pleads specially and generally, and the special plea contains nothing of which the defendant cannot avail himself under the general issue, an error in sustaining a demurrer to the special plea, as it works no injury, constitutes no ground for reversal. *Pollak v. Brush Electric Ass'n*, 128 U. S. 447, 32 L. Ed. 474.

Error to state court.—The ruling of the trial court in sustaining a demurrer to an equitable plea and refusing to permit a second to be filed, presents no question for the consideration of this court, where it was held by the supreme court of the state that under the plea of not guilty all the matters of defense set up in the equitable pleas could be offered in evidence and made available; and, the defendant on the trial offered his testimony to establish them. The substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice. *Johnson v. Drew*, 171 U. S. 93, 98, 43 L. Ed. 88.

39. Overruling demurrer.—Though a court erroneously overrule a demurrer to a special plea specially demurred to, yet if on another plea the whole merits of the case are put in issue, the error in overruling the demurrer is not ground for reversal. "While we think there was error in the judgment upon this plea, it seems to have been a harmless one. The defendants had another plea which covered the same ground. In *Grand Chute*

v. Winegar, 15 Wall. 355, 21 L. Ed. 170, we held that where a plea had been improperly stricken out, but no harm had resulted therefrom, that it was not cause for reversing the judgment." *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

40. Striking out pleadings.—*Nemaha County v. Frank*, 120 U. S. 41, 30 L. Ed. 584; *Lloyd v. Preston*, 146 U. S. 630, 36 L. Ed. 1111; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408.

It is harmless error to strike out pleadings when the court nevertheless appears to have treated the allegations as before it, applying the evidence to them, and holding that they were not sustained. *Lloyd v. Preston*, 146 U. S. 630, 36 L. Ed. 1111.

Answer.—It is harmless error to enter a motion to strike out an answer, where there is a general denial of each and every allegation of the petition, and no allegation of the petition was otherwise admitted in the answer. It follows, therefore, that every defense which was open to the defendant under that portion of the answer stricken out was equally open to him under the answer as it stood at the trial. *Nemaha County v. Frank*, 120 U. S. 41, 30 L. Ed. 584.

Although it is plain that a plea of non est factum is technically struck out because inconsistent with the plea of nil debet, yet if no evidence was rejected on account of its absence, but the defendant has litigated every question of fact as fully as if that plea had remained, and though much evidence offered by the defendant was rejected, none was rejected because of the absence of a proper plea, such action of the court does not constitute reversible error. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

Cross bill.—Where there is nothing in the proceeding in the court below in striking out a cross bill prejudicial to the rights of the appellant, the judgment will be affirmed. *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408.

41. Garnharts v. United States, 16 Wall. 162, 21 L. Ed. 275, citing *Hozey v. Buchanan*, 16 Pet. 215, 218, 10 L. Ed. 941; *Mandelbaum v. Nevada*, 8 Wall. 310, 333, 19 L. Ed. 479.

It is error, entitling the aggrieved party to a reversal, for a court, on motion of a plaintiff, to strike out an answer which

(3) *Errors with Respect to the Evidence*—aa. *In General*.—Where evidence has become wholly immaterial in the progress of the case, the admission or exclusion of it, though erroneous, cannot be assigned for error.⁴²

bb. *Admission of Evidence*—aaa. *In General*.—The modern tendency, both of legislation and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.⁴³ Accordingly, the rule is well settled that the admission of incompetent, immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.⁴⁴

Illustrative Cases.—This well-established rule has often been applied to alleged errors in the admission of depositions,⁴⁵ evidence to interrupt the course of adverse possession,⁴⁶ documentary evidence of all kinds such as records and

constitutes a good defense, and on which the defendant may chiefly rely. *Mandelbaum v. Nevada*, 8 Wall. 310, 19 L. Ed. 479, citing *Hozey v. Buchanan*, 16 Pet. 215, 10 L. Ed. 941.

42. Errors with respect to the evidence in general.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157, citing *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Cunningham v. Springer*, 204 U. S. 647, 655, 51 L. Ed. 662.

Where it appears upon the pleadings and proof, that the plaintiff was entitled to recover, whether the deposition objected to was admitted or excluded, any action of the court in this regard was harmless error. *Wilson v. Hoss*, 131 U. S., appx. cxx, 24 L. Ed. 270.

Where the admission or rejection of evidence could not change the result, such motion of the court constitutes no reason for reversing the judgment. *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813.

If a question is asked of a witness on the stand, the answer to which is pertinent and legal testimony, and the court refuses to permit the witness to answer, this is error which a revising court will correct, because the injury to the party consists in the refusal of the court to permit the answer to be given, and he can do nothing more to prove the wrong done him than to show that he asked a legal question, the answer to which, by the action of the court, was denied him. But where a question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, the injury done the party is by the answer, and notwithstanding the erroneous ruling of the court, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury. If it does, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of which a revising court

can take notice. *Nailor v. Williams*, 8 Wall. 107, 109, 19 L. Ed. 348.

43. Admission of evidence in general.—*Holmes v. Goldsmith*, 147 U. S. 150, 164, 37 L. Ed. 118; *Mammoth Min. Co. v. Salt Lake, etc., Machine Co.*, 151 U. S. 447, 38 L. Ed. 229; *Bannon v. United States*, 156 U. S. 464, 39 L. Ed. 494; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 567, 46 L. Ed. 331.

44. Union Min. Co. v. Taylor, 100 U. S. 37, 42 L. Ed. 541; *Carr v. Fife*, 156 U. S. 494, 500, 39 L. Ed. 508; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472; *Mexia v. Oliver*, 148 U. S. 664, 673, 37 L. Ed. 602.

Although incompetent evidence is admitted, yet if it could not possibly have affected the result, it is no ground for reversal. *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213.

This court will not reverse the judgment for the admission of evidence which, though technically inadmissible, could do no harm. *Relfe v. Wilson*, 131 U. S., appx., clxxxix, 26 L. Ed. 212; *Klein v. Hoffheimer*, 132 U. S. 367, 33 L. Ed. 373.

An assignment of error that the court admitted evidence directly pertinent to the issues which had been made by the pleadings, are not grounds of reversal. *Very v. Watkins*, 23 How. 469, 16 L. Ed. 522.

45. The court refused to reverse a decree which on the merits they approved because a deposition which ought not to have been read was read before a commissioner to whom the case was referred to compute damages; there being other evidence that the damages were as great as this court finally awarded. *The Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774.

46. Evidence to interrupt adverse possession.—Error in the admission of evidence concerning acts held adequate to interrupt the course of adverse possession are not grounds for reversal, where the supreme court holds that a longer period of prescription governed the acts, concerning which the acts of interruption

papers in the general land office,⁴⁷ letters,⁴⁸ and copies of surveys.⁴⁹ The rule has also been applied to the admission of evidence of collateral facts,⁵⁰ to the admission of cumulative evidence,⁵¹ and to the admission of expert and opinion evidence.⁵²

Rule in Criminal Cases.—The rule is equally applicable in criminal cases.⁵³

bbb. Trials by Court without Jury.—The admission of improper evidence on a trial by the court without a jury is harmless, where there is sufficient and proper evidence on which to base the decision.⁵⁴

cc. Exclusion of Evidence—**aaa. Harmless Error.**—A judgment will not be reversed for the rejection of testimony, whether it was in strict principle admis-

were wholly irrelevant, and this is true although it is contended that the defendant might have introduced evidence at the trial in support of defenses other than prescription, if he had not relied upon the certainty of securing a reversal because of the erroneous rulings as to the interruption of the prescription. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 50 L. Ed. 226.

47. Land office records.—The judgment of a lower court admitting certified copies of records and papers in the general land office under Revised Statutes, § 891, will not be disturbed, although some of the papers were material, in the absence of prejudice to appellant. *Howard v. Perrin*, 200 U. S. 71, 50 L. Ed. 374.

48. Letters.—An assignment of error taken to the admission of certain letters in evidence is of no avail, where this court cannot see that the other party is prejudiced by their production. *Union Pacific R. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896.

When the introduction of a letter in evidence is immaterial and works no prejudice to the objecting party, this court will not reverse a judgment for that cause only. *Gilbert v. Moline Plow Co.*, 119 U. S. 491, 30 L. Ed. 476.

49. In an action on a covenant of seisin, error in admitting copies of surveys is ground for reversing judgment and remanding the cause for a new trial. *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

In an action on a covenant of seisin, it has been held reversible error to admit parol evidence to prove prior claims upon the land, or unauthenticated copies of surveys. *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

50. Although evidence of collateral facts is not admissible, yet the admission of this evidence does not constitute reversible error, unless there is reason to think that the other party was injured thereby. *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118.

51. Cumulative evidence.—It is not reversible error to admit evidence that is cumulative in its character and not of controlling importance, and which if excluded would not have changed the result. *Mammoth Min. Co. v. Salt Lake, etc., Machine Co.*, 151 U. S. 447, 38 L. Ed. 229.

In a suit for goods sold, when a witness proves by testimony not competent that they have been delivered, the reception of his testimony is not ground for reversal where competent prime facie evidence, wholly uncontradicted, and therefore conclusive, has also been given of the delivery. The defendant in such case suffers nothing by the incompetent testimony. *Cooper v. Coates*, 21 Wall. 105, 22 L. Ed. 481.

52. Where expert and opinion evidence is admitted over the objection of the party, he should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict. If the evidence admitted has become immaterial by the verdict of the jury, the exception should be overruled. *Cunningham v. Springer*, 204 U. S. 647, 51 L. Ed. 662, citing *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002.

53. In a criminal case the erroneous admission of evidence for the state will not require a reversal of a judgment of conviction, where the prisoner under oath has admitted that he is guilty as charged in the indictment, since such erroneous admission could not have prejudiced him. *Motes v. United States*, 178 U. S. 458, 44 L. Ed. 1150.

54. Trials by court without jury.—*Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967; *Mammoth Mining Co. v. Salt Lake, etc., Machine Co.*, 151 U. S. 447, 38 L. Ed. 229.

The improper exclusion of testimony, on trial by court, where jury has been dispensed with, is error reviewable on bill of exceptions. If, however, the testimony excluded is merely cumulative, upon a question of fact, its exclusion may be immaterial, as the decision of the judge may be well warranted upon the evidence already in. *Arthurs v. Hart*, 17 How. 6, 15 L. Ed. 30.

Where the trial had been before a jury, if it be seen that the rejection of testimony could not properly have influenced the jury to a different conclusion on the question of fact, the objection may be immaterial. But the courts require a clear case to be made out that the rejection will work no prejudice to the party. And

sible or not, where the rejection worked no harm to the party offering it.⁵⁵ As, for example, a refusal to admit in evidence the certificate of a bank cashier,⁵⁶ a telegram,⁵⁷ or a record.⁵⁸

Cumulative Evidence.—Nor will a judgment be reversed for error in excluding testimony which is cumulative only, if it is apparent that if received it would not affect the result.⁵⁹

Incompetent Evidence.—It is not reversible error to refuse to admit evidence that is incompetent and inadmissible.⁶⁰ In like manner, it is not error in the court below to reject, as incompetent, admissible testimony tending to prove a fact not relevant to the case before the court.⁶¹

Where evidence is introduced as leading up to a controlling question, if such controlling question was not admissible, then the exclusion of such preceding evidence would not constitute reversible error.⁶²

Reasons for Decision.—Where the defendants are not deprived of any

in cases where the trial by jury has been waived, and the facts as well as the law are submitted to the judgment of the court, if the determination of the question of fact be against the party offering the evidence, "we do not perceive why the rejection should not be regarded as error reviewable on a bill of exceptions." *Arthurs v. Hart*, 17 How. 6, 13, 15 L. Ed. 30.

55. When exclusion of evidence harmless.—*Origet v. Hedden*, 155 U. S. 228, 235, 39 L. Ed. 130; *United States v. Brig Burdett*, 9 Pet. 682, 9 L. Ed. 273; *Lutz v. Magone*, 153 U. S. 105, 109, 38 L. Ed. 651; *Gregg v. Moss*, 14 Wall. 564, 20 L. Ed. 740; *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. Ed. 468; *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892; *Runkle v. Burnham*, 153 U. S. 216, 38 L. Ed. 694; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Union, etc., Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541.

The erroneous rejection of evidence, which does not injure the parties offering the same, is not reversible error. *Philpot v. Gruninger*, 14 Wall. 570, 20 L. Ed. 743.

A judgment will not be reversed for the exclusion of testimony that could do no harm. *Relfe v. Wilson*, 131 U. S., appx. clxxxix, 26 L. Ed. 212.

If the fact intended to be established by evidence offered could not have availed the plaintiffs, the court commits no error in rejecting it, whatever may have been the reasons given for the rejection. *Livingston v. Moore*, 7 Pet. 469, 552, 8 L. Ed. 751.

Where the error of the court if there is error, in excluding evidence, is harmless, it will not justify directing a new trial. *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779.

56. Indemnity bond.—Error in refusing to permit the defendant in an action on the indemnity bond of a bank president where it was sought to prove knowledge

on the part of the bank of the fraud of the president, to read as evidence to the jury, the certificate of the bank cashier, at the renewal of the bond, that the president had satisfactorily performed his duties, is harmless error where the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict. *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193.

57. Where telegrams are offered for the purpose of showing the revocation of a power of attorney, but they are rejected on the ground that they have not been properly proved, such rejection being immaterial to the result, is not reversible error, because the telegrams called for a confirmation of the existing power, and not for its revocation. So that if they had been admitted, they could not have affected the question of the revocation of the power. *Runkle v. Burnham*, 153 U. S. 216, 38 L. Ed. 694, citing *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Union, etc., Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541.

58. The improper exclusion of a record is not error when the party offering it has proved, in another way, every fact which the record, if it had been admitted, would prove. The court said: "The error of the court, therefore, if there was an error, was perfectly harmless, and it would not justify directing a new trial." *Lucas v. Brooks*, 18 Wall. 436, 454, 21 L. Ed. 779.

59. *Cannon v. Pratt*, 99 U. S. 619, 25 L. Ed. 446; *Muser v. Magone*, 155 U. S. 240, 250, 39 L. Ed. 135.

60. *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. Ed. 468.

61. *Turner v. Fendall*, 1 Cranch 117, 2 L. Ed. 53.

62. *Hegler v. Faulkner*, 153 U. S. 109, 38 L. Ed. 653.

right by the rejection of evidence, it is not cause for reversing the judgment that an erroneous reason was given for rejecting it.⁶³

But this court will presume that testimony excluded was material and not harmless error, if the bill of exceptions does not state the contrary,⁶⁴ though it has been said that an assignment of error relating to the exclusion of evidence, which does not show that such evidence was material, or that the exclusion of the proof is prejudicial to the party complaining, will not be sustained.⁶⁵

bbb. *Reversible Error*.—On the other hand, a refusal to receive in a proper case, competent admissible evidence to prove a fact relevant to the issue is reversible error.⁶⁶

dd. *Witnesses*—aaa. *In General*.—Where a question is asked of a witness, which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it is not error of which a revising court can take notice. It works him no injury. If it does work the objecting party injury, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of the sort mentioned.⁶⁷

bbb. *Competency*.—Since in Ohio a party to the suit is a competent witness on his own behalf, it is reversible error to refuse to permit him to testify.⁶⁸

ccc. *Examination*.—But where it appears that no injury resulted to the plaintiff in error, a judgment will not be reversed merely because the court, at the trial, permitted a witness on his cross-examination to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief.⁶⁹ Nor will a judgment be reversed because a witness, when on the stand testifying in his own behalf, was not permitted to answer certain questions put to him on cross-examination, where no harm could have resulted from the ruling on the

63. *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

64. *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Haussknecht v. Claypool*, 1 Black 431, 17 L. Ed. 172.

"But it was said by the supreme court of Montana, on appeal, that since the record did not contain all the testimony, the court could not see that defendants were injured by the refusal to have the questions answered. We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded. This court, in *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653, used this language: 'Wherever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'" *Gilmer v. Higley*, 110 U. S. 47, 50, 28 L. Ed. 62.

65. *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. Ed. 507, citing *Northwestern, etc., Packet Co. v. Clough*, 20 Wall 528, 22 L. Ed. 406; *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

66. *Reversible error*.—It is reversible error to overrule evidence to show that a judgment brought collaterally before the court as evidence, is void upon its face by want of notice to the person against

whom judgment was entered or for fraud. Likewise to refuse to admit evidence showing that the judgment which has not been obtained in conformity with the law which required certain preliminary steps to be taken. *Webster v. Ried*, 11 How. 437, 13 L. Ed. 761.

Where the suit was upon a postmaster's bond and the district attorney offered to read in evidence an authentic copy thereof, which the court refused to receive, this refusal was erroneous. *United States v. Wilkinson*, 12 How. 246, 13 L. Ed. 974.

67. *Witnesses in general*.—*Nailor v. Williams*, 8 Wall. 107, 19 L. Ed. 348.

68. *Competency*.—*Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559.

69. *Examination*.—*Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607.

Error cannot be assigned to the action of the court in sustaining an objection to a question propounded upon cross-examination, on the ground that it was not within the scope of the direct examination, because the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination was not offered at any subsequent stage of the trial, no prejudicial error was committed by the ruling complained of. *Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118.

cross-examination, as in a subsequent stage of the case, when the questions were clearly proper, the witness testified fully as to all the matters originally inquired about.⁷⁰

ee. *Curing Errors*.—Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed.⁷¹ There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court.⁷²

(4) *Errors with Respect to the Instructions*—aa. *In General*.—**Errors in Giving Instructions**.—Where an instruction given, whether right or wrong, could not have affected the complainant, such action of the court does not con-

70. *Clark v. Fredericks*, 105 U. S. 4, 26 L. Ed. 938.

71. **Curing errors**.—*Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. Ed. 453.

Where, before the final submission of the case to the jury, irrelevant evidence, which had been admitted, was withdrawn, and they were instructed to disregard it, held, that an exception to the action of the court will not be sustained, the presumption being, so far as this court is concerned, that, under such circumstances, the jury based their verdict upon legal evidence only. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141.

Depositions.—The trial court permitted the deposition of a witness to be read when the witness was actually in court and his presence was known to the plaintiff. The witness was called by the defendant after the deposition had been admitted over his, the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related. It was held, the error committed is not sufficiently grave in its results to require an appellate court to reverse the case. *Texas & Pac. R. Co. v. Watson*, 190 U. S. 287, 291, 47 L. Ed. 1057.

72. *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. Ed. 453.

The rule and its exception were considered in *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. Ed. 708, where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice Field: "But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted its subsequent withdrawal from the case with its accompanying instruction cured the error. It is true that in some instances there may be such strong impressions made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional." *Waldron v. Waldron*,

156 U. S. 361, 383, 39 L. Ed. 453.

The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, such direction cures any error which may have been committed by its introduction. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 452, 26 L. Ed. 141; *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. Ed. 708. But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. Ed. 708. And see *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. Ed. 453; *Throckmorton v. Holt*, 180 U. S. 552, 567, 45 L. Ed. 663.

Several witnesses gave opinions in regard to the genuineness of the testator's handwriting in a disputed will, based upon their knowledge of the handwriting of the testator and also based upon their familiarity with his legal attainments and with his characteristics of style and composition, while others based their opinions upon handwriting only. The judge instructed the jury to disregard any opinion as to whether the testator wrote the paper in controversy that may have been expressed by any of the witnesses so far as such opinion was based upon anything but the handwriting of the paper. It was held that this attempted withdrawal of the objectionable evidence from the consideration of the jury is too uncertain to cure its erroneous admissions. Under the facts of the case the names of the witnesses should have been given and the specific evidence which was given by them and which was to be withdrawn should have been pointed out. *Throckmorton v. Holt*, 180 U. S. 552, 566, 45 L. Ed. 663, distinguishing *Pennsylvania Co. v. Roy*, 102 U. S. 451, 452, 26 L. Ed. 141; *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708.

stitute reversible error.⁷³ In other words, where the plaintiff could not recover in any event, an erroneous instruction could do him no harm, and therefore is no ground for reversal.⁷⁴

Language of Instructions.—Where the case is clearly decided correctly on the merits, this court will not consider the abstract question of whether the language used by the court in its instructions is technically accurate as applied to the

73. Nonprejudicial error in giving instructions.—*Johnston v. Jones*, 1 Black 209, 17 L. Ed. 117; *Wilson v. Everett*, 139 U. S. 616, 35 L. Ed. 286; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485; *Cavazos v. Trevino*, 6 Wall. 773, 785, 18 L. Ed. 813; *Hansen v. Boyd*, 161 U. S. 397, 405, 40 L. Ed. 746.

Where the plaintiff suffered no injury from an error in the instruction of the court below, there is no ground for reversal. *Iron Silver Min. Co. v. Mike, etc.*, Min. Co., 143 U. S. 394, 36 L. Ed. 201.

Where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions however erroneous. *Barth v. Clise*, 12 Wall. 400, 20 L. Ed. 393.

Though there may be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly, the result of the trial would have been the same as it was, this court will not reverse. *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 22 L. Ed. 560.

Errors in the charge of the court which seem to be quite immaterial so far as they were excepted to, will not be considered. *Bannon v. United States*, 156 U. S. 464, 39 L. Ed. 494.

Allowance of interest.—An instruction to the jury to allow interest on the value of certain property destroyed is not reversible error, if the jury did not in fact allow the interest. *Eddy v. Lafayette*, 163 U. S. 456, 41 L. Ed. 225.

Peremptory instructions.—Where the defendant pleads the statute of limitations, and this plea is overruled, and at the close of the evidence he claims a right to go to the jury, and presented certain prayers for instructions, but this claim is denied, and the court ruled as matter of law, that upon the evidence the plaintiff was entitled to recover from the defendant only a certain amount, which instruction the plaintiff excepts to, but does not present any prayers for instructions, it was held that the peremptory instruction to the jury to find a verdict in favor of the plaintiff, was erroneous, but as the defendant did not prosecute a writ of error, the judgment below must be affirmed, upon the ground that no error was committed to the prejudice of the plaintiff. *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 33 L. Ed. 473.

Effect of deed of mortgage.—The erroneous instruction of the court in regard

to the effect of a deed of mortgage on the plaintiff's title, is no ground for reversal, when this court can see that the plaintiff had no title on which the jury could have found in his favor, because the error, if there was one in the instructions of the court, could work no injury. *Deery v. Cray*, 10 Wall. 263, 19 L. Ed. 887.

Medium of payment.—On a writ of error to review a judgment in a suit to recover for services in lighting the street lamps in the city of San Juan, Porto Rico, it is harmless error to instruct that the time of making the contract was to be alone considered in determining the foreign current money for which the contract provided, because "it was conceded that, if foreign current money was required by the contract, money of the United States current at the time the contract was made was within the contemplation of the parties, and that such money was also current in the island at the time when performance was due. From this it results that the rights of the parties were in no way affected by the erroneous ruling." *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. Ed. 299.

When a declaration in assumpsit contains a special count, under which on the proofs the plaintiff can recover, and also general counts, an instruction to the jury that the plaintiff can recover under the general counts, if it be erroneous, works no injury to the defendant. *Struthers v. Drexel*, 122 U. S. 487, 30 L. Ed. 1216.

In a suit against a joint maker of a promissory note a charge to the jury that he was only a guarantor works no injury to him. *Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90.

74. *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653; *St. Louis Public Schools v. Risley*, 10 Wall. 91, 115, 19 L. Ed. 850; *Deery v. Cray*, 10 Wall. 263, 272, 19 L. Ed. 887; *Bropst v. Brock*, 10 Wall. 519, 528, 19 L. Ed. 1002; *Barth v. Clise*, 12 Wall. 400, 403, 20 L. Ed. 393; *Tweed's Case*, 16 Wall. 50, 517, 21 L. Ed. 389; *Walbrun v. Babbitt*, 16 Wall. 577, 580, 21 L. Ed. 489; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 301, 22 L. Ed. 560; *McLemore v. Louisiana State Bank*, 91 U. S. 27, 28, 23 L. Ed. 196; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527; *Lancaster v. Collins*, 115 U. S. 222, 227, 29 L. Ed. 373; *Evans v. Pike*, 118 U. S. 241, 250, 30 L. Ed. 234; *West v. Camden*, 135 U. S. 507, 521, 34 L. Ed. 254; *Hartman v. Langfaeld*, 125 U. S. 128, 31 L. Ed. 672.

case; because in such case the error is immaterial.⁷⁵ An exception to the refusal of the court to grant certain prayers for instructions is not available, where the instructions were substantially given, although in different language, in the charge of the court to the jury.⁷⁶

Refusal to Give Instructions.—It is equally well settled that although the instructions requested may be sound in law, yet if their refusal works no injury, the judgment will not be reversed.⁷⁷ Thus, where the failure of the court to instruct the jury, did not alter the verdict, the error is harmless and a judgment will be affirmed.⁷⁸

Likewise, where the charge asked and refused is immaterial, the judgment cannot be reversed because it was not given.⁷⁹

Refusal to grant specific prayers of a party for instructions is not error, the substance of the requested instructions being embraced in the instructions actually given.⁸⁰

Failure to Give One of Several Instructions.—Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and the instructions are framed in clear and unambiguous terms, it is no cause for the reversal of the judgment to show that one or more of the prayers for instruction presented by the losing party, and not given by the court, were correct in the abstract, as the refusal of the court to give the instructions as requested under those circumstances could not work any injury to the party making the request, and, therefore cannot be regarded as error.⁸¹

bb. Inaccuracies in Expression.—Where an instruction, though not in the best form of words, is sufficiently intelligible, and has been rightly interpreted by the jury, in reference to the evidence, a reversal will not be ordered in the indulgence of a nice criticism.⁸² Nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms in particulars considered apart by themselves, which would not when taken with the rest of the charge have misled a jury of ordinary intelligence.⁸³

cc. Giving Instructions More Favorable than Requested.—Plaintiffs in error

75. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 262, 33 L. Ed. 934.

76. *Patrick v. Graham*, 132 U. S. 627, 33 L. Ed. 460.

77. *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 30 L. Ed. 1140; *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100.

The refusal to give a charge that was wholly immaterial, is no ground for reversal. *Bank v. White*, 154 U. S., appx., 660, 26 L. Ed. 307.

The refusal of the court to give instructions asked for by the defendant constitutes no ground for reversal, where the charge of the court contains everything that need have been said to the jury upon the question submitted to them. *Hartford v. Life, etc., Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. Ed. 496.

Where the evidence is such that, as to a given matter, there is no question for the jury, a charge and a refusal to charge in regard to such matter are not a ground for reversing the judgment, because they work no injury to the party excepting. *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100.

78. *Douglass v. McAllister*, 3 Cranch 298, 2 L. Ed. 445.

79. *Bank v. White*, 154 U. S., appx., 660, 26 L. Ed. 307.

80. *Tome v. Dubois*, 6 Wall. 548, 18 L. Ed. 943.

81. *St. Louis Public Schools v. Risley*, 10 Wall. 91, 115, 19 L. Ed. 850; *Law v. Cross*, 1 Black 533, 536, 17 L. Ed. 185; *Tome v. Dubois*, 6 Wall. 548, 555, 18 L. Ed. 943; *Tweed's Case*, 16 Wall. 504, 517, 21 L. Ed. 389.

It is not error for a court to refuse to give an extended series of instructions, though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings. *Chicago, etc., R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571.

82. **Inaccuracies in expression.**—*Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624.

When on the undisputed facts of a case a verdict is clearly right, so that if a new venire were awarded the same verdict would have to be given, a court will not reverse because on some disputed points a charge may have been technically inaccurate. *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489.

83. *Chicago, etc., R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571.

cannot complain of a charge as being harmful to them, that is more favorable than the one contended for.⁸⁴

dd. *Invasion of Province of Jury*—aaa. *In General*.—An expression of an opinion simply by a judge upon a question of fact is not a ground of error.⁸⁵ Nor is it necessarily error for a court to instruct the jury that if the testimony of a certain witness is believed, it will establish a specified fact, leaving to the jury to believe or disbelieve the witness. The propriety of such instruction depends upon the fullness, certainty and clearness of the testimony of the witness upon the point in issue.⁸⁶

The comments of the judge in his charge to the jury, as to the circumstances under which the defendant might be entitled to damages against the plaintiff, cannot be a ground of error, when there was no such issue, and when the defendant could not have been thereby prejudiced.⁸⁷

bbb. *Direction of Verdict*.—It is not reversible error to direct a verdict for the plaintiff, where it appears that if the jury had found a verdict in favor of the defendant, the court would have set it aside as against what is admitted to have been proved.⁸⁸

ee. *Misleading Instructions*.—Where the charge to the jury could not have misled, such action of the court cannot be assigned as error.⁸⁹

ff. *Instructions Not Based on the Evidence*.—Where the bill of exceptions does not purport to set out all the evidence given in a case below, and it does not appear what other evidence, if any, was there given, a court of error will not reverse for an instruction whose correctness or want of it depends upon the state of the evidence; the terms of the instruction not necessarily implying that there were not facts in proof bearing upon the subject besides those on which the instruction was expressly predicated; and error not being matter to be presumed, but contrariwise.⁹⁰

84. Giving instructions more favorable than requested.—*Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90.

It is not error to refuse to give an instruction, when the language of the one given, though not the same as the one refused, is more favorable than that requested. *Relfe v. Wilson*, 131 U. S., appx. clxxxix, 26 L. Ed. 212.

85. Invasion of province of jury in general.—*Eastern Transportation Line v. Hope*, 95 U. S. 297, 302, 24 L. Ed. 477.

86. Russell v. Ely, 2 Black 575, 17 L. Ed. 258.

87. Walker v. Johnson, 96 U. S. 424, 24 L. Ed. 834.

88. Direction of verdict.—*Arthur v. Jacoby*, 103 U. S. 677, 26 L. Ed. 454, citing *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780.

Where, upon the undisputed facts of the case, the plaintiff is entitled to recover, it is not error for the court to instruct the jury to find for him. *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

It is not error for the court to charge the jury to find the issue for the plaintiff, where if the jury had found otherwise it would have been the duty of the judge to set the verdict aside as unsupported by evidence and in hostility to all the evidence given. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the

close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his behalf; but if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 701, 27 L. Ed. 266.

89. Misleading instructions.—*New York, etc., R. Co. v. Madison*, 123 U. S. 524, 31 L. Ed. 258.

Where the correct rule as to the obligation of an employer to furnish employees a reasonably safe place to work and reasonably safe machinery and appliances with which to discharge their duties, was given to the jury in other parts of the charge, detached and incidental remarks made in regard to such obligation, which fail to state the proper limitation of liability, but were used under such circumstances as to make it absolutely certain that the jury were not misled thereby, are not grounds for reversal. *Choctaw, etc., R. Co. v. Tennessee*, 191 U. S. 326, 48 L. Ed. 201.

90. Instructions not based on the evidence.—*Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884.

(5) *Rule in Criminal Cases.—In General.*—Nonprejudicial error is no more a ground for reversal in a criminal than in a civil case.⁹¹

Illustrative Cases.—And this rule has been applied to improper questions on cross examination of the accused,⁹² to improper remarks by the court during the trial,⁹³ to the overruling of objections to the sufficiency of the indictment,⁹⁴ to irregularities in selecting and impaneling the grand jury,⁹⁵ and to objections that the accused was absent from the trial.⁹⁶

c. *Change in Law Pending Appeal.*—Though error may have been committed by a court below on the then state of the statutory law, yet where a statute has been passed since that court gave their judgment, changing the then existing law, so that if the judgment were reversed and the case sent back, the court would now and in virtue of the new statute have to rightly give the same judgment, that they gave before erroneously, this court will affirm.⁹⁷

2. **PRESUMPTION AS TO PREJUDICE**—a. *In General.*—While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.⁹⁸ In other words, error is presumed to be prejudicial unless the contrary is shown.⁹⁹ And errors

91. **Rule in criminal cases.**—*Connors v. United States*, 158 U. S. 408, 39 L. Ed. 1033.

92. **Cross-examination of the accused.**—In a trial for homicide, error in the cross-examination of the accused in asking him a question as to previous trouble or insubordination on his part is not prejudicial, where he answers denying the charge and it is plain that he was not injured thereby. *Sawyer v. United States*, 202 U. S. 150, 167, 50 L. Ed. 972.

93. **Improper remarks by the court.**—When on the trial of a person for the homicide of several persons, the court says that the accused is not charged with the murder of one of them, whose name is contained in the indictment, and that if charged in the bill there was no evidence to support such charge, such remarks are not prejudicial to the accused. *Sawyer v. United States*, 202 U. S. 150, 168, 50 L. Ed. 972.

94. **Sufficiency of the indictment.**—An objection made by demurrer or by motion to the sufficiency of the allegations in the indictment, would not avail "on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. Rev. Stat., § 1025." *Connors v. United States*, 158 U. S. 408, 411, 39 L. Ed. 1033.

95. **For such irregularities in selecting and impaneling the grand jury**, as do not prejudice the defendant, he has no cause of complaint, and can take no exception. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624.

96. **Absence of accused from trial.**—It is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error.

Howard v. Kentucky, 200 U. S. 164, 175, 50 L. Ed. 421.

97. **Change in law pending appeal.**—*Pugh v. McCormick*, 14 Wall. 361, 20 L. Ed. 789. See post, "Effect of Change in Law Pending Appeal," XVII, M.

98. **Presumption as to prejudice in general.**—*Smiths v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 28 L. Ed. 62; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99, 103, 30 L. Ed. 299.

While it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of. *Smiths v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717, citing *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U. S. 47, 28 L. Ed. 62.

When it is argued here that an error in the court below worked no injury to the party complaining, the fact that it worked no injury must be made to appear beyond question. If it is only to be seen by a mere preponderance of evidence, and the error is substantiated, the judgment must be reversed. *Smiths v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717, citing *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653.

99. *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Smiths v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717; *Gilmer v. Higley*, 110 U. S. 47, 28 L. Ed. 62; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99, 30 L. Ed.

cannot be said to be immaterial, where it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiff.¹

b. *Illustrative Cases.*—While this rule works a reversal most frequently where evidence has been excluded,² yet it has been applied to rulings of the court in sustaining a demurrer,³ and to the action of the court in striking out answers.⁴

3. OTHER KINDS OF HARMLESS ERRORS CONSIDERED—*a. Invited Errors*—(1) *In General.*—A party cannot be permitted to complain in an appellate court of the action of the court below, had in compliance with his request,⁵ nor will a

299; *Mexia v. Oliver*, 148 U. S. 664, 37 L. Ed. 602; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. Ed. 1003.

1. *Mexia v. Oliver*, 148 U. S. 664, 37 L. Ed. 602, citing *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U. S. 47, 28 L. Ed. 62.

2. *Exclusion of testimony.*—Because the record does not contain all the testimony, a revisory court cannot assume that the appellants were not injured by a refusal to have questions answered. The farthest any court has gone has been to hold, that when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded: *Gilmer v. Higley*, 110 U. S. 47, 28 L. Ed. 62, citing *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653.

When it is sought to apply the rule that a court of error will not reverse where an error works no injury, it must appear beyond doubt that the error complained of neither did prejudice nor could have prejudiced the party against whom the error was made. Hence, where by an error of the court below a plaintiff had not been allowed to introduce the first item of her testimony, and had no interest therefore to show anything which might avoid the proof of the other side—proof which, though apparently fatal to her case, even though the error had not been made, she might, possibly, have avoided if the court had not committed the error, but had given her a standing in the case which would have made it avail her to avoid such opposite proof—the judgment was reversed. *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653.

3. *Where the court errs in sustaining a demurrer* to a plaintiff's replication, the judgment below in favor of the defendant must be reversed, unless it clearly appears that the plaintiff was not prejudiced by the error. *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. Ed. 870, citing *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653.

4. *Striking out answers.*—Where, on an information for breach of the internal revenue laws, the record shows that an answer of a claimant was stricken out by the court, in a case in which he was entitled to a trial by jury, and judgment rendered against him as upon default, the court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a

conclusion. Any such judgment will accordingly be reversed, and the cause remanded with directions to permit the claimant to answer, and to award a venire. *Garnhart v. United States*, 16 Wall. 162, 21 L. Ed. 275.

5. *Invited errors in general.*—*United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *New York Elevated R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 34 L. Ed. 231.

An order made by the court below, pursuant to the consent of parties, is binding upon them here. *Waterworks Co. v. Barret*, 103 U. S. 516, 26 L. Ed. 523.

Where both of the parties at the trial of an action against a railroad company for injuries to live stock, had accepted the value of the cattle at the ultimate destination as the basis upon which the damages are to be computed, the defendant cannot contend on appeal, that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292.

A defendant to a bill in equity, who states in his answer under oath the provisions of a writing, which is presumed to be in his possession, cannot complain that the court acted upon his admission. *Cavender v. Cavender*, 114 U. S. 464, 471, 29 L. Ed. 212.

Appointment of receivers.—Where the record shows that the appointment of receiver was made by consent of parties, the attorneys of appellant being in court at the time, this cannot be assigned as error by the appellants. "However other parties may complain of this act, and there were other parties, none of whom have appealed, the present appellants are bound by their consent in this court as well as in the court below, and cannot be heard to object to what they then agreed to." *Waterworks Co. v. Barret*, 103 U. S. 516, 517, 26 L. Ed. 523.

Construction of written instruments by jury.—The defendant is not at liberty to complain that the construction of an instrument was left to the jury, if it was so done at his own request, and where, if the court had construed it, the construction must have been unfavorable to the defendant. *Randon v. Toby*, 11 How. 493, 13 L. Ed. 784.

Amendment of findings of court of claims.—Amendments of the findings by the court of claims, made at the request of the defendant in connection with his

writ of error lie for one's own neglect or irregularity.⁶

Where Counsel Have Misled Court.—In spite of special circumstances of an alleged misleading of the court and opposite counsel by a statement of counsel, this court will nevertheless reverse a judgment, manifestly erroneous.⁷

(2) *Admission or Exclusion of Evidence.*—For example, a party in this court cannot allege as error in the court below, the admission of evidence offered by himself and objected to by the other side.⁸

(3) *Instructions.*—The defendant in error is not entitled to claim that the judgment should be affirmed because an instruction given at his own request is not sufficiently favorable to him.⁹

(4) *Jurisdiction of Court.*—But an exception to this rule is that a plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort.¹⁰ On the other hand, where a person has voluntarily invoked the equity jurisdiction of the court, he is not in a position to urge on appeal that his complaint should have been dismissed because of the adequacy of the remedy at law.¹¹

b. Errors Favorable to the Complainant.—(1) *In General.*—An error favorable to the party objecting furnishes no ground for a reversal,¹² and this rule

motions for a new trial, which motions were made after the findings of fact, conclusions of law and judgment were filed by the court of claims, are not assignable for error. *United States v. St. Louis, etc., Transp. Co.*, 184 U. S. 247, 249, 46 L. Ed. 520.

6. *Townsend v. Jemison*, 7 How. 706, 718, 12 L. Ed. 880, 885.

7. *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. Ed. 685.

8. *Admission or exclusion of evidence.*—*Avendano v. Gay*, 8 Wall. 376, 19 L. Ed. 422; *Bethell v. Mathews*, 13 Wall. 1, 3, 20 L. Ed. 556; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 95, 37 L. Ed. 93.

Parol evidence.—Where a defendant, on a trial, introduces, under the objection of the plaintiff, parol evidence of what occurred in negotiations between the parties prior to the making of a contract between them, with a view to the construction of the contract, he cannot on a writ of error to review a judgment against him, allege as error the admission of such evidence. *McGillin v. Bennett*, 132 U. S. 445, 33 L. Ed. 422.

9. *Instructions.*—*Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 587, 38 L. Ed. 279.

"While the plaintiff has no right to complain of this instruction, it does not necessarily follow that defendant is entitled to an affirmance of the judgment because the charge of the court was not sufficiently favorable to him in that particular, when such charge was made upon his own request." *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 606, 38 L. Ed. 279.

10. *Jurisdiction of court.*—*Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229.

A receiver, having voluntarily brought the cause into the circuit court by whose appointment he held his office, cannot, after that court has passed upon the matter in controversy, be heard to object to

the power of that court to render judgment therein. *Baggs v. Martin*, 179 U. S. 206, 208, 45 L. Ed. 155; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 342, 45 L. Ed. 220.

11. *Adequate remedy at law.*—*Perego v. Dodge*, 163 U. S. 160, 41 L. Ed. 113; *Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 40 L. Ed. 263.

12. *Errors favorable to the complainant in general.*—*Ferguson v. Baron*, 2 Dall. 113, 1 L. Ed. 311; *Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884; *Bethell v. Mathews*, 13 Wall. 1, 20 L. Ed. 556; *Avendano v. Gay*, 8 Wall. 376, 19 L. Ed. 422; *Law v. Cross*, 1 Black 533, 17 L. Ed. 185; *McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443; *Thompson v. Roberts*, 24 How. 233, 16 L. Ed. 648; *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 42, 3 L. Ed. 143; *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 376, 378, 48 L. Ed. 225; *Tilden v. Blair*, 21 Wall. 241, 22 L. Ed. 632.

Plaintiff in error cannot complain of errors in his favor. *Law v. Cross*, 1 Black 533, 540, 17 L. Ed. 185.

Errors on the part of the court cannot be complained of, if they are favorable to the party objecting. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884.

An error favorable to the plaintiffs in error is not ground of reversal. *Thompson v. Roberts*, 24 How. 233, 16 L. Ed. 648.

It has been often decided that a plaintiff in error cannot take advantage of rulings upon exceptions in his own favor, even if erroneous. *Bethell v. Mathews*, 13 Wall. 1, 20 L. Ed. 556, citing *Genres v. Bonnemere*, 7 Wall. 564, 19 L. Ed. 227; *Avendano v. Gay*, 8 Wall. 376, 19 L. Ed. 422; *Kearney v. Case*, 12 Wall. 275, 276, 20 L. Ed. 395.

Where the case is tried before a jury, contested facts must be accepted to be

applies equally in criminal cases.¹³

(2) *Errors with Respect to the Evidence.*—Errors in the admission or exclusion of evidence, favorable to the party complaining, constitute no ground for reversal,¹⁴ and this is the rule in criminal cases also.¹⁵

(3) *Errors with Respect to the Instructions.*—Errors in giving or refusing to give instructions, which are favorable to the party complaining, are no ground for reversal,¹⁶ as where the error consists in submitting a mixed question of law and of fact to the jury.¹⁷

(4) *Exceptions to General Rule.*—A party may take advantage of an error in his favor, if it be an error of the court.¹⁸

as alleged by the plaintiff, because resolved in his favor by the verdict. *Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759, citing *Lancaster v. Collins*, 115 U. S. 222, 29 L. Ed. 373.

Where in a prize case, the libelants demur to the grounds of defense taken of the answer of the respondent, and the demurrer is sustained, and from such decision the respondent appeals, the appeal on the part of the respondent will be dismissed, if the decision upon the matter in controversy was in his favor, and the question of law decided against him on the first demurrer is open for argument upon the appeal of the libelants. *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 246.

13. *Errors favorable to the complainant in criminal cases.*—*Williams v. United States*, 168 U. S. 382, 389, 42 L. Ed. 509, citing *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445; *Pierce v. United States*, 160 U. S. 355, 40 L. Ed. 454.

14. *Errors with respect to the evidence.*—*Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 144, 42 L. Ed. 693.

Where it appears from the charge that the decision of the court was favorable to the plaintiff, he has no cause for complaint upon his exceptions to the competency of the evidence. *Chandler v. Von Roeder*, 24 How. 224, 16 L. Ed. 633; *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. Ed. 455.

Whether the conviction of a witness for a felony is admissible to affect his credibility is not before us, where the ruling on that question was in favor of the plaintiffs in error. *Legan v. United States*, 144 U. S. 263, 36 L. Ed. 429.

15. *Errors in criminal cases.*—*Pierce v. United States*, 160 U. S. 355, 40 L. Ed. 454.

16. *Errors in giving or refusing instructions.*—*Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90; *Reed v. Proprietors*, 8 How. 274, 291, 12 L. Ed. 1077; *McLemore v. Powell*, 12 Wheat. 554, 556, 6 L. Ed. 726; *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050; *Wiggins v. Burkham*, 10 Wall. 129, 133, 19 L. Ed. 884; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 30 L. Ed. 1140.

And where the plaintiff excepted to the opinion of the court, which opinion was

more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although there may have been error in the instructions, provided that error consisted in giving the plaintiff too much. *McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443.

17. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884.

18. *Exceptions to general rule.*—*Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229. See *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 376, 48 L. Ed. 225.

It is true, as a general rule, that a man cannot reverse a judgment for error in process or delay, unless he can show that the error was to his disadvantage; but it is also a rule, that he may reverse a judgment for an error of the court, even though it be for his advantage. As if a verdict be found for the debt, damages, and costs, and the judgment be only for the debt and damages, the defendant may assign for error that the judgment was not also for costs, although the error is for his advantage. Here it was the duty of the court to see that they had jurisdiction, for the consent of parties could not give it. It is therefore an error of the court, and the plaintiff has a right to take advantage of it. *Capron v. Van Noorden*, 2 Cranch 126, 127, 2 L. Ed. 229.

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the circuit court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462.

It is true that the plaintiffs below,

Failure to Give Full Relief.—It is also a rule that although a court may decree in favor of a complainant, yet if the decree is not to the extent prayed for in his bill, he may have just cause of appeal on that account.¹⁹

C. Waiver of Error.—1. EXPRESS WAIVER.—An agreement of parties, spread upon the record, affording evidence of the assent of the parties to any irregularity, is a waiver of the right to reverse.²⁰

2. IMPLIED WAIVER.—In General.—It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called hereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them.²¹

Mere irregularities in the court below are not ground for reversal, if waived by the complainant going to trial on the merits. Such as, that a general demurrer had been filed, and had not been disposed of; that a nonsuit had been taken by the plaintiff in error, and that a motion to set it aside had been overruled; that the case had been submitted to a jury, without an issue between the parties; and finally, that the verdict, if an issue was made, had been returned by eleven instead of twelve jurors.²²

against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462.

In *Scott v. Sanford*, 19 How. 393, 400, 15 L. Ed. 691, it was decided that a judgment of the circuit court, upon the sufficiency of a plea in abatement denying its jurisdiction, was open for review upon a writ of error sued out by the party in whose favor the plea had been overruled. And in this view Mr. Justice Curtis, in his dissenting opinion, concurred; and we adopt from that opinion the following statement of the law on the point: "It is true," he said, 19 How. 566, "as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in *Bac. Ab. Error* H, 4. And this court followed this practice in *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229, where the plain-

tiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the circuit court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, when no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. *Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863. "*Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 383, 28 L. Ed. 462.

19. *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 14 L. Ed. 768.

20. **Improper joinder of parties.**—A decree of the circuit court will not be reversed on the ground that there is an improper joinder of parties, where there is an agreement of the parties, spread upon the record, affording evidence of the assent of the parties, and the waiver of all objection to the regularity of the proceeding, especially where it appears that by this mode of procedure, the rights of the parties concerned could in no respect be prejudiced. *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398.

21. **Implied waiver.**—*Montana R. Co. v. Warren*, 137 U. S. 348, 351, 34 L. Ed. 681.

22. *Evans v. Gee*, 11 Pet. 80, 85, 9 L. Ed. 639.

Motion for Nonsuit.—For example, a defendant waives error in overruling his motion to nonsuit the plaintiff by afterwards introducing evidence, and cannot insist on the error on appeal.²³

Sustaining and Overruling Demurrers.—Likewise, though it be error to sustain in part, and overrule in part a demurrer which is single, yet a complainant by amending his bill, and a defendant by answering, afterwards both waive their right to allege error; as a defendant specially does in such a case in this court by not appealing.²⁴ But when the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict.²⁵

Estoppel to Allege Error.—An appellant or plaintiff in error is precluded from objecting, on appeal, that an excessive allowance was made to his adversary out of the fund in which both of them are interested, when he has received the benefit of a similar allowance.²⁶

XVII. Hearing and Determination.

A. Stipulations²⁷—1. IN GENERAL.—A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced, as an agreement to submit the case on printed argument alone, within the time allowed by the rule of this court.²⁸

2. WITHDRAWAL FROM STIPULATIONS.—Stipulations between counsel relative to the course of proceeding in a cause pending in this court cannot be withdrawn by one party without the consent of the other, except by leave of the court upon cause shown.²⁹

B. Order in Which Causes Should Be Heard.—Cases regularly on the calendar, whether brought here by writ of error or appeal, if within the jurisdiction of the court, are required to be heard when reached in the regular call of the docket, and they cannot be heard before they are reached except when they are advanced by the order of the court.³⁰

C. Advancement of Causes—1. STATUTES AND RULES OF COURT STATED.—The 30th rule of this court prescribes that "All cases on the calendar, except cases advanced as hereinafter provided, shall be heard when reached in the regular call of the docket, and in the order in which they are entered,"³¹ and a motion to advance the cause upon the docket will be denied, where it does not come within any of the exceptions to this rule.³²

But an act of Congress, passed June 30th, 1870, enacts: "That in all suits and actions * * * now pending, or which may hereafter be brought in any of the courts of the United States or brought into said courts by appeal or writ of error, * * * wherein a state is a party, or where the execution of

23. *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 713, 31 L. Ed. 296, citing *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. Ed. 740; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. Ed. 497.

24. *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121.

25. *Teal v. Walker*, 111 U. S. 242, 246, 28 L. Ed. 415.

26. *Terry v. Abraham*, 93 U. S. 38, 23 L. Ed. 794.

27. See the various particular sections for exemplifications of this question in specific cases.

28. In general.—*Dakota County v. Glidden*, 113 U. S. 222, 225, 28 L. Ed. 981;

Woodman Pebbling Machine Co. v. Guild, 154 U. S. 597, 21 L. Ed. 743.

29. **Withdrawal from stipulations.**—*Muller v. Dows*, 94 U. S. 277, 278, 24 L. Ed. 76; *Aurrecoechea v. Banks*, 110 U. S. 217, 28 L. Ed. 125.

30. **Order in which causes should be heard.**—*The Eutaw*, 12 Wall. 136, 139, 20 L. Ed. 278.

31. **Statutes and rules of court stated.**—*Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260.

32. *Baltimore, etc., R. Co. v. Marshall County Supervisors*, 131 U. S., appx. xcix, 19 L. Ed. 452.

the revenue laws of any state may be enjoined or stayed by judicial order or process, it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give such cause the preference and priority over all other civil causes pending in such court between private parties. And the state or the party claiming under the laws of the state, the execution of whose revenue laws is enjoined or suspended, shall have a right to have such cause heard at any time after such cause is docketed in such court in preference to any other civil cause pending in such court between private parties."³³

2. WHAT CAUSES ADVANCED—*a. Questions of Public Importance*—(1) *In General*.—Up to the time of the passage of the act of June 30th, 1870, when the order of hearing the causes in this court was regulated almost entirely by rule, it was held, that the only cases of general public interest which should be taken up out of their regular order, were those in which the question in dispute would embarrass the operations of the government while it remained unsettled.³⁴

But merely because the questions involved may be of public importance, does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances it is our duty not to take up a case out of its order except for imperative reasons.³⁵

(2) *Where Execution of Revenue Laws Is Enjoined or Stayed*.—Section 949 of the Revised Statutes provides: When the execution of the revenue laws of a state is enjoined or stayed in any suit in a court of the United States, such state, or the party claiming under the revenue laws of a state the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties.³⁶

The original act, to which this section of the revision is applicable, was passed June 30, 1870 (16 Stat. 176).³⁷

The statute is not imperative. It does not provide that all cases in which the execution of the revenue laws of the state is enjoined or stayed shall have preference over others upon the docket, but only such as, upon a showing, the court is of the opinion should be heard out of their order. The court must determine what is "sufficient reason" for this preference, under all the circumstances of the case.³⁸

Paragraph 4, of Rule 26 relates only to revenue cases and cases in which the United States are concerned, which also involve or affect some matter of general public interest. Even these cannot be advanced except in the discretion of the court and on motion of the attorney general.³⁹

Must Embarrass Operations of Government.—Cases in which the execution of the revenue laws of the state have been enjoined or stayed are only to be advanced on motion where it appears that the operations of the government will be embarrassed by delay,⁴⁰ and it must be shown that such will be the effect of the delay before a case will be advanced, even on motion by the state or those claiming under it.⁴¹ The court will not, in preference to cases pending between

33. *Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260; *Miller v. New York*, 12 Wall. 159, 161, 20 L. Ed. 259.

34. **Questions of public importance in general.**—*United States v. Fossatt*, 21 How. 446, 16 L. Ed. 186.

35. *Carter v. Greenhow*, 109 U. S. 63, 65, 27 L. Ed. 860; *Baltimore, etc., Railroad v. Marshall County Supervisors*, 131 U. S. appx. xcix, 19 L. Ed. 452.

36. **Where execution of revenue laws is enjoined or stayed.**—*Hoge v. Richmond, etc., R. Co.*, 93 U. S. 1, 2, 23 L. Ed. 781.

37. *Hoge v. Richmond, etc., R. Co.*, 93 U. S. 1, 2, 23 L. Ed. 781.

38. *Hoge v. Richmond, etc., R. Co.*, 93 U. S. 1, 2, 23 L. Ed. 781; *Miller v. New York*, 12 Wall. 159, 20 L. Ed. 259; *Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260; *Davenport City v. Dows*, 15 Wall. 390, 21 L. Ed. 96.

39. *Carter v. Greenhow*, 109 U. S. 63, 64, 27 L. Ed. 860.

40. *Central R. Co. v. Bourbon County*, 116 U. S. 538, 540, 29 L. Ed. 725.

41. *Hoge v. Richmond, etc., R. Co.*, 93 U. S. 1, 23 L. Ed. 781; *Central R. Co. v. Bourbon County*, 116 U. S. 538, 29 L. Ed. 725.

private parties, set down for argument a case in which the execution of the revenue laws of a state has been enjoined, unless it sufficiently appears that the operation of the government of the state will be embarrassed by delay.⁴²

What Are Revenue Laws.—The ordinances of municipal corporations laying taxes cannot be regarded as the revenue laws of the state from which they derive their power of laying taxes, within the meaning of the act of June 30th, 1870.⁴³

Injunction against Collection of Taxes.—A motion to advance upon the docket an injunction cause against the collection of certain taxes, on the ground that very important interests of a state are involved in the litigation, does not come within any of the exceptions to Rule 30, which requires that all cases shall be heard when reached in the regular call of the docket, and the order in which they are entered.⁴⁴

Where a tax collector has been sued for alleged wrongs done the several plaintiffs while he was engaged in the collection of taxes due the state, but he is not restrained from discharging any of his official duties, the execution of the revenue laws cannot be said to have been enjoined or stayed.⁴⁵

On Whose Motion.—Cases in which the execution of the revenue laws of the state have been enjoined or stayed are only to be advanced on motion of the state or the party claiming under such laws.⁴⁶ The motion cannot be made by the party taxed, when the suit is by the county claiming under the tax laws for the recovery of a tax.⁴⁷

b. *Causes Involving Private Interests.*—A cause involving private interests only, will not be advanced for a hearing in preference to other suits on the docket.⁴⁸ The only cases where this rule does not apply, are those in which the question in dispute will embarrass the government while it remains unsettled.⁴⁹

c. *Causes Involving Great Hardships.*—Cases involving great hardships are frequently brought here for revision, and in such cases it is competent for the court to advance the same on motion.⁵⁰

d. *Jurisdiction of Court Below.*—(1) *Rules of Court Stated.*—By rule promulgated November 28, 1892, amending Rule 32 of this court, it was provided that cases brought to this court by writ of error or appeal, under the act of February 25, 1889, ch. 236, or under § 5 of the act of March 3, 1891, ch. 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.⁵¹

(2) *Appeals from Decree on Merits.*—Rule 32 applies only to cases which have been remanded by a circuit court to a state court, or dismissed, under the authority of § 5 of the act of March 3, 1875, c. 137. Not to an appeal from a decree on the merits in a suit removed from a state court to the circuit court.⁵²

42. *Hoge v. Richmond, etc., R. Co.*, 93 U. S. 1, 23 L. Ed. 781.

43. *Davenport City v. Dows*, 15 Wall. 390, 21 L. Ed. 96.

44. **Injunction against collection of taxes.**—*Baltimore, etc., R. Co. v. Marshall County Supervisors*, 131 U. S., appx. xcix, 19 L. Ed. 452.

45. **Suit against tax collector.**—*Carter v. Greenhow*, 109 U. S. 63, 64, 27 L. Ed. 860.

46. Rev. Stat., § 949.

47. **Parties to motion.**—*Central R. Co. v. Bourbon County*, 116 U. S. 538, 540, 29 L. Ed. 725; *Carter v. Greenhow*, 109 U. S. 63, 64, 27 L. Ed. 860.

48. **Causes involving private interests.**—*Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933; *United States v. Fossatt*, 21 How. 446, 16 L. Ed. 186.

49. *United States v. Fossatt*, 21 How. 446, 16 L. Ed. 186.

50. **Causes involving great hardships.**—*Ex parte Robinson*, 19 Wall. 505, 513, 22 L. Ed. 205.

51. **Rules of court stated.**—Amendment of Rules, 146 U. S., appx. 707; *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. Ed. 911.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, ch. 236, where the final judgment or decree rendered by the circuit court does not exceed the sum of five thousand dollars, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals. Promulgated March 10, 1890. Rule 32, 133 U. S., appx., 711.

52. **Appeals from decree on merits.**—*Call v. Palmer*, 106 U. S. 39, 27 L. Ed. 61.

(3) *Writs of Error to State Courts.*—Rule 32 applies only to writs of error and appeals brought to this court under the provisions of § 5 of the act of March 3, 1875; that is to say, to writs of error and appeals from orders of the circuit courts remanding causes which have been removed from a state court, and from orders dismissing suits because they do not really and substantially involve disputes or controversies properly within the jurisdiction of the circuit courts, or because the parties to the suits have been improperly made or joined for the purpose of creating a case cognizable under that act. It does not apply to writs of error to state courts.⁵³ But a case brought here in error from the supreme court of a state, in which the trial court refuses to let go its jurisdiction on a petition for removal, and in which the supreme court of the state affirmed that ruling, is within the spirit of Rule 32, 108 U. S. 591, relating to the advancement of causes, and the court, on motion in such a cause, may advance it to be heard under the rules prescribed by Rule 6, 108 U. S. 574, in regard to motions to dismiss.⁵⁴

(4) *The Motion.*—A motion is the remedy used to secure the right to advance a cause,⁵⁵ which motion should be accompanied by an agreed statement of the case, or by such extracts from the record as will show that the case is one to which the rule is applicable.⁵⁶

(5) *Hearing and Determination.*—By the 32d rule as amended (146 U. S. 707), cases brought to this court by writ of error or appeal under § 5 of the act of March 3, 1891, when the only question at issue is the question of the jurisdiction of the court below, will be advanced on motion and taken on printed briefs or arguments in accordance with the prescription of Rule 6 in regard to motions to dismiss writs of error or appeals.⁵⁷

e. *Criminal Cases.*—Rule 30 of this court prescribes that criminal cases may be advanced by leave of the court, on motion of either party,⁵⁸ but since the motion is addressed to the discretion of the court,⁵⁹ an advancement under this rule may be refused where it appears that the party asking the advance is not in jail.⁶⁰

Form and Requisites of Motion.—A motion to advance a criminal cause made on behalf of the United States must state the facts in such manner that the court may judge whether the government will be embarrassed in the administration of its affairs by delay.⁶¹

f. *Where a State Is a Party.*—The act of congress of the 30th of June, 1870, which is now § 949 of the Revised Statutes, provides that "in all suits and actions now pending, or which may hereafter be brought, in a federal court, whether the suit is original or brought into said courts by appeal or writ of error or by removal from a state court, wherein a state is a party, * * * it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give such cause the preference and priority over all other civil causes pending in such court between private parties."⁶²

Right of State to United States Bonds.—A motion to advance a case under this act will be granted, where the question presented relates to the right of the state to certain bonds of the United States, that the money represented

53. *Writs of error to state courts.*—*Carter v. Greenhow*, 109 U. S. 63, 64, 27 L. Ed. 860.

54. *Burlington, etc., R. Co. v. Dunn*, 121 U. S. 182, 30 L. Ed. 885.

55. *Remedy is by motion.*—*Miller v. New York*, 12 Wall. 159, 20 L. Ed. 259; *Central R. Co. v. Bourbon County*, 116 U. S. 538, 29 L. Ed. 725.

56. *Agreed statement should accompany motion.*—*Call v. Palmer*, 106 U. S. 39, 27 L. Ed. 61.

57. *Hearing and determination.*—*Aspen*

Min., etc., Co. v. Billings, 150 U. S. 31, 34, 37 L. Ed. 986.

58. *Criminal cases.*—*Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260.

59. *Ward v. Maryland*, 12 Wall. 163, 164, 20 L. Ed. 260.

60. *Denied where petitioner is at large.*—*Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260.

61. *United States v. Norton*, 91 U. S. 558, 23 L. Ed. 250.

62. *Where a state is a party.*—*Miller v. New York*, 12 Wall. 159, 161, 20 L. Ed. 259.

by the bonds was part of the school money for the school fund, and is very much wanted for the school.⁶³

Who Entitled.—A motion to advance cannot, under the act of June 30th, 1870, be made except in behalf of a state, or by a party claiming under its laws.⁶⁴ Although a suit be nominally by a state as the plaintiff, yet where the real plaintiffs are individuals—as ex gr. in a quo warranto, where the state is plaintiff *ex relatione*—the court will not advance, even by consent of counsel on both sides, a case under the act of June 30th, 1870.⁶⁵

Hearing and Determination.—Where it is suggested that the state is the only party plaintiff in the writ of error, it is the duty of the court in such a case to open the record and ascertain whether the case in point of fact is one where the parties are entitled to be heard in preference to other civil causes between party and party pending on the calendar.⁶⁶

g. Causes without Merits.—A cause will not, on the ground that it has no merits, be advanced for argument.⁶⁷

h. Direct Appeals under the Act of March 3rd, 1891.—Cases brought directly to this court on a certificate of jurisdiction under § 5 of the judiciary act of March 3rd, 1891, may be advanced on the docket under Rule 32.⁶⁸

i. Appeals from Interlocutory Orders under § 7 of the Court of Appeals Act.—It was not intended by § 7 of the act of March 3, 1891, allowing an appeal from an interlocutory decree granting or continuing an injunction or appointing a receiver to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of congress in this legislation was that there be an immediate review of the interlocutory proceedings, and not an advancement generally over other litigation.⁶⁹

3. HEARING AND DETERMINATION OF MOTION—*a. In General.*—Such motions are not granted as of course, even when both parties concur, as such an order, if improperly made, would prejudice the rights of other parties on the calendar, and in view of that consideration it is necessary to determine whether the case is one where the parties, or either of them, are entitled to such preference.⁷⁰ A motion to dismiss or affirm may be treated as equivalent to a submission under Rule 32.⁷¹ "All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application."⁷²

b. Consolidation of Causes.—When a case is advanced to be heard with another which has precedence on the docket, the rule is to require the two to be argued as one. This rule is never departed from except under very peculiar

63. *Huntington v. Texas*, 131 U. S., appx. cx, 20 L. Ed. 550, citing *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

Under the act providing that it shall be the duty of the court on sufficient reason shown, to give causes in which a state is a party preference and priority over all other civil causes pending in such court between private parties, it was held that where the question presented relates to the right of the state to certain bonds of the United States belonging to the state and it was stated by the governor of the state that the money represented by the bonds is part of the school fund, and is very much wanted for the schools, this is sufficient reason for advancing the causes. *Huntington v. Texas*, 131 U. S., appx. cx, 20 L. Ed. 550.

64. *Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260.

65. *Miller v. New York*, 12 Wall. 159, 20 L. Ed. 259.

66. **Hearing and determination of motion.**—*Miller v. New York*, 12 Wall. 159, 162, 20 L. Ed. 259.

67. **Causes without merits.**—*Amory v. Amory*, 91 U. S. 356, 23 L. Ed. 436.

68. **Direct appeals under the act of March 3rd, 1891.**—*Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. Ed. 911.

69. **Appeals from interlocutory orders under § 7 of the court of appeals act.**—*Ex parte National Enameling, etc., Co.*, 201 U. S. 156, 50 L. Ed. 707.

70. **Right to advancement.**—*Miller v. New York*, 12 Wall. 159, 161, 20 L. Ed. 259.

71. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. Ed. 911.

72. **Amendment to Rule No. 26**, 21 Wall. V.

circumstances.⁷³ Accordingly, as this court cannot compel a party against his will to argue his case with another, this court has always heretofore denied motions to advance when they are resisted.⁷⁴

c. *Briefs and Arguments*.—Cases advanced under § 3 of Rule 32 are to be submitted like motions to dismiss under Rule 6, that is to say, on printed briefs or arguments after service of notice and brief or argument, as required by § 4, Rule 6. The rule does not require a motion to dismiss or affirm.⁷⁵

d. *The Record*.—A motion to advance cannot be considered, in the absence of a printed record.⁷⁶

e. *Sufficiency of Motion Papers*.—A motion to advance will be denied, but without prejudice, where the motion papers are not such that we can pass upon the motion to advance, without referring to the transcript on file.⁷⁷

f. *The Order*.—Where the writ of error to the judgment below was allowed November 30, 1869, less than thirty days before the first day of the present term, which began December 6, 1869, this court will deny a motion to rescind an order advancing a cause.⁷⁸

D. Arguments of Counsel⁷⁹—1. *LATITUDE*.—There is no rule of court or principle of law which prevents the complainants from assuming in the argument a ground in this court which was not suggested in the court below; but such a course may be productive of much inconvenience, and of some expense.⁸⁰ But language employed in oral argument must be respectful.⁸¹

2. *TIME FOR HEARING ARGUMENTS*—a. *Rules of Court*.—The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court; and on Friday in each week, during the sitting of the court, motions in cases not required by the rules of the court to be put on the docket shall be entitled to preference, if such motions shall be made before the court shall have entered on the hearing of a cause upon the docket.⁸²

b. *Assigning Days for Argument*.—Where a cause upon the original docket of this court is assigned for argument on a certain day at the next term, if no exception shall be filed by either party, then the case stands for final hearing on the day last mentioned.⁸³ And after a case has been called, and placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases, of great public importance, have already been assigned for what may be the remainder of the term.⁸⁴

This court may rescind an order assigning the cause for hearing at a particular term.⁸⁵

c. *Neither Party Ready at Second Term*.—When a case is called for argument at two successive terms and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.⁸⁶

73. *Consolidation of causes*.—Louisiana v. New Orleans, 103 U. S. 521, 26 L. Ed. 306.

74. *Louisiana v. New Orleans*, 103 U. S. 521, 26 L. Ed. 306.

75. *Briefs and arguments*.—Fletcher v. Hamlet, 116 U. S. 408, 29 L. Ed. 679.

76. *The record*.—Crane Iron Co. v. Hoagland, 108 U. S. 5, 27 L. Ed. 630.

77. *Sufficiency of motion papers*.—Callan v. Bransford, 139 U. S. 197, 35 L. Ed. 144.

78. *The order*.—Cox v. United States, 131 U. S., appx. c, 19 L. Ed. 500.

79. See generally, the title ARGUMENTS OF COUNSEL.

80. *Latitude*.—Watts v. Waddle, 6 Pet. 389, 402, 8 L. Ed. 437.

81. *Kneeland v. American Loan, etc., Co.*, 138 U. S. 509, 34 L. Ed. 1052; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102.

82. *Rules of court*.—Rule of Court No. 27, 21 How. xv.

83. *Assigning days for argument*.—Pennsylvania v. Wheeling, etc., Bridge Co., 11 How. 528, 13 L. Ed. 799.

84. *Barry v. Mercein*, 4 How. 574, 11 L. Ed. 1108.

85. *Rescission of order*.—Connellsville, etc., R. Co. v. Baltimore, 154 U. S., appx., 553, 38 L. Ed. 1087.

86. *Neither party ready at second term*.—Rule 19, 21 How. xii.

Where neither party is prepared to argue the cause at the second term at

3. **ORAL ARGUMENTS.**—Where a case has been submitted on briefs, the submission may be set aside and an oral argument ordered. And if when the case is reached neither party appears by counsel, but an offer is again made to submit on the briefs, this court will order the case dismissed for want of prosecution.⁸⁷

Grounds for Ordering Oral Argument.—But merely because remarks of opposing counsel are lacking in the courtesy and temperance of language due from members of the bar, is not sufficient reason for the allowance of oral argument.⁸⁸

Oral Argument on Motions to Dismiss.—As a general rule, oral argument is not allowed on motions to dismiss appeals or writs of error.⁸⁹

4. **EFFECT OF FAILURE TO SUBMIT ARGUMENT.**—Where no argument has been submitted for the plaintiff in error in the circuit court, this court will infer that the exceptions relied upon in the circuit court have been abandoned.⁹⁰

5. **SUBMISSION OF CAUSES ON PRINTED ARGUMENTS.—Rules of Court.**—In all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same. But the arguments must be filed within the first ten days of the term, and signed by attorneys or counsellors of this court.⁹¹

Parties Who Must File Printed Arguments.—When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.⁹²

What Is a Sufficient Submission.—Where counsel on both sides stipulate in writing or submit a case under Rule 20, and by its terms plaintiff in error was to have until a certain time to serve and file his printed argument, and the counsel for the defendant in error until a certain time to serve and file his printed argument, and the counsel for the plaintiff in error a certain time to reply, but no argument was filed in behalf of the plaintiff in error, but one is filed in behalf of defendant, it was held that this court would take the case as submitted under the rule, although there is no argument for the plaintiff in error.⁹³

Right to Compel Submission.—A motion to require the defendant in error to submit the cause under Rule 20 will be denied. In other words, where the stipulation to submit contains no reference to Rule 20, this court cannot apply that rule to the case on the suggestion of one of the parties against the protest of the other.⁹⁴

which it is called for argument, the appeal will be dismissed at the cost of the appellants pursuant to the 55th rule of this court. *Mayer v. The Venelia*, 131 U. S., appx. lxx, 15 L. Ed. 41.

"In the crowded state of our docket, filled with cases from all parts of the United States, it is our duty to take special care that the necessary delays in disposing of the business are not added to by the neglect of counsel or parties. For this reason, our rules requiring causes to be ready for hearing when reached are, and will continue to be, rigidly enforced." *Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008; *Alvord v. United States*, 99 U. S. 593, 25 L. Ed. 399.

87. **Oral arguments.**—*Ficklen v. Shelby County*, 145 U. S. 1, 36 L. Ed. 601.

88. **Grounds for ordering oral argument.**—*Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 37 L. Ed. 986.

89. **No oral argument on motion to dismiss.**—*Carey v. Houston, etc., R. Co.*, 150 U. S. 170, 179, 37 L. Ed. 1041.

90. **Effect of failure to submit argument.**—*Duvall v. United States*, 154 U. S., appx., 548, 18 L. Ed. 252, 253.

The court expresses its dissatisfaction at the manner in which a plaintiff in error sends a case here, without argument, either oral or printed, thus leaving the court to search the entire record to find out whether error had been committed; increasing the trouble moreover by a general exception to the charge instead of specific exceptions to parts complained of; this, in violation of the Rules of court. *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769.

91. **Submission of causes on printed arguments.**—Rule of Court, No. 20, § 1, 21 How. xii.

92. Rule of Court, No. 20, § 2, 21 How. xii.

93. *Aurrecochea v. Bangs*, 110 U. S. 217, 28 L. Ed. 125.

94. *Glenn v. Fant*, 124 U. S. 123, 31 L. Ed. 352.

Time of Submission.—While the stipulation binds the parties to submit the cause without oral argument, there is nothing which requires this to be done at any particular time. Its terms will be fulfilled if the submission is made when the case is reached in its order.⁹⁵

Time of Filing Printed Arguments.—When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.⁹⁶

Withdrawal of Stipulations.—Stipulations of counsel to submit a cause under rule of court, on printed argument alone, cannot be withdrawn by either party without the consent of the other, except by leave of the court upon cause shown.⁹⁷

Setting Aside Submission.—Where the judges differ in opinion upon the questions presented, a submission on briefs may be set aside, and an oral argument ordered and the cause restored to its place on the calendar.⁹⁸

6. OPENING AND CLOSING ARGUMENT.—The plaintiff or appellant in this court shall be entitled to open and conclude the case. But, when there are cross appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.⁹⁹

E. Submission of Cause.—Submission without Consent of Parties.—This court will decline to accept the submission of the cause against the wishes of those who, being collaterally interested in the decision which may be made, united in the employment of counsel to present their defense, and contributed to a common fund for the payment of the expenses of the litigation.¹

Setting Aside Submission.—Where the rules of this court have been disregarded,² or the accused in a criminal appeal has escaped pending the writ of error in this court,³ or the judges differ in opinion on a question submitted on

95. No particular time necessary in which to submit.—*Glenn v. Fant*, 124 U. S. 123, 124, 31 L. Ed. 352.

96. Rule of Court, No. 20, § 3, 21 How. xii.

97. *Wright v. Nagle*, 101 U. S. 791, 793, 25 L. Ed. 921, following *Muller v. Dows*, 94 U. S. 277, 24 L. Ed. 76; *Aurrecochea v. Bangs*, 110 U. S. 217, 28 L. Ed. 125.

98. *Louisiana v. New Orleans*, 131 U. S., appx. cci, 26 L. Ed. 427.

99. Opening and closing argument.—Rule 22, 21 How. xiii.

1. Submission without consent.—Where the showing on a motion to set aside submission to satisfy the court that the case at bar, and the one which follows it on the docket, depend on a common defense; "that the decision of these suits will dispose of a large number of others now pending in the court below; that when the suits were begun below all the defendants united in the employment of counsel to present their defense, and contributed to a common fund for the payment of the expenses of the litigation; that since these cases have been docketed here the parties to this have come to an amicable understanding in respect to the subject matter of their particular litigation, under which this submission has been made, through new counsel em-

ployed in behalf of the defendants in error and without the concurrence of those interested in the other case and the suits still pending below. The questions involved are important. Under these circumstances we think we ought not to accept the submission of the cause against the wishes of those collaterally interested in the decision that may be made." *St. Louis Smelting, etc., Co. v. Kemp*, 103 U. S. 666, 26 L. Ed. 313.

2. Disregard of rules of court.—Where a cause submitted under the 20th rule has disregarded Rule 21, part 4, subd. 4, which provides that when a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length either in or with the brief, the submission will be set aside and the cause restored to its place on the docket. *School District v. St. Joseph Fire, etc., Ins. Co.*, 101 U. S. 472, 25 L. Ed. 868.

3. Escape of accused pending appeal.—The submission of the cause will be set aside in a criminal case, where it appears that during the pendency of the writ of error the plaintiff in error has escaped from custody. *Bohanan v. Nebraska*, 125 U. S. 692, 31 L. Ed. 854, followed in *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949, citing *Smith v. United States*, 94 U. S. 97, 24 L. Ed. 32.

briefs,⁴ the submission may be set aside, and the case restored to its place on the calendar.

But this court may allow a resubmission where there was some irregularity in the original submission of the cause.⁵

F. Consolidation of Causes.—While a party cannot be compelled against his will to argue his case with another,⁶ yet where two cases involve the same questions of constitutional law, growing out of one transaction and dependent on the same facts, the court will order them to be argued together.⁷

G. Continuance or Postponement of Hearing—1. **IN GENERAL.**—**Time for Hearing.**—The rules requiring causes to be ready for hearing when reached will continue to be rigidly enforced.⁸

Notice of Hearing.—The 22d section of the judiciary act, taken in connection with the act of 1803, provides for the re-examination of cases on writ of error, the adverse party having at least thirty days' notice.⁹

Grounds for Continuance in General.—A cause may be continued by this court to a subsequent term upon sufficient cause shown.¹⁰

2. **ABSENCE OF COUNSEL.**—The absence of one or all the counsel employed by one party, in the pursuit of other business, furnishes no ground for delaying a case in this court, without the consent of the adverse party.¹¹

3. **DEATH OF COUNSEL.**—Death of counsel has been held to be a sufficient ground for continuing the cause until the next term.¹²

4. **Difference of opinion between judges.**—Where the question whether the state constitution conflicts with the fourteenth amendment to the federal constitution is submitted on briefs, but the judges differ in opinion, the submission on briefs will be set aside and oral argument ordered, and the cause restored to its place on the calendar. *Louisiana v. New Orleans*, 131 U. S., appx. cci, 26 L. Ed. 427.

5. *Caldwell v. Texas*, 141 U. S. 209, 35 L. Ed. 718.

6. **Consolidation of causes.**—*Louisiana v. New Orleans*, 103 U. S. 521, 26 L. Ed. 306.

7. *Ableman v. Booth*, 18 How. 470, 15 L. Ed. 465.

8. **The rules of court strictly enforced.**—*Hurley v. Jones*, 97 U. S. 318, 24 L. Ed. 1008; *Alvord v. United States*, 99 U. S. 593, 25 L. Ed. 399.

9. **Thirty days' notice to adverse party.**—*Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500.

This provision does not necessarily require that the thirty days' notice shall be given prior to the first day of the term; but in the case of *Welsh v. Mandeville*, 5 Cranch 321, 3 L. Ed. 113, the court held as a matter of discretion, that they would not compel the hearing of the cause at the first term unless such notice had been given, and this decision was made the rule of the court. This decision was made in accordance with a rule of the court adopted February term, 1803, 1 Wheat. xvi, Rule xvi, that where the writ of error issued within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance and proceed to trial; otherwise, the cause must be continued. *Cox v. United States*, 131 U. S.,

appx. c. 19 L. Ed. 500. See *National Bank v. Bank*, 99 U. S. 608, 25 L. Ed. 362.

10. Where an appeal was taken at the December term, 1832, of the circuit court for the District of Columbia, to the January term, 1833, of this court; but the appeal was not entered to that term, but was entered to January term, 1834, the case being called for argument, the defendant asked for a continuance which was granted. *Brown v. Swann*, 8 Pet. 435, 8 L. Ed. 1001.

After-acquired evidence.—A continuance granted on an appeal from the court of claims, there having been a motion made there by the appellant, and yet undisposed of, for a new trial on the ground of after-acquired evidence. But the court declares that it must not be understood as giving any sanction to the idea that indefinite postponement of final hearing and determination can be obtained by repeated motions for continuance here. The court below, not this court, must determine whether the application for a new trial is seasonably made. *United States v. Crusell*, 12 Wall. 175, 20 L. Ed. 384.

11. **Absence of counsel.**—*Day v. Hayward*, 20 How. 208, 15 L. Ed. 851.

In a case depending between the states of Rhode Island and Massachusetts, the senior counsel appointed to argue the cause for the state of Rhode Island, by the legislature, was prevented, by unexpected and severe illness, attending the court; the court, on the application of the attorney general of the state, ordered a continuance for the term. *Rhode Island v. Massachusetts*, 11 Pet. 226, 9 L. Ed. 697. See *McGuire v. Massachusetts*, 3 Wall. 382, 18 L. Ed. 164.

12. **Death of counsel.**—*Hunter v. Fairfax*, 3 Dall. 305, 1 L. Ed. 613.

4. **ABIDING THE EVENT.**—Parties may stipulate that their case shall abide the event of a decision to be made in another.¹³

H. Withdrawal or Discontinuance.—1. **IN GENERAL.**—After an appeal is brought to the appellate court, its withdrawal or discontinuance is not a matter of course, but if the plaintiff finds it expedient to discontinue, he must first obtain leave of the court.¹⁴ The discontinuance is usually granted on the application, unless some special reason be shown by the defendant for retaining the case with a view to a determination on the merits. Usually the courts will not allow it, if the party intends at some future time to bring a new appeal, as the allowance under such circumstances would be unjust to the defendant.¹⁵

2. **GROUND'S FOR ALLOWANCE.**—It is not the practice of this court to allow a discontinuance of a writ of error, except for sufficient reason assigned, or by consent of the adverse party.¹⁶ Leave will not be given to discontinue a writ of error on the ground of the inability of leading counsel for the plaintiff in error to make proper preparations for argument within the time allowed, and the sickness of one of his associate counsel.¹⁷

3. **TIME OF ALLOWANCE.**—Before trial the plaintiff may in many cases, as a matter of right, discontinue his cause, at any time when he is demandable in court.¹⁸

But after a trial or verdict, he can do so only by leave of the court, which it may grant or refuse, in its discretion. But, under ordinary circumstances, before verdict, it is almost a matter of course to grant it, upon payment of costs, when it is not strictly demandable of right.¹⁹

I. Double Appeals.—Where two appeals are taken, the first one regularly as from a final decree, but the second from a refusal of the court below to open a decree which rests in the sound discretion of the court below, and therefore is

13. **Abiding the event.**—McCready v. Virginia, 154 U. S., appx., 628, 38 L. Ed. 1090.

14. **Withdrawal or discontinuance in general.**—2 Daniel's Pr., 1644; Veazie v. Wadleigh, 11 Pet. 55, 9 L. Ed. 630.

15. **United States v. Minnesota, etc., R. Co.,** 18 How. 241, 15 L. Ed. 347, 348.

Certified cases.—On the trial of a cause in the circuit court of the district of Maine, upon certain questions which arose in the progress of the trial, the judges of the court were divided in opinion, and the questions were, at the request of the plaintiff, certified to the supreme court, to January term, 1835; in December, 1836, the plaintiff filed in the office of the clerk of the circuit court of Maine, a notice to the defendant, that he had discontinued the suit in the circuit court, and that as soon as the supreme court should meet at Washington, the same disposition would be made of it there, and that the costs would be paid, when made up; a copy of this notice was given to the counsel of the defendants. The plaintiff's counsel asked the court for leave to discontinue the cause; and the discontinuance was allowed. The party on whose motion questions are certified to the supreme court, under the act of congress, has a right, generally, to withdraw the record, or discontinue the case in the supreme court; the original cause being detained in the circuit court for ulterior proceedings. *Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630.

Where the United States brought a

case up to this court as plaintiffs in error, and the attorney general moved for a discontinuance upon the ground that he wished other questions to be presented upon the record, which he deemed necessary for a full elucidation of the case, the court, without expressing an opinion upon these other questions, will grant the motion made by the legal representative of the government. *United States v. Minnesota, etc., R. Co.*, 18 How. 241, 15 L. Ed. 347.

16. **Grounds for allowance.**—*McGuire v. Massachusetts*, 3 Wall. 382, 387, 18 L. Ed. 164.

17. *McGuire v. Massachusetts*, 3 Wall. 382, 18 L. Ed. 164.

"The only reasons assigned in support (of the motion) are the alleged inability of the leading counsel for the plaintiff in error to make proper preparation for argument within the time allowed, and the sickness of one of his associate counsel. Our opinion of the learning and ability of the counsel who submits the motion obliges us to think that he has underrated his power and overrated his need of preparation to set before us the case of his client in all the strength of which it is capable, notwithstanding the absence of his associate, whose indisposition to us, as to him, causes sincere regret." *McGuire v. Massachusetts*, 3 Wall. 382, 387, 18 L. Ed. 164.

18. **Time of allowance.**—*Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630.

19. *Veazie v. Wadleigh*, 11 Pet. 55, 61, 9 L. Ed. 630.

not appealable, the case will stand for hearing upon the first appeal when it is reached in the regular call of the docket.²⁰

J. Mandamus to Compel Hearing.—The remedy in case of a refusal to hear and decide a cause, if any, is by mandamus to compel the court to entertain the case and proceed to its determination, not by writ of error to review what has been done.²¹ And the writ will lie for this purpose as well to the court of claims,²² as to the circuit court.²³

K. Right to Introduce New Evidence in Appellate Court.—1. IN GENERAL.—By the rules of an appellate court, it can act on no evidence which was not before the court below, or receive any paper that was not used at the re-hearing.²⁴

20. Double appeals.—*Wyle v. Cox*, 14 How. 1, 14 L. Ed. 301. See vol. 1, p. 430.

21. Mandamus to compel hearing.—Ex parte Bradstreet, 7 Pet. 634, 647, 8 L. Ed. 810; Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877; *Harrington v. Holler*, 111 U. S. 796, 797, 28 L. Ed. 602.

Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it? Where a final judgment or decree to which a writ of error or an appeal can be taken is based on a supposed want of jurisdiction, that question, as well as other questions, may be examined by the appellate court. Ex parte Russell, 13 Wall. 664, 670, 20 L. Ed. 632.

Certain Prussian sailors libelled a Prussian vessel in New York in admiralty for wages, less in amount than \$2,000. The master set up a provision in a treaty of the United States with Prussia, by which it was stipulated that the consuls of the respective countries should sit as judges in "differences between the crews and captains of vessels" belonging to their respective countries; and the consul of Prussia, coming into the district court, protested against the district court's taking jurisdiction. The district court, however, did take jurisdiction, and decreed \$712 to the sailors. On appeal the circuit court reversed the decree, and dismissed the libel because of the consul's exclusive jurisdiction. Held, that mandamus would not lie to the circuit judge to compel him to entertain jurisdiction of the cause on appeal, and to hear and decide the same on the merits thereof; and that this conclusion of this court was not to be altered by the fact that owing to the sum in controversy being less than \$2,000, no appeal or writ of error from the circuit court to this court existed. Ex parte Newman, 14 Wall. 152, 20 L. Ed. 877.

22. When the court of claims on a motion for a new trial under the second section of the act of June 25th, 1868, has not reached the consideration of the motion on its merits, but has dismissed it under

an assumption that they had no jurisdiction to grant it, mandamus directing the court to proceed with the motion is the proper remedy. Appeal is not a proper one. "Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it? Where a final judgment or decree to which a writ of error or an appeal can be taken is based on a supposed want of jurisdiction, that question, as well as other questions, may be examined by the appellate court." Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

23. Bankruptcy proceedings.—Where, under the 41st section of the bankrupt act of 1867, a trial by jury is had in the district court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the circuit court when the debt or damage claimed amount to more than \$500; and if that court dismiss or declines to hear the matter a mandamus will lie to compel it to proceed to final judgment. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

24. Right to introduce new evidence in appellate court in general.—*Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388.

We take a case on appeal as it comes to us in the record, and receive no new evidence. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932.

No evidence can be looked into, in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying a record, a part of the evidence in the case has been omitted, it may be certified in obedience to a certiorari; but in such a case, it must appear from the record that the evidence was used or offered to the circuit court. *Holmes v. Trout*, 7 Pet. 171, 8 L. Ed. 647,

2. **AFFIDAVITS TO SUPPORT MOTION FOR NEW TRIAL.**—Affidavits of newly-discovered evidence cannot be received in this court to support a motion made after the decision of the case here to set aside the decree and remand the case to the circuit court for further preparation and proof, upon the ground that new and material evidence has been discovered since the trial of the case in that court. This court must affirm or reverse upon the case as it appears in the record. This is according to the practice of the court of chancery from its earliest history to the present time. But if the established chancery practice had been otherwise, the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence in this court, on the hearing of an appeal from the circuit court, except in admiralty and prize causes.²⁵

3. **APPEALS IN EQUITY**—a. *In General.*—As to appeals to this court from the decrees of circuit courts in equity causes, it was provided by the second section of the act of congress of March 3, 1803, c. 40, 2 Stat. 244, carried forward into § 698 of the Revised Statutes, which was the first enactment giving the remedy by appeal, "that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes."²⁶

California Land Claims.—And this rule will be followed where this court is exercising the special jurisdiction conferred by congress in respect to California land claims.²⁷

b. *Limitation of General Rule.*—But the statute "of March 3, 1803, c. 40, 2 Stat. 244, carried forward into § 698 of the Revised Statutes, which was the first enactment giving the remedy by appeal, 'that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes,'" is not mandatory, but empowers the court to direct further proofs and to amend the record if in its judgment the case demands its interposition to that effect.²⁸ This court is compelled, as all courts are, to receive evidence de-

cited in *United States v. Coe*, 155 U. S. 76, 83, 39 L. Ed. 76.

Appeals from district court of Florida.—After the case had been fully heard in the superior court of Middle Florida, the judge of that court, in examining the evidence in the case, with a view to its decision, considered that he had discovered in the date of the watermark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument; no objection of this kind had been made, during the argument of the cause; and after the supposed discovery, no opportunity was permitted, by the court of Florida, to the claimants, to explain or account for the same; after the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony, which it was alleged, would fully explain the circumstance, and offered to read *ex parte* depositions to the same purpose. This is refused, because, in an appellate court, no new evidence can be taken or received, without violating the best established rules of evidence. *Mitchel v. United States*, 9 Pet. 711, 715, 9 L. Ed. 283.

25. **Affidavits to support motion for new trial.**—*Russell v. Southard*, 12 How. 139, 13 L. Ed. 997.

26. **Appeals in equity in general.**—*Holmes v. Trout*, 7 Pet. 171, 8 L. Ed. 647; *Mitchel v. United States*, 9 Pet. 711, 9

L. Ed. 283; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388; *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521; *United States v. Coe*, 155 U. S. 76, 83, 39 L. Ed. 76.

Cases in equity come here from the circuit courts, and the district courts sitting as circuit courts, by appeal, and are heard upon the proofs sent up with the record. No new evidence can be received here. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521; *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267.

Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted, and the pleadings cannot be amended in this court. *Pacific R. of Missouri v. Ketchum*, 95 U. S. 1, 3, 24 L. Ed. 347.

27. **California land claims.**—This court will not suffer its judgment upon an appeal to be influenced in any respect by new testimony offered here, even in a case which is within its general chancery powers, much less where it is exercising merely the special jurisdiction conferred by congress in respect to California land claims. *United States v. Knight*, 1 Black 488, 17 L. Ed. 80, citing *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927.

28. **Limitation of general rule.**—*United States v. Coe*, 155 U. S. 76, 84, 39 L. Ed. 76.

Undoubtedly appellate courts proceeding according to the course of the civil law may allow parties to introduce new allegations and further proofs, and such has

hors the record affecting their proceeding in a case before them on error or appeal. The death of one of the parties after a writ of error or appeal requires a new proceeding to supply his place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on.²⁹

4. **ADMIRALTY AND PRIZE CAUSES.**³⁰—The act of congress allowing appeals to this court from final decrees in the circuit court in cases of admiralty jurisdiction, provides that new evidence may be received here upon the hearing of such appeals.³¹

L. Right of Parties to a Decision.—Every party to the proceeding of an inferior court of the United States, has a right to the judgment of this court in a suit brought in those courts, provided the matter in dispute is sufficient,³² but this court may postpone the final disposition of the case and hold it under advisement, where other information is required and is obtainable.³³

M. Effect of Change in Law Pending Appeal.—1. **IN GENERAL.**—As a general rule an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not.³⁴ But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, no court can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.³⁵ In short, appeals from final

been the settled practice of the ecclesiastical courts in England and of the admiralty courts in this country. Nevertheless, orders allowing this to be done are not granted as matter of course, but made with extreme caution, and only on satisfactory grounds. *United States v. Coe*, 155 U. S. 76, 83, 39 L. Ed. 76.

^{29.} *Dakota County v. Glidden*, 113 U. S. 222, 225, 28 L. Ed. 981; *Throp v. Bonnifield*, 177 U. S. 15, 19, 44 L. Ed. 652.

^{30.} See the title **ADMIRALTY**, vol. 1, p. 193.

^{31.} *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499.

^{32.} **Right of parties to a decision.**—Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; *Taylor v. Morton*, 2 Black 481, 17 L. Ed. 277.

^{33.} **May postpone final decision.**—*Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938, cited on this point in *Menard v. Massey*, 8 How. 293, 304, 12 L. Ed. 1085; *Crespin v. United States*, 168 U. S. 208, 212, 42 L. Ed. 438, 440.

^{34.} **Effect of change in law pending appeal in general.**—*United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49; *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111.

^{35.} *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111.

This suit was brought in the circuit court of the United States for the southern district of Georgia, by citizens of New York against the Southern Express Company, a corporation of Georgia, and the railroad commission of that state, to prevent the company from applying any of its moneys to meet the requirements of the war revenue act of June 13, 1898, in relation to adhesive stamps to be placed on bills of lading, etc., The circuit court having enjoined the commission from proceedings, appeal was taken to the circuit court of appeals which reversed that decree, and ordered the case to be dismissed. The case was then brought to this court and submitted here on February 25, 1901. On the 2nd of March, 1901, an act was passed (to take effect, July 1, 1901), excluding express companies from the operation of the war revenue act of 1898. Held, that no actual controversy now remains nor can arise between the parties. *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111.

decrees, must be taken under laws then in existence, and to the court provided by such laws.³⁶

Treaties.—Since a decision of an appellate court must conform to the state of rights of the parties at the time of its own judgment, a treaty although ratified subsequent to the decision of the court appealed from becomes a part of the law of the case, and must control its decision.³⁷

2. **REPEAL OF STATUTES.—In General.**—When congress enacts that this court shall have appellate jurisdiction over final decisions of the circuit courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.³⁸ In other words, cases pending on appeal fall with a repeal of the law allowing such appeal if there has been no reservation of pending cases.³⁹ A repealing statute which contains no saving clause operates as well upon pending cases as upon those thereafter commenced.⁴⁰ But though error may have been committed by a court below on the then state of statutory law, yet where a statute has been passed since that court gave their judgment, changing the then-existing law, so that if the judgment were reversed and the case sent back, the court would now and in virtue of the new statute have to give rightly the same judgment, that they gave before erroneously, this court will affirm.⁴¹

Illustrative Cases.—These rules have been applied to statutes prescribing the jurisdictional amount for a review by this court of inferior courts,⁴² and to appeals in proceedings to confirm private land claims.⁴³

Effect on Property.—If pending the appeal in this court, and before final

36. *Gwin v. United States*, 184 U. S. 669, 674, 46 L. Ed. 741, reaffirmed in *Gore v. United States*, 199 U. S. 604, 50 L. Ed. 329.

37. *Fairfax v. Hunter*, 7 Cranch 603, 3 L. Ed. 453.

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the fourth article of the convention with France signed September 30, 1800, providing that property captured and not yet definitely condemned then shall be mutually restored. This court is as much bound as the executive, to take notice of a treaty, and will reverse the original decree of condemnation, although it was correct when made, and decree restoration of the property, under the treaty made since the original condemnation. *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49.

38. **Repeal of statutes.**—Ex parte McCordle, 7 Wall. 506, 19 L. Ed. 264, cited in re Hall, 167 U. S. 38, 42, 42 L. Ed. 69; *Gwin v. United States*, 184 U. S. 669, 674, 46 L. Ed. 741; *Murphy v. Utter*, 186 U. S. 95, 109, 46 L. Ed. 1070; *Bird v. United States*, 187 U. S. 118, 125, 47 L. Ed. 100.

39. **Pending cases fall with the repeal.**—Baltimore, etc., R. Co. v. Grant, 98 U. S. 398, 399, 401, 25 L. Ed. 231; *Gwin v. United States*, 184 U. S. 669, 674, 46 L. Ed. 741, reaffirmed in *Gore v. United States*, 199 U. S. 604, 50 L. Ed. 329.

40. *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741, reaffirmed in *Gore v. United States*, 199 U. S. 604, 50 L. Ed. 329, citing *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *Yeaton v. United States*, 5 Cranch 281, 3 L. Ed. 101; *The Schooner Rachel*, 6 Cranch 329, 3 L. Ed. 239; *United States v. Preston*, 3 Pet. 57, 7 L. Ed. 601; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; Ex parte McCordle, 7 Wall. 506, 19 L. Ed. 264.

41. *Pugh v. McCormick*, 14 Wall. 361, 20 L. Ed. 789.

42. *Dennison v. Alexander*, 103 U. S. 522, 26 L. Ed. 313.

43. **From court of private land claims.**—No appeal lies to this court from the decree of the district court of the northern district of California dismissing a petition to enforce a final decree of confirmation of a grant of land under the private land claims act, entered on November 30th, 1859. Although the circuit court of appeals act of March 3rd, 1891, § 5, does not apply, the right to appeal in proceedings to confirm private land claims was taken away expressly by the act of July 1, 1864, except where an appeal has already been taken, and is transferred to the circuit court. *Gwin v. United States*, 184 U. S. 669, 674, 46 L. Ed. 741, reaffirmed in *Gore v. United States*, 199 U. S. 604, 50 L. Ed. 329.

decree, the statute affecting the property in dispute is repealed, the disposition of such property must be governed by the provisions of such repealing act.⁴⁴

If the law, under which a sentence of forfeiture is inflicted, expires or is absolutely repealed after an appeal and before sentence by the appellate court, the sentence must be reversed.⁴⁵

Appeals from Orders of Remand.—The general rule that if the law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law, was frequently applied to appeals or writs of error from orders of the circuit courts remanding cases removed to it from state courts, where the order to remand was made while the act of March 3, 1875, allowing such review, was in force, but the writ of error was not brought until after the passage of the act of March 3, 1887, denying the right to appeal in such cases.⁴⁶

Vested Rights.—But the repeal of a law pending an appeal cannot affect a vested right.⁴⁷

44. *United States v. Preston*, 3 Pet. 57, 7 L. Ed. 601, citing *Yeaton v. United States*, 5 Cranch 281, 286, 3 L. Ed. 101; *In re Hall*, 167 U. S. 38, 42 L. Ed. 69.

45. *Yeaton v. United States*, 5 Cranch 281, 3 L. Ed. 101; *The Schooner Rachel*, 6 Cranch 329, 3 L. Ed. 239; *United States v. Preston*, 3 Pet. 57, 7 L. Ed. 601; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741, reaffirmed in *Gore v. United States*, 199 U. S. 604, 50 L. Ed. 329.

No sentence of condemnation can be affirmed, if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States, before the expiration of the law. *The Schooner Rachel*, 6 Cranch 329, 3 L. Ed. 239, citing *Yeaton v. United States*, 5 Cranch 281, 3 L. Ed. 101; *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741.

46. **Appeals from orders remanding causes.**—*Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Morey v. Lockhart*, 123 U. S. 56, 31 L. Ed. 68; *Wilkinson v. Nebraska*, 123 U. S. 286, 31 L. Ed. 152; *Sherman v. Grinnell*, 123 U. S. 679, 31 L. Ed. 278; *Gurnee v. Patrick County*, 137 U. S. 141, 34 L. Ed. 601, cited in *In re Hall*, 167 U. S. 38, 42, 42 L. Ed. 69.

In *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231, writ of error had been sued out on December 6, 1875, to reverse a judgment of \$2,250 by the supreme court of the District of Columbia. At that time the appeal was properly taken to this court, but on February 25, 1879, congress passed an act limiting writs of error from this court to judgments exceeding the value of \$2,500, and it was held that the writ of error must be dismissed. Said the Chief Justice: "The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done un-

der the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their cases to this court by writ of error and appeal, and gave us the authority to re-examine, reverse or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit because our jurisdiction is gone." Approved in *Gwin v. United States*, 184 U. S. 669, 674, 46 L. Ed. 741.

47. **Repeal does not affect vested rights.**—When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute. Ex. gr. Where a pilot, licensed under a statute, had tendered his services to pilot a vessel out of port, and such services were refused, his claim to the half-pilotage fees, allowed by the statute in such cases, became perfect; and the subsequent repeal of the statute does not affect a judgment rendered in an action brought to recover the claim, or the jurisdiction of this court to review the judgment on writ of error. *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

Affirmance or Reversal.—Where the act authorizing the action is repealed while the writ of error to the supreme court of the territory is pending in this court, this court may, in the exercise of appellate jurisdiction, decline to send the case back to the court below with instructions to enter a judgment of nonsuit, but may affirm the judgment if no error is found.⁴⁸

3. WRIT OF ERROR TO STATE COURT.—Where a statute applicable to a case is passed after the judgment of the supreme court of the state is rendered, and while the case is pending in the United States supreme court, parties will not be compelled to resort to some form of original proceeding to obtain relief thereunder, where, apart from the statute, the decree must be reversed, as in such case the record will be open for such adjudication as the situation may then demand, and the cause remanded for further proceedings.⁴⁹

N. Effect of Destruction or Abolition of Court Pending Appeal.—Where the court from which the appeal is taken ceases to exist pending the appeal in this court, the proceeding must abate, because there is no court in existence to which the mandate of this court could be sent to carry into effect our judgment. Our power therefore would be incomplete and ineffectual, were we to consent to a review of the case.⁵⁰

O. Scope of Review⁵¹—1. **IN GENERAL.**—The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the court.⁵²

Directing Verdict.—If an examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in giving peremptory instructions to the jury to find for the defendant, it will not be necessary to consider each and every assignment of error, nor to scan minutely isolated expressions used by the court.⁵³

Where no special request as to the constitutionality of a statute seems to have been made to the court below, and there is no specific assignment of errors as to it, nor does it appear that any person to be affected thereby is a party as plaintiff in error, this court will refuse to consider that point.⁵⁴

48. **Affirmance or reversal.**—*Kansas Pac. R. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550, approved in *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 8, 49 L. Ed. 639.

49. **Writ of error to state court.**—*Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 49 L. Ed. 639; *Northern Pac. R. Co. v. Hasse*, 197 U. S. 9, 49 L. Ed. 642, citing *Kansas Pac. R. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550.

50. **Effect of destruction or abolition of court pending appeal.**—*McNulty v. Batty*, 10 How. 72, 13 L. Ed. 333, reaffirmed in *Preston v. Bracken*, 10 How. 81, 13 L. Ed. 336; *Hunt v. Palao*, 4 How. 589, 11 L. Ed. 1115.

51. As to scope of review upon error to state court, vol. 1, p. 771. As to scope of review under judiciary act of March 3, 1891, see vol. 1, p. 476.

52. **In general.**—*Scott v. Sanford*, 19 How. 393, 428, 15 L. Ed. 691.

Upon a writ of error to a circuit court of the United States, the transcript of the record of all the proceedings in the case is brought before this court, and is open to its inspection and revision. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691, citing *United States v. Smith*, 11 Wheat. 172, 6 L. Ed. 443.

It is often the duty of this court, after having decided that a particular decision of the circuit court was erroneous, to examine into other alleged errors, and to correct them if they are found to exist. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to further and useless litigation. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

53. **Directing verdict.**—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 37 L. Ed. 223.

54. **Constitutionality of statutes.**—*Shoe-*

Matters of Conjecture.—The supreme court will not investigate nor decide a proposition which rests upon a series of mere conjectures and concerning which no question appears to have been raised in the court below.⁵⁵

2. **CASES DISMISSED FOR WANT OF JURISDICTION.**—There can be no doubt as to the jurisdiction of this court to revise the judgment of a circuit court, and to reverse if for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.⁵⁶ Likewise, where the court below files no opinion, and we are not distinctly informed upon which of the several grounds alleged the court proceeded in dismissing a cause for want of jurisdiction, it is necessary for this court to consider each and all of them.⁵⁷

3. **CASES PENDING IN LAW AND EQUITY.**—Where a case which has been on the chancery side of the court is transferred thence to the law docket without objection or by consent, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side.⁵⁸

maker *v. United States*, 147 U. S. 282, 37 L. Ed. 170.

55. **Matters of conjecture.**—Thompson *v. Darden*, 198 U. S. 310, 317, 49 L. Ed. 1064.

56. **Cases dismissed for want of jurisdiction.**—Scott *v. Sanford*, 19 How. 393, 427, 15 L. Ed. 691.

Distinguished from error to state court.—In the famous *Dred Scott* case, the court uses the following convincing language: "Undoubtedly, upon a writ of error to a state court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in this court. And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a state court, and to a circuit court of the United States, are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a circuit court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit. The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the circuit court. And it appears by the record before us, that the circuit court committed an error, in deciding that it had jurisdiction, upon the facts in the case, admitted by the pleadings, it is the duty of the appellate tribunal to correct

this error; but that could not be done by dismissing the case for want of jurisdiction here—for that would leave the erroneous judgment in full force, and the injured party without remedy. And the appellate court therefore exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the circuit court, as they appear upon the record brought up by the writ of error." Scott *v. Sanford*, 19 How. 393, 427, 15 L. Ed. 691.

"In the case before us, we have already decided that the circuit court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant, where, upon the facts admitted in the exception, it had no jurisdiction. We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court had not judicial authority to correct the last-mentioned error, because they had before corrected the former; or by what process of reasoning it can be made out, that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, cannot be looked into or corrected by this court, because we have decided a similar question presented in the pleadings." Scott *v. Sanford*, 19 How. 393, 429, 15 L. Ed. 691.

57. *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 574, 44 L. Ed. 276.

58. **Causes pending in law and equity.**—*Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628; *McLaughlin v. Bank*, 7 How. 220, 12 L. Ed. 675.

For example, whilst an ejectment suit was pending to try the legal title to a tract of land in Mississippi, the defendant filed an appeal on the equity side of

Issue to the Jury.—Likewise, where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal.⁵⁹

4. **WHERE PART ONLY OF DECISION IS APPEALED FROM.**—Although an appeal from a part of a decree does not bring up the part not appealed from, yet, if the whole decree must be reviewed in order to decide the appeal, such appeal brings up the entire record. The case is even stronger where the appeal is taken from the whole decree.⁶⁰ But that part of the decree from which no appeal has been prosecuted must stand, and cannot be reversed by this court along with the rest of the case.⁶¹

5. **MATTERS UNNECESSARY TO DECIDE IN THIS COURT.**—This court will decline to consider matters not necessary to a determination of the issue,⁶² nor where the judgment is reversed on one sufficient ground, will the appellate court consider other grounds, because the same questions may not arise on a second appeal.⁶³ When a case is presented to an appellate court it is not obliged to con-

sider the court, praying for a perpetual injunction. It was held by this court, on an appeal from the decree granting a perpetual injunction, that they would abstain from expressing any opinion on legal questions pending in the court below, as it belongs to the ejectment suit pending on the law side of the court. *Gaines v. Nicholson*, 9 How. 356, 13 L. Ed. 172.

So also, where the court while a cause is pending on the chancery side of the court, struck out the answer of the defendants on motion of the plaintiffs, and the cause is subsequently transferred to the law docket without objection, it was held that a bill of exceptions did not bring into the United States supreme court any of the prior proceedings for revision. In this case the court said that whatever may be the practice in the state courts, there is a broad distinction between the suits at law and the suits in equity, and that the supreme court will not overlook this distinction. *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628.

59. **Issues to the jury.**—*McLaughlin v. Bank*, 7 How. 220, 12 L. Ed. 675.

"We wish it to be distinctly understood, as a matter of practice in like cases, that this court cannot express any opinion on matters ruled in any other court, or side of the court, than that appealed from; and if it be necessary to go into other courts to get verdicts or decisions on any portion of the case in its progress below, any objections to rulings on the points arising in those trials or decisions must be presented for revision to the court which orders the issue, and be acted upon there, if we are expected to take cognizance of them here. *Brockett v. Brockett*, 3 How. 691, 11 L. Ed. 786; *Van Ness v. Van Ness*, 6 How. 62, 12 L. Ed. 344; *Mayhew v. Soper*, 10 Gill & J. (Md.), 372. Such, too, is substantially the doctrine in England. 2 Dan., Ch. Pr., 746; *Bootle v. Blundell*, 19

Ves., 500." *McLaughlin v. Bank*, 7 How. 220, 227, 12 L. Ed. 675.

60. **Where part only of decision is appealed from.**—*De La Rama v. De La Rama*, 201 U. S. 303, 310, 50 L. Ed. 765.

Appeals in divorce proceedings.—"While, as indicated in *Simms v. Simms*, 175 U. S. 162, 44 L. Ed. 115, the decree for alimony, although in one sense an incident to the suit for divorce, is a distinct and final judgment for a sum of money, and is therefore a good ground for appeal from that part of the decree; yet, where the appeal is from the whole decree (as in this case), or even from a part of the decree, and the denial of alimony or separation of the conjugal property depends upon the evidence which bears upon the right to divorce, we cannot determine that question without passing upon the sufficiency of the testimony authorizing or refusing the divorce. An appeal from the decree for alimony or other property right would be of no value whatever, unless the facts connected with the allowance or refusal of such right were open to review in the appellate court." *De La Rama v. De La Rama*, 201 U. S. 303, 310, 50 L. Ed. 765.

61. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 318, 30 L. Ed. 83; *Harrison v. Perca*, 168 U. S. 311, 42 L. Ed. 478.

62. **Matters unnecessary to decide in this court.**—"Other questions have been argued by counsel in this case, and we have been urged in the brief to decide them; but as this proposition is a broad one, which covers the whole case, and is sufficient to dispose of it, we pursue our uniform course of declining to consider other matters not necessary to a determination of the issue." *Glasgow v. Baker*, 128 U. S. 560, 577, 32 L. Ed. 513.

63. Where the fact that an instruction, which assumes the existence of facts of which there is no evidence, leads to the reversal of the judgment, this court will

sider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation.⁶⁴ If an appellate court finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions.⁶⁵

6. **CONSTITUTIONAL QUESTIONS.**—It is not the habit of this court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.⁶⁶

7. **MATTERS NOT DECIDED BELOW.**—**In General.**—It has been repeatedly held that the failure to present and insist upon errors assigned in the court below constitutes an abandonment, or waiver, of all the errors so assigned, not vital to the question of jurisdiction, or the foundation of the right; and this court can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion, of the court below. If the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here.⁶⁷

This court will decline to give instructions to the court below relative to questions which were not decided in that court. It would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject.⁶⁸

8. **IN PARTICULAR CASES**—**a. Damages for Breach of Contract.**—In a case where it would be difficult to ascertain the injury resulting from the breach of the contract, or the sum in damages by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue quantum damnificatus.⁶⁹

b. Appeals from Orders Confirming Foreclosure Sales.—Where in a suit for

not consider any of the other errors assigned, as whether the instruction requested was properly modified, because the same question may not arise on the second appeal. *Jones v. Randolph*, 104 U. S. 108, 26 L. Ed. 671.

64. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, 48 L. Ed. 788.

65. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, 48 L. Ed. 788.

66. **Constitutional questions.**—*Burton v. United States*, 196 U. S. 283, 295, 49 L. Ed. 482.

67. **Matters not decided below.**—*Montana R. Co. v. Warren*, 137 U. S. 348, 351, 34 L. Ed. 681; *San Pedro, etc., Co. v. United States*, 146 U. S. 120, 136, 36 L. Ed. 911; *Old Jordan Min., etc., Co. v. Societe Anonyme Des Mines*, 164 U. S. 261, 264, 41 L. Ed. 427; *High v. Coyne*, 178 U. S. 111, 44 L. Ed. 997.

The plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. *Harris v. Wall*, 7 How. 693, 705, 12 L. Ed. 875.

After one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. It was held that where the judgment is before an appellate court for review, all questions which appear upon the record and have not already been decided are open for consideration. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 48 L. Ed. 788.

Sufficiency of proof of contract.—Where the only error urged in the court below, or noticed in its opinion, turns upon the alleged insufficiency of the proof of the contract set up in the complaint, this court will confine its consideration of the case to that point, notwithstanding other errors are assigned in this court, and to some extent noticed in brief to the plaintiff in error. *Old Jordan Min., etc., Co. v. Societe Anonyme Des Mines*, 164 U. S. 261, 41 L. Ed. 427.

Validity of contract with Indians.—On appeal to the supreme court of the United States from a decree of the circuit court of appeals affirming a judgment of the court of appeals for the Indian Territory, that court was asked to assume that the authority to make the lease in question was not either directly or indirectly conferred by congress, and that in consequence the contract was made under authority of a tribal law of the Choctaw Nation, and was of no validity by reason of § 2116. Rev. Stat., it was held, that the supreme court of the United States will not decide this contention in view of the fact that it does not appear to have been raised or considered in the courts below. *Southwestern Coal, etc., Co. v. McBride*, 185 U. S. 499, 46 L. Ed. 1010.

68. *United States v. Berreyesa*, 23 How. 499, 16 L. Ed. 474; *Union Pac. R. Co. v. James*, 163 U. S. 485, 41 L. Ed. 236.

69. **Damages for breach of contract.**—*Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 791.

the foreclosure of a mortgage, a final decree is rendered in favor of the complainant, and the mortgaged property is sold, upon an appeal merely from the order confirming the report of sale, the authority of this court extends no farther than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken.⁷⁰

c. *Appeal from Order of Revival*.—Upon an appeal from an order reviving a suit and admitting an executor in the place of the deceased complainant, this court will not, on the hearing of that appeal, consider the merits of the original case, nor the jurisdiction of the court below over it if there is sufficient in the record to give an apparent jurisdiction.⁷¹

d. *Appeals in Habeas Corpus Proceedings*.⁷²—Upon an appeal from the circuit court of the United States in a case of habeas corpus, all questions of law or of fact, arising upon the record, including the evidence, are open to consideration; and the circuit court has no authority to make conclusive findings of fact, as it might do in actions at law upon waiver of a jury, or in cases in admiralty.⁷³ But even in an appellate court the writ of habeas corpus is not of itself the equivalent of a writ of error, although when supplemented by certiorari, it may bring the whole case before the appellate court for review.⁷⁴ Nor does the review extend to any errors or irregularities in the proceedings below. Nor does it extend to the merits of the detention; as, for example, the sufficiency of the indictment.⁷⁵

Construction of Statutes.—For example, it is not proper for this court on appeal in habeas corpus proceedings to determine as to whether the offense with which the accused is charged comes within the meaning of the statute.⁷⁶

A writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on habeas corpus, either originally or by appeal.⁷⁷

e. *Under Circuit Court of Appeals Act*.—In direct appeals to this court from the district or circuit courts "in cases involving the construction or application of the constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the constitution or a law of a state is claimed to be in contravention of the constitution of the United States: in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case."⁷⁸

70. Appeals from orders confirming foreclosure sales.—*Turner v. Farmers' Loan and Trust Co.*, 106 U. S. 552, 27 L. Ed. 273.

71. Appeal from order of revival.—*Terry v. Sharon*, 131 U. S. 40, 33 L. Ed. 94. But this case was distinguished from *Mackaye v. Mallery*, 79 Fed. 2, on the ground that in this case the original suit had passed to a final decree and the defendant would have had no opportunity to review the order by appealing from that decree.

72. See the title HABEAS CORPUS.

73. In re *Neagle*, 135 U. S. 1, 42, 34 L. Ed. 55; *Bond v. Dustin*, 112 U. S. 604, 28 L. Ed. 835; *Ralli v. Troop*, 157 U. S. 386, 417, 39 L. Ed. 742; *Johnson v. Sayre*, 158 U. S. 109, 115, 39 L. Ed. 914, reaffirmed in *McGlensy v. Van Vranken*, 163

U. S., appx., 694, 41 L. Ed. 311.

74. *Bessette v. Conkey*, 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in *In re Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

75. In re *Cortes*, 136 U. S. 330, 34 L. Ed. 464; *Stevens v. Fuller*, 136 U. S. 468, 34 L. Ed. 461; *Horner v. United States*, 143 U. S. 570, 36 L. Ed. 266.

76. *Horner v. United States*, 143 U. S. 570, 36 L. Ed. 266.

77. In re *Cortes*, 136 U. S. 330, 334, 34 L. Ed. 464.

78. Under circuit court of appeals act. —Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828; *Horner v. United States*, 143 U. S. 570, 36 L. Ed. 266; *Chappell v. United States*, 160 U. S. 499, 40 L. Ed. 510; Press Publishing Co. v. *Monroe*, 164 U. S. 105, 110, 41 L. Ed. 367. See vol. 1, p. 476.

f. *Appeals from Indian Territory*.—On appeals to this court under the act of July 1, 1898, allowing appeals from the United States courts in the Indian Territory direct to the supreme court in certain cases, the whole case is not open to adjudication as upon appeals under the act of March 3, 1891, but the appeal is restricted to the constitutionality and validity of the legislation.⁷⁹

9. **REASONS FOR DECISION.—In General.**—The question before an appellate court is, was the judgment correct, not the ground upon which the judgment professes to proceed. In other words this court will not review and reverse a judgment which is correct, although the reasons given by the court below for its rendition are erroneous.⁸⁰ Where the judgment rests upon sound principles of law, this court will affirm it, although the court gave a wrong reason therefor.⁸¹

Error to State Court.—And this rule applies equally to writs of error to state courts.⁸²

10. **ORDERS PREVIOUSLY MADE IN CAUSE.**—An appeal asked and granted "to this cause," that is, to the whole cause as far as it has progressed, brings up orders previously made in the cause.⁸³ But where an appeal is taken to this court from an order in a foreclosure suit ordering a fund to be paid into court, this does not bring up former orders before us for revision, if no appeal was prosecuted from such orders.⁸⁴

11. **ORDERS SUBSEQUENT TO DECISION APPEALED FROM.**—The appeal does not bring up orders subsequent to the decision appealed from.⁸⁵ On appeal to this court from a circuit court, no question of error in matter of equity procedure in the retaining of a cross bill, after the dismissal of the bill, is open for consideration.⁸⁶

12. **WHERE JURISDICTIONAL AMOUNT IS INSUFFICIENT.**—Where the judgment below is under the jurisdictional amount, no other question than that of jurisdiction can be reviewed by this court. In such case, matters touching the merits of the action are not open to consideration here.⁸⁷

P. Opinions of Court⁸⁸—1. **DUTY TO DELIVER.**—In appeals involving mere questions of fact, where the district and circuit courts have taken the same view, this court, on affirming the decree, will content itself with an announcement of its conclusions, without an extended comment on the testimony.⁸⁹ Accordingly,

79. *Appeals from Indian Territory.*—*Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. Ed. 1041, distinguishing *Horner v. United States*, 143 U. S. 570, 36 L. Ed. 266.

80. *Reasons for decision.*—*McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Davis v. Packard*, 6 Pet. 41, 48, 8 L. Ed. 312.

Where a deed is in fact void on some sufficient ground, this court will not reverse a judgment holding it to be void on some insufficient ground. *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655.

Therefore, where the respondent in a chancery suit in the circuit court took two grounds of defense, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree. The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree. *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 14 L. Ed. 768.

81. *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 36 L. Ed. 214.

82. *Grounds of decision.*—The question before this court on a writ of error to a state court, is whether the judgment was correct, not the ground on which that judgment was given. *Davis v. Packard*, 6 Pet. 41, 47, 8 L. Ed. 312, citing *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340.

83. *Orders previously made in cause.*—*Central Trust Co. v. Seasongood*, 130 U. S. 482, 32 L. Ed. 985.

84. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97.

85. *Orders subsequent to decision appealed from.*—*Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. 655, 17 L. Ed. 673.

86. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. Ed. 911, citing *Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 33 L. Ed. 900.

87. *Where jurisdictional amount is insufficient.*—*Ambler v. Eppinger*, 137 U. S. 480, 34 L. Ed. 765.

88. See the title **OPINIONS OF COURT**.

89. *Duty to deliver.*—*The Spray*, 12 Wall. 363, 20 L. Ed. 286.

where a question brought to this court is wholly one of the weight of evidence, involving no controverted proposition of law, this court will not, under the pressure of business which now rests upon it, consider itself justified in reproducing in its opinion the facts on which its judgment rests. It will content itself with announcing fully its conclusions upon the evidence.⁹⁰

2. **MAJORITY OF COURT**—a. *Constitutional Questions*.—The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court.⁹¹ And the court will refuse to hear cases involving constitutional questions, when the court is not full.⁹²

b. *Questions of Reversal*.—Although on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of this court think there is no error, yet the judgment of the district court must be reversed, as, on the question of reversal, the minorities unite and constitute a majority of the court.⁹³

3. **CERTIFIED COPIES OF OPINIONS**.—Certified copies of the opinions of the court, delivered in cases decided by the court, are to be given by the reporter; and not by the clerk of the court.⁹⁴

4. **RECORDATION**.—All opinions delivered by the court shall immediately, upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver the originals, with a transcript of the judgment or decree of the court thereon, to the reporter, as soon as the same shall be recorded.⁹⁵ And all the opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.⁹⁶

5. **DISPOSITION OF ORIGINAL OPINION**.—The original opinions of the court, delivered to the reporter, shall be filed in the office of the clerk of the court, for preservation, as soon as the volume of reports for the term, at which they are delivered, shall be published.⁹⁷

Q. Reversal—1. **IN GENERAL**.—To obtain a reversal of a judgment it is necessary that the facts upon which such reversal is claimed should appear from the record, sufficiently to be passed upon;⁹⁸ this court cannot proceed upon conjecture of what the court below may have laid down for law.⁹⁹

Where Injustice Would Attend an Affirmance.—Where it appears to this court that the parties below proceeded upon a mutual mistake of law and that the practical injustice that may follow from an affirmance of the judgment may be avoided by reversing it at the cost of the plaintiff in error and sending the

90. *Harrell v. Beall*, 17 Wall. 590, 21 L. Ed. 692; *Levis v. Kengla*, 169 U. S. 234, 42 L. Ed. 728; *Barton v. Geiler*, 108 U. S. 161, 27 L. Ed. 687.

Therefore, where the decision of the court below involves no difficult or doubtful question of law, but a pure question of fact, depending on the weighing and comparison of varying and conflicting evidence, this court, in affirming the decree below, will decline to deliver an extended opinion, because it can be of no value as a precedent, and the preparation of an extended opinion would not be according to the practice of the court, and will serve no useful purpose. *Tyler v. Campbell*, 106 U. S. 322, 27 L. Ed. 162; *Levis v. Kengla*, 169 U. S. 234, 42 L. Ed. 728; *Woolfolk v. Nisbet*, 154 U. S. 650, 38 L. Ed. 1091.

91. *Constitutional questions*.—*Mayor v. Miln*, 8 Pet. 120, 122, 8 L. Ed. 888.

92. *Mayor v. Miln*, 9 Pet. 85, 9 L. Ed. 60.

93. *Questions of reversal*.—*Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

94. *Certified copies of opinions*.—*Anonymous*, 3 Pet. 397, 7 L. Ed. 719.

95. *Recordation*.—Rule of Court No. 25, § 1, 21 How. xiv.

96. Rule of Court No. 25, § 2, 21 How. xiv.

97. *Disposition of original opinion*.—Rule of Court No. 25, § 3, 21 How. xiv.

98. *Reversal in general*.—*New York, etc., Min. Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031.

99. *Bradstreet v. Huntington*, 5 Pet. 402, 8 L. Ed. 170.

cause back to the circuit court, this court will order such a course with directions to proceed therein according to law.¹

Nature of Judgment of Reversal.—While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case.²

A prayer for reversal is probably unnecessary.³

2. **GROUND FOR REVERSAL.**—a. *In General.*—It is a general rule that any exception which may be taken advantage of on a writ of error, may also be taken advantage of on a motion in arrest of judgment.⁴ Accordingly, only errors that are apparent on the record will be considered on a writ of error.⁵

Findings of Court.—The rule is general, that, wherever the trial court finds the facts and the conclusions of law therefrom, it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal.⁶

Where Reversal Would Not Benefit Appellant.—It is also well settled that this court will refuse to reverse a decree of the circuit court, although an error has been committed, if no benefit can result to the appellant from the reversal.⁷

1. **Where reversal will subserve the ends of justice.**—*Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009. See *Sherman v. United States*, 178 U. S. 150, 168, 44 L. Ed. 1014.

2. **Judgment of reversal distinguished from judgment of affirmance.**—*Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, 48 L. Ed. 788.

3. **Prayer for reversal unnecessary.**—*Mussina v. Cavazos*, 6 Wall. 355, 359, 18 L. Ed. 810. But see Rev. Stat. § 997.

4. **Errors reviewable on motion in arrest of judgment the test.**—*Teal v. Walker*, 111 U. S. 242, 246, 28 L. Ed. 415.

The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. *Teal v. Walker*, 111 U. S. 242, 246, 28 L. Ed. 415.

In suit on promissory note, judgment had been obtained by an indorsee, and writ of inquiry had been issued and returned. Held, it was not too late to arrest judgment, on the ground that the note was not payable to order. "It is a general rule, that any exception which may be taken advantage of on a writ of error, may also be taken advantage of on a motion in arrest of judgment. By the declaration, it appears that the party had not a cause of action, since the promissory note is there stated to have been made payable to Vuyton only, and not to his order. For this defect of title (which will be apparent from the record whenever and wherever it may be examined), there is no doubt the judgment would be reversed on a removal into the

high court of errors and appeals. And, if it would be sufficient ground to reverse, I repeat that it is a sufficient ground to arrest the judgment." *Barriere v. Nairac*, 2 Dall. 249, 1 L. Ed. 368.

When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. *Teal v. Walker*, 111 U. S. 242, 246, 28 L. Ed. 415.

5. This point has been treated at length elsewhere. See ante, "The Record or Transcript," IX, H.

6. **Findings of court.**—*The E. A. Packer*, 140 U. S. 360, 365, 35 L. Ed. 453.

7. **No reversal for errors favoring complainant.**—*Campbell v. Pratt*, 2 Pet. 354, 7 L. Ed. 449, cited in *Brobst v. Brock*, 10 Wall. 519, 528, 19 L. Ed. 1002.

A judgment will not be reversed on a writ of error, where the reversal would be of no use to the plaintiff in error, "because, if reversed, the order here could not be to render judgment for the defendant, but to have a record made of the waiver or decision of the demurrer, if either occurred, and if not, then a joinder in demurrer and an opinion below on the question presented by it, and

b. *Want of Jurisdiction.*—**In General.**—Usually where a court has no jurisdiction of a cause, the correct practice is to dismiss,⁸ but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has improperly given judgment for the plaintiff. In such a case the judgment in the court below must be reversed, else the plaintiff would have the benefit of a judgment rendered by a court which had no authority to hear and determine the matter in controversy.⁹ In other words, where

which opinion, as already shown, must probably be for the plaintiff, and then the same judgment be entered again on the verdict which exists now." *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

The court refused to reverse the decree of the circuit court of the county of Washington, although an error had been committed in proceeding under the mandate from this court, as no benefit would result to the appellant from a reversal. *Campbell v. Pratt*, 2 Pet. 354, 7 L. Ed. 449.

8. See ante, "Dismissal," XIV, A.

9. **Reversal for want of jurisdiction.**—*The assessor v. Osbornes*, 9 Wall. 567, 575, 19 L. Ed. 748; *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 385, 28 L. Ed. 462; *Whitemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002.

When the record, as brought here by writ of error, does not show that the circuit court had jurisdiction, this court has jurisdiction to revise and correct the error, like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here; for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment, and, as in any other case of reversal, send a mandate to the circuit court to conform its judgment to the opinion of this court. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

Want of jurisdiction in the court below does not prevent this court from assuming jurisdiction on appeal for the purpose of reversing the decree rendered by that court, and of vacating any unwarranted proceedings of that court, which necessarily stand in the way of a new trial there, in a case where, in the judgment of this court, a new trial ought to be granted. Where the court below has no jurisdiction of the case, in any form of proceeding, the course of this court is to direct the cause to be dismissed, if the judgment or decree was for the defendant or claimant, but if the judgment or decree was for the plaintiff or libellant, the court here will reverse the judgment or decree, and remand the cause, with directions to the court below to dismiss the proceeding. Unless the practice were as explained, great injustice would be done in all cases where the judgment or decree was in favor of the party who in-

stituted the suit, as he would obtain the full benefit of the judgment or decree, rendered by a court in his favor, which had no jurisdiction to hear and determine the controversy. Hence, this court will, in all such cases, reverse the judgment or decree, and direct the proceedings to be dismissed, or remand the cause, with directions to allow the pleadings to be amended, and to grant a new trial, according to law. *Morris's Cotton*, 8 Wall. 507, 511, 19 L. Ed. 481.

In the language of Mr. Justice Clifford: Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal, but a necessary exception exists to that rule where the consequence of a decree of dismissal will be to give full effect to an irregular and erroneous decree of the subordinate court in a case where the decree is entered without jurisdiction, and in violation of any legal or constitutional right. Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect, appellate courts are inclined to regard the case as one of an exceptional character. Such courts, where there is no defect in bringing up a cause, usually affirm or reverse the judgment or decree of the subordinate court, but cases occasionally arise in which the proceedings in the lower court are so irregular that a mere affirmance or reversal upon the merits would work very great injustice, and in such cases it is competent for the appellate court to reverse the judgment or decree in question and to remand the cause with such directions, if it be practicable, as will do justice to both parties. Instances of the kind are numerous in the decisions of this court, nor is there much difficulty in accomplishing the end in view in a case where the subordinate court has jurisdiction of the subject matter, and the right to a new appeal or writ of error is not barred by lapse of time. *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267; *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160; *Montgomery v. Anderson*, 21 How. 386, 388, 16 L. Ed. 160; *Mordecai v. Lindsay*, 19 How. 199, 200, 15 L. Ed. 624; *Stickney v. Wilt*, 23 Wall. 150, 162, 23 L. Ed. 50.

The courts of the United States are courts of limited but not of inferior jurisdiction. If the jurisdiction be not al-

a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse. It is not enough to dismiss the suit.¹⁰

Where Inferior Court Has Rendered Judgment.—Where both the circuit court and this court are without jurisdiction it is in general irregular to make any order or decree in the case, except to dismiss the suit, but that rule does not apply to a case where the circuit court renders a judgment or decree in favor of the party instituting the suit, but in such a case the court here will reverse the judgment or decree in the court below, and remand the cause with directions to dismiss the suit.¹¹ Unless the practice were as explained great injustice would be done in all cases where the judgment or decree is in favor of the plaintiff or petitioner, as he would obtain the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy.¹²

Difficulties of kind frequently occur in cases of seizures, as the district courts have often failed to distinguish between seizures on land and seizures on navigable waters, sometimes trying the latter as a common-law action, and sometimes trying the former as an instance cause. Mistakes of the kind have also been made in libels of information filed under the confiscation act passed by congress. Errors of the kind, when they have seasonably come to the knowledge of this court, have uniformly been corrected, as far as it is in the power of this court to afford a remedy. Serious embarrassment often arises in such cases where it appears that the subordinate court is also without jurisdiction, but that difficulty does not prevent this court from assuming jurisdiction, on appeal, for the purpose of reversing the judgment or decree rendered in such subordinate court, in order to vacate the same, when rendered or passed without authority of law.¹³

leged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error and appeal; but, until reversed, they are conclusive evidence between parties and privies. "This opinion was strongly intimated, if not decided by this court, in the case of *Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70, and was afterwards confirmed by the decision made in the case of *Skillem v. May*, 6 Cranch 267, 3 L. Ed. 220. That suit came before this court upon a writ of error, where the decree of the court below was reversed, and the cause remanded for further proceedings to be had therein. After this, it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that reason. This point, on which the judges were divided, was certified to the supreme court, where it was decided that the merits of the cause having been finally decided in this court, and its mandate only requiring the execution of its decree, the court below was bound to carry that decree into execution, notwithstanding the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered as a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior courts." *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300.

A decree in the circuit court dismissing a bill on the merits, will be reversed here if the circuit court had not jurisdiction, and a decree of dismissal without prejudice directed. *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825.

10. *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

11. *Stickney v. Wilt*, 23 Wall. 150, 162, 23 L. Ed. 50.

Want of jurisdiction to hear and determine the merits in such a case does not show that this court may not correct the erroneous judgment or decree of the circuit court, but if the circuit court is also without jurisdiction, this court cannot direct a new trial or a new hearing, as it may do in a case where the want of jurisdiction in this court is occasioned by a mistrial in the court below, which has led to an erroneous removal of the cause from the circuit court into this court, as by appeal instead of a writ of error, or by a writ of error, when it should have been by appeal. *Morris's Cotton*, 8 Wall. 507, 512, 19 L. Ed. 481; *New Orleans, etc., Mail Co. v. Fernandez*, 12 Wall. 130, 135, 20 L. Ed. 249; *Stickney v. Wilt*, 23 Wall. 150, 162, 23 L. Ed. 50.

12. *United States v. Huckabee*, 16 Wall. 414, 435, 21 L. Ed. 457; *Stickney v. Wilt*, 23 Wall. 150, 162, 23 L. Ed. 50.

13. **Rule in cases of seizure.**—*Stickney v. Wilt*, 23 Wall. 150, 163, 23 L. Ed. 50.

Practice on Reversal.—Where the court below has no jurisdiction of the case in any form of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the cause to be dismissed, but if the judgment or decree is for the plaintiff or petitioner, the court here will reverse the judgment or decree and remand the cause with proper directions, which in the case supposed must be to dismiss the writ, libel, or petition as the subordinate court cannot properly hear and determine the matter in controversy.¹⁴

Direct Appeals.—Where on direct appeal to this court from the decree of the circuit court of the United States on the ground of the existence of a constitutional question, if the contention as to the want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, the judgment of this court is not simply to dismiss the appeal, but to reverse the decree below with instructions to the circuit court to dismiss for want of jurisdiction.¹⁵

Jurisdiction Dependent on Citizenship of Parties.—Whenever the jurisdiction of the circuit court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the circuit court.¹⁶

Showing as to Jurisdiction.—This court will not reverse a judgment for want of jurisdiction in the circuit court, if its jurisdiction sufficiently appears either from the pleadings or from the record.¹⁷

How Want of Jurisdiction Shown.—The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So also where it appears that a court of admiralty has exercised jurisdiction in a case belonging exclusively to a court of common law. In these cases there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment, although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.¹⁸

Effect of Reversal.—If the court reserves a judgment upon the ground that it appears by a particular part of the record that the circuit court had no juris-

14. **Remanding cause for further proceedings.**—*Insurance Co. v. United States*, 6 Wall. 760, 18 L. Ed. 879; *Armstrong's Foundry*, 6 Wall. 769, 18 L. Ed. 882; *United States v. Hart*, 6 Wall. 770, 772, 18 L. Ed. 914; *The Brig Caroline*, 7 Cranch 496, 500, 3 L. Ed. 417; *The Sarah*, 8 Wheat. 391, 394, 5 L. Ed. 644; *Stickney v. Wilk*, 23 Wall. 150, 163, 23 L. Ed. 50.

This court will assume jurisdiction on appeal for the purpose of reversing a decree rendered by an inferior court not having jurisdiction to proceed in the way in which it has proceeded, and of vacating any unwarranted proceedings of it which stand in the way of a new trial there in a case where, in the judgment of this court, a new trial ought to be granted. And it will in such cases either reverse the judgment or decree, and direct the proceedings to be dismissed, or remand the cause, with directions to allow the pleadings to be amended, and to grant a new trial, according to law. And if the subject in controversy be a fund lately in the registry of the court, but which has

been distributed, so that a new trial would be useless unless the fund was restored to the registry where it was before the decree of distribution was executed, it will direct that a writ of restitution issue to the proper parties to restore the fund to the registry. *Morris's Cotton*, 8 Wall. 567, 19 L. Ed. 481.

15. **Direct appeals under court of appeals act.**—*Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 795, citing *Deliance Water Co. v. Deliance*, 191 U. S. 184, 48 L. Ed. 140.

16. *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. Ed. 579. See the title COURTS.

17. *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823; *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390; *Robertson v. Cease*, 97 U. S. 646, 648, 24 L. Ed. 1057; *Waite v. Santa Cruz*, 184 U. S. 302, 327, 46 L. Ed. 552.

18. *Scott v. Sanford*, 19 How. 393, 420, 15 L. Ed. 691.

diction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the circuit court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds, where more than one error appears to have been committed. And the error of a circuit court in its jurisdiction stands on the same ground, and is to be treated in the same manner as any other error upon which its judgment is founded.¹⁹

c. *Admission or Exclusion of Evidence*.—It is elementary that the admission of illegal evidence, over objection, necessitates reversal.²⁰

d. *No Actual Controversy*.—Although as a general rule where it appears to this court that the controversy is not a real one, the writ of error will be dismissed, yet if this court deems it most consonant to justice, it may reverse the judgment and remand the cause for further proceedings in conformity to law. Where for example, if the writ of error is dismissed, the judgment will remain undisturbed and the plaintiff in error might be cut off from submitting the questions involved to the determination of the appellate tribunal.²¹

e. *Errors Cured by the Verdict or Statute of Jeofails*.—**In General**.—The act of congress of 1789, ch. 20, § 32, expressly provides, among other things, that no judgment shall be reversed for any defect or want of form; but that the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or want of form in the judgment or course of proceeding, except those specially demurred to.²² It is not a little singular, that the unwillingness in England to have judgments disturbed by writs of error for defects in them or in the prior pleadings, where a verdict of a jury has been rendered for a plaintiff, is such that something like five or six acts of Parliament were passed before our ancestors emigrated hither, and several more since, to prevent writs of error from being maintained for defects in form, as well as to empower amendments in such cases.²³

Determination of Question.—But the difficulty is in deciding "What is substance and what is form," and that is governed by no fixed test, but it is laid down that it "must be determined in every action according to its nature."²⁴

Illustrative Cases.—Since the passage of this statute defects of form in the writ or declaration,²⁵ defects of form in the process,²⁶ defects in collateral matters,²⁷ the failure of the record to disclose a power of attorney when one is neces-

19. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691.

20. **Admission or exclusion of evidence**.—*Waldron v. Waldron*, 156 U. S. 361, 380, 39 L. Ed. 453. See the title EVIDENCE.

21. **Reversal for want of an actual controversy**.—*South Spring Hill Gold Min. Co. v. Amador, etc.*, Gold Min. Co., 145 U. S. 300, 36 L. Ed. 712. See ante, "Dismissal," XIV, A.

22. **Errors cured by the verdict or statute of jeofails**.—*Van Ness v. Bank*, 13 Pet. 17, 22, 10 L. Ed. 38.

23. *Townsend v. Jemison*, 7 How. 706, 720, 12 L. Ed. 880.

24. *Townsend v. Jemison*, 7 How. 706, 720, 12 L. Ed. 880.

25. **Defects of form in the writ or declaration**, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and con-

ditions as the rules of the court prescribe. 1 Stat. at L. 91; *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918; *New Orleans, etc., R. Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328; *Ewing v. Howard*, 7 Wall. 499, 503, 19 L. Ed. 293.

26. **Defects in the process**.—The decree of the circuit court ought not to be reversed for a defect of form in the process which is amendable by the express words of an act of congress, unless it appears that the alleged defect may have injured the complaining party, or that he would have been prejudiced if the defect had been amended. *Semmes v. United States*, 91 U. S. 21, 25, 23 L. Ed. 193.

27. **At common law, defects in collateral pleadings**, or other matters not preceding the verdict, and not to be proved in order to get a verdict, were not cured by it. Yet those were cured which related to matters necessary to be shown to get a verdict, and hence, after it, are presumed to have been shown. But these defects in collateral matters, when they

sary,²⁸ the failure of the record to dispose of all the issues raised,²⁹ defects or want of form in the entry by the clerk of the judgment,³⁰ or omission to enter a formal judgment,³¹ or to record the judgment upon a demurrer, as for example

relate to form, are as fully cured by the statutes of jeofails as those connected with the verdict are by intentment at common law. *Townsend v. Jemison*, 7 How. 706, 721, 12 L. Ed. 880, 886.

28. Power of attorney not apparent on record.—Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of reversal for error, in an appellate court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the judiciary act of 1789, ch. 20. *Osborn v. Bank*, 9 Wheat. 738, 739, 6 L. Ed. 204.

29. Although in a cause where several pleas are filed, and some terminate in a demurrer and others in an issue to the jury, they should all, as a general rule, unless there be a waiver or withdrawal, be in some way disposed of by the court. But such error is cured by the 32d section of the judiciary act of 1789, 1 Stat. at L. 91, providing that defects or want of form in judgments shall be no ground for reversal. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880; *Dufau v. Couprey*, 6 Pet. 170, 8 L. Ed. 359.

Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of the case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled. The thirty-second section of the judiciary act (1 Stat. at Large, 91) forbids a reversal of the judgment on account of the omission of the clerk to record such waiver or overruling. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

In *Dufau v. Couprey*, 6 Pet. 170, 8 L. Ed. 359, a writ of error was brought, on the ground that one of the pleas intended for the court did not appear by the record to have been decided. But the court sustained the judgment below; the other plea, on examination, as will soon be shown to be the case here, being found immaterial after the finding of the jury. Where one material issue is decided going to the whole declaration, it is no consequence how an immaterial issue going only to a part of it is found, if no injury be done by it to either party. (6 Missouri 544). And by parity of reasoning, it would be of no consequence whether it was decided at all or not, if enough else is decided to dispose properly of the whole case. Approved in *Townsend v. Jemison*, 7 How. 706, 717, 12 L. Ed. 880, 885.

Accordingly, where from the whole record it appears that the judgment below in favor of the plaintiff is probably correct, even if the demurrer had not been disposed of, and has not been withdrawn or overruled, the judgment should not on this account be reversed. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

30. Defects or want of form in the entry by the clerk of the judgment are not reversible error under the statute of jeofails curing all defects or want of form in judgments. *Townsend v. Jemison*, 7 How. 706, 720, 12 L. Ed. 880.

Mistake of clerk in entering verdict.—Where the judgment below was entered properly, this court will not remand the case for a new trial because of the verbal mistake of the clerk in using a superfluous word in entering the verdict. As the verdict was amendable in the court below, the amendment will be regarded as made. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

In the declaration in ejectment, various demises were laid, and the verdict of this jury, and the judgment of the circuit court, were entered on one of the demises only; and it was contended that the court ought not to have entered a judgment on the issue found for the plaintiff, but should have awarded a venire de novo; and that this irregularity might be taken advantage of upon a writ of error. Held, that if this objection had been made in the circuit court on a motion in arrest of judgment, the plaintiff would have been permitted to strike out all the demises for the declaration but that on which the verdict was given. The omission to strike out these demises was only, therefore, an omission of form; and the act of congress of 1789 (ch. 20, § 32) expressly provides that no judgment shall be reversed for any defect or want of form; but that the courts of the United States shall proceed and give judgment, according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects, or want of form in the judgment or course of proceeding, except that specially demurred to. *Van Ness v. Bank*, 13 Pet. 17, 10 L. Ed. 38.

31. The omission to enter a formal judgment on a plea in scire facias against special bail, when such plea does not raise any issue, cannot come under the act of congress of 1789, ch. 20, § 22, to be assigned as error. The omission would be a mere imperfection in form, not affecting the right of the cause or the matter in law as they appear on the record. *Morsell v. Hall*, 13 How. 212, 14 L. Ed. 117, citing *Roach v. Holings*, 16 Pet. 319,

whether it was withdrawn or overruled,³² defective statements as to the amount of the judgment,³³ or the rendition of a verdict and judgment on several counts some of which are defective,³⁴ are no longer sufficient ground for reversing the judgment or decree.

f. *Changing Theory of Case on Appeal*.—Although the mere fact that a case is tried on one theory and decided on another does not always and necessarily constitute error, yet if under the circumstances, as disclosed by the record, it appears that injustice has probably resulted, the decree should be reversed.³⁵

g. *Reasons for Decision*.—The law gives the party aggrieved an appeal from a final decree of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor, because the judge has given no reasons, or recited insufficient ones for a judgment admitted by the appellate to be correct.³⁶ The question before an appellate court is, was the judgment cor-

10 L. Ed. 979; *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918; and *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883, decided at the present term.

32. And the 32d section of the judiciary act of 1789, 1 Stat. at L. 91, forbids a reversal of the judgment on account of the omission of the clerk to record the withdrawal or overruling of the demurrer. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, would be merely a clerical mistake; and it is well settled at common law, that a misprision by a clerk, if the case be clearly that alone, though it consist of the omission of an important word or expression, is not a good ground to reverse a judgment, where substance enough appears to show that all which was proper and required was properly done. *Townsend v. Jemison*, 7 How. 706, 720, 12 L. Ed. 880, 886.

Considering the omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, as a case of defect or want of form in the entry by the clerk, and not of error in the real doings of the court, the statute of jeofails of the United States, curing all defects or want of form in judgments, is explicit against our reversing for such a cause. *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

33. *Amount of judgment*.—An assignment of error is that the judgment of the general term of the supreme court of the District of Columbia, affirming the judgment of the special term, was erroneous in declaring that the plaintiff recover "as in his declaration claimed." The judgment in the special term is for \$8,000. And although the amount claimed in the declaration was for \$10,000, the affirmation of the judgment of the special term is necessarily limited to the amount of the judgment so affirmed; and the words "as in his declaration claimed," carelessly put into the final order of the general term, cannot have the effect to increase the sum actually recovered in the special

term. In other words, such an inaccuracy in form is not ground for reversal. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624.

34. *Verdict and judgment on several counts, some of which are bad*.—By the common law, a general verdict and judgment upon several counts in a civil action must be reversed on writ of error if only one of the counts was bad. But Lord Mansfield "exceedingly lamented that ever so inconvenient and ill-founded a rule should have been established," and added, "what makes this rule appear more absurd is that it does not hold in the case of criminal prosecutions." *Bond v. Dustin*, 112 U. S. 604, 609, 28 L. Ed. 835.

In Illinois it has been changed by statute, providing that whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of a defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict. *Illinois Rev. Stat. 1874, ch. 110, § 58*. That statute governs proceedings in cases tried in the federal courts within that state. *Rev. Stat., § 914; Townsend v. Jemison*, 7 How. 706, 722, 12 L. Ed. 880; *Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926; *Bond v. Dustin*, 112 U. S. 604, 609, 28 L. Ed. 835.

Judgments without verdict.—And the rule thereby established must be applied to judgments lawfully rendered without a verdict. *Bond v. Dustin*, 112 U. S. 604, 609, 28 L. Ed. 835.

35. *Changing theory of case on appeal*.—*Peoria Gas, etc., Co. v. Peoria*, 200 U. S. 48, 54, 50 L. Ed. 365.

36. *Reasons for decision*.—*Corning v. Troy Iron & Nail Factory*, 15 How. 451, 464, 14 L. Ed. 768, 774; *Pennsylvania R. Co. v. Wabash, etc., R. Co.*, 157 U. S. 225, 39 L. Ed. 682.

The court having erroneously refused to allow the plaintiff to offer a paper in evidence as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiff's rights. This last refusal was correct. The reason given was erroneous,

rect, not the ground on which the judgment professes to proceed.³⁷

h. *Instructions*.³⁸—**Failure to Give Instructions Not Required.**—It is no ground for reversal that the court omitted to give instructions, where they were not requested by the defendant. It is sufficient that the court gave no erroneous instructions.³⁹

Form of Instructions.—Nor is it ground for reversal that the court instructed the jury in its own words, and declined to adopt the language of the counsel to the same effect.⁴⁰

Peremptory Instructions.—It is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instruction to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.⁴¹

In Equity Cases.—Assignments of error cannot be based upon instructions given or refused in an equity case.⁴²

i. *De Minimis Lex Non Curat.*—The maxim *de minimis lex non curat* is often applied by appellate courts when reversal is sought for trifling errors.⁴³

but this is not a sufficient cause for reversing the judgment. *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

Thus, an assignment of error, that the facts on which the circuit court had founded their decree, did not fully appear upon the record, as required by the 19th section of the judiciary act, is not sufficient ground for reversing the decree. *Hills v. Ross*, 3 Dall. 184, 1 L. Ed. 562.

37. *McClung v. Silliman*, 6 Wheat. 598, 603, 5 L. Ed. 340.

38. See the title INSTRUCTIONS.

39. *Pennock v. Dialogue*, 2 Pet. 1, 15, 7 L. Ed. 327; *Texas, etc., R. Co. v. Volk*, 151 U. S. 73, 78, 38 L. Ed. 78; *Isaacs v. United States*, 159 U. S. 487, 491, 40 L. Ed. 229; *Bennett v. Harkrader*, 158 U. S. 441, 446, 39 L. Ed. 1046; *Humes v. United States*, 170 U. S. 210, 211, 42 L. Ed. 1011.

40. *Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112, citing *Anthony v. Louisville, etc., R. Co.*, 132 U. S. 172, 33 L. Ed. 301.

41. *Supreme Lodge, Knights of Pythias v. Beck*, 181 U. S. 49, 52, 45 L. Ed. 741, quoting with approval *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 660, 45 L. Ed. 361.

The action of a trial court in declining to give a peremptory instruction for a verdict for the defendant in an action on an insurance policy on the ground that the testimony established a violation of the policy by suicide, is not ground of reversal, after verdict and judgment, where it is not absolutely certain from the

testimony that the insured committed suicide. *Supreme Lodge, Knights of Pythias v. Beck*, 181 U. S. 49, 53, 45 L. Ed. 741.

42. **Assignments of error in equity cases.**—*McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 569, 46 L. Ed. 331.

43. *De minimis lex non curat.*—An assignment of error that the penalty on a delinquent tax was erroneously included in the judgment rendered, will not be ground for reversal, where it involves only an error of calculation for a small amount, and is hence controlled by the principle *de minimis*, etc. *Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 39 L. Ed. 447.

If a judgment is obtained against a surety, the amount of it being fixed by a judgment previously obtained against his principal, the former judgment cannot be reversed on error as for an amount too small, though the latter should be afterwards reversed as having so been. *United States v. Allsbury*, 4 Wall. 186, 18 L. Ed. 321.

In proceedings in Arizona to enforce the collection of taxes, assessed upon real estate, a printed copy of the delinquent list, instead of the original filed in the office of the county treasurer, was offered in evidence. To the introduction of this, objection was made, but not upon the ground that the original was the best evidence or that the copy offered was not an exact copy. In this court it was for the first time objected that the list, as

j. *Upon Question of Costs.*—This court has held in several cases that an appeal does not lie from a decree for costs; and if an appeal be taken from a decree upon the merits, and such decree be affirmed with respect to the merits, it will not be reversed upon the question of costs.⁴⁴

k. *Remittitur.*—See the title REMITTITUR.

3. REVERSAL OF VOID JUDGMENTS.—The fact that a judgment is void will not prevent its reversal upon appeal.⁴⁵

4. REVERSAL BY AGREEMENT OR STIPULATION.—Where the controversy between the parties has been subsequently amicably adjusted, the parties may stipulate for the reversal of the judgment of the court below and the remand of the cause.⁴⁷

5. PARTIAL REVERSAL.—a. *In General.*—This court has in some cases affirmed a decree in part, and reversed it in part, where such a course did not affect the interest of different parties in a different manner. But even then it would have been in the discretion of the court to reverse the decree and remand the cause for correction.⁴⁸ Accordingly, where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, then the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment in toto and grant a new trial in regard to all the defendants.⁴⁹

And where there is a joint decree against three parties, and all the

filed in this case, was not a copy of the original. Held, that this court would not disturb the judgment of the court below on such technical grounds, apparently an afterthought, applying the maxim *de minimis lex nor curat*. *Maish v. Arizona*, 164 U. S. 599, 41 L. Ed. 567.

44. *Upon question of costs.*—*Glendale Elastic Fabric Co. v. Smith*, 100 U. S. 110, 112, 25 L. Ed. 547; *Paper-Bag Machine Cases*, 105 U. S. 766, 772, 26 L. Ed. 959; *Wood v. Weimar*, 104 U. S. 786, 792, 26 L. Ed. 779; *Russell v. Farley*, 105 U. S. 433, 437, 26 L. Ed. 1060; *Du Bois v. Kirk*, 158 U. S. 58, 67, 39 L. Ed. 895. See vol. 1, p. 988.

46. *Reversal of void judgments.*—*Alexander v. Crollott*, 199 U. S. 580, 581, 50 L. Ed. 317; *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229; *Kempe v. Kennedy*, 5 Cranch 173, 3 L. Ed. 70; *Scott v. Sanford*, 19 How. 393, 473, 518, 566, 15 L. Ed. 691; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 208, 39 L. Ed. 672.

47. *Reversal by agreement or stipulation.*—*Union Mut. Life Ins. Co. v. Waters*, 124 U. S. 369, 31 L. Ed. 474; *Bond v. Davenport*, 123 U. S. 619, 31 L. Ed. 279; *Woodman Peabbling Machine Co. v. Guild*, 154 U. S. 597, 21 L. Ed. 743; *Arbuckle v. Quigley*, 131 U. S. 428, 33 L. Ed. 213.

Thus, where since the appeal, the parties have come to an adjustment of the controversy, as appears by the stipulation on file, the decree of the lower court will be reversed, and the entry will be that it was reversed by consent, and that the cause is remanded, with directions

that a decree be entered in the circuit court for the complainant, as prayed in the bill of complaint, it being stated in the mandate that the decree here is entered by consent of the parties, as appears by the stipulation, it will be recorded in the case. *Woodman Peabbling Machine Co. v. Guild*, 154 U. S. 597, 21 L. Ed. 743.

48. *Partial reversal in general.*—*City of Elizabeth v. American, etc., Pavement Co.*, 131 U. S., appx. cxlviii, 24 L. Ed. 1059; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 660, 27 L. Ed. 211; *Coggeshall v. Hartshorn*, 154 U. S., appx., 533, 15 L. Ed. 261; *Jaeger v. Moore*, 154 U. S., appx., 641, 38 L. Ed. 1090.

49. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 556, 43 L. Ed. 543.

The provisions contained in the judgment in *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, at 354, 39 L. Ed. 176, indicate the opinion of this court that it was right to reverse the entire judgment in that case for error in regard to one of several defendants, but the court held that as the error did not affect the others, the plaintiff should have liberty to become nonsuit as to the one defendant and to then have judgment upon his verdict against the others. In that case there was a failure to prove a cause of action against the one defendant while no such failure existed as to the others, and there were no special reasons for a total reversal, but on the contrary, justice seemed to require that plaintiff should have the liberty of entering judgment upon his verdict against the other companies. Distinguished in *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 556, 43 L. Ed. 543.

defendants join in an appeal for its reversal, the ordinary course is to reverse the decree as an entirety and remand the cause for a new decree.⁵⁰

Appeals from Ancillary Dependent Decrees.—Where an appeal is taken from a decree in an equity cause, which is merely in execution of a prior decree in the same suit, if such decree is dependent upon the decree to execute which it is rendered and the latter is reversed, such ancillary decree is left without support and falls of itself, by reason of that reversal; vitiated by the common error.⁵¹

b. *Rule in Criminal Cases.*—Where an indictment charges the commission of two crimes, and the trial results in a general verdict which imports of necessity a conviction as to both crimes, and this court finds that there was error as to the conviction of one of the offenses charged, but no error in the conviction upon the other, there may be a reversal of the conviction on that count alone and the reversal need not be also as to that count in which no error exists; in other words, this court, after reversing the judgment, which was on both counts, may annul the verdict upon the first count alone, and leave the verdict to stand as to the second count unaffected by the reversal.⁵²

6. JUDGMENTS BY DEFAULT.—A judgment rendered on default, upon a declaration setting forth no cause of action, may be reversed on writ of error.⁵³

50. *City of Elizabeth v. American, etc., Pavement Co.*, 131 U. S. 148, 24 L. Ed. 1059.

51. **Appeals from ancillary dependent decrees.**—*Montana Min. Co. v. St. Louis Min. Co.*, 186 U. S. 24, 46 L. Ed. 1039, citing and approving *Butler v. Eaton*, 141 U. S. 240, 243, 35 L. Ed. 713; *Kimball v. Kimball*, 174 U. S. 158, 43 L. Ed. 932; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293; *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 80, 27 L. Ed. 47.

An appeal may lie from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which originate in it; but when such decrees are dependent upon the decree, to execute which they were rendered, they are vacated by its reversal; in which case, the appeal which brings them into review will be dismissed for want of a subject matter on which to operate. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47.

Where appeals were taken from a decree of foreclosure and sale, and also from decrees made in execution of that decree, and the principal decree was reversed, it was held that the later appeals having been annulled by operation of law, their subject matter was withdrawn, and they must be dismissed for lack of anything on which they could operate. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 80, 27 L. Ed. 47; *Mills v. Green*, 159 U. S. 651, 654, 40 L. Ed. 293, reaffirmed in *Cedar Rapids Water Co. v. Cedar Rapids*, 199 U. S. 600, 50 L. Ed. 327; *In re Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

A decree in personam for the amount remaining due upon a mortgage debt, after the execution of a decree of foreclosure and sale, is of this description; but, when rendered in favor of other parties than the complainant, it will be reversed for the same error that required

the reversal of the decree of foreclosure and sale. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47.

52. **Rule in criminal cases.**—*Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

In *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388, it was found that a judgment entered upon a general verdict of guilty on an indictment consisting of several counts was erroneous as respects one of the counts alone, and for this cause the judgment was not reversed in toto, but was only set aside as to the count in regard to which error had been committed, and the case was remanded to the trial court for sentence on the count as to which no error was found to have arisen, and for further proceedings as to the other count. *Selvester v. United States*, 170 U. S. 262, 267, 42 L. Ed. 1029.

In *Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118, where distinct sentences of concurrent imprisonment had been imposed under separate counts of an indictment, reversible error having been found to exist as to one of the counts only, the judgment was affirmed as to the count where there was no error and was reversed as to the other, and the cause was remanded for further proceedings with respect to the count as to which error had been committed. *Selvester v. United States*, 170 U. S. 262, 268, 42 L. Ed. 1029.

53. **Judgments by default.**—*Cragin v. Lovell*, 109 U. S. 194, 27 L. Ed. 903, citing *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

If a judgment by default would have been arrested on motion, because the declaration did not state facts sufficient to constitute a cause of action, it may, for the same reason, be reversed upon error. *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615, followed in *Cragin v. Lovell*, 109 U. S. 194, 199, 27 L. Ed. 903.

Upon a writ of error to reverse a judgment by default, such defects in the declaration or complaint as could have been taken advantage of before judgment by general demurrer may be brought under review.⁵⁴

7. **EFFECT OF REVERSAL**.—*a. In General.*—Where a decree which is merely an order in execution of the previous decrees of the court, is reversed, they are vacated by the reversal and the whole subject matter of the writ of error is thus withdrawn, and the writ of error must be dismissed for want of anything upon which it can operate.⁵⁵ For example, a decree in personam for the amount remaining due upon a mortgage debt after the execution of a decree for foreclosure and sale, is of this description, but when rendered in favor of other parties than the complainant, it will be reversed for the same error that required the reversal of the decree of foreclosure and sale.⁵⁶

Estoppel.—Where a judgment of a state court that was a bar to another suit in a United States circuit court has been reversed on appeal pending the decision of an appeal to the United States supreme court, it will not obviate the erroneous ruling at the trial in the lower court that the judgment was not an estoppel.⁵⁷

b. On Judicial Sales.—A sale made to one not a party to the suit, under a judgment or decree, will be valid, though the judgment may afterwards be reversed.⁵⁸ In other words, although the judgment or decree may be reversed, yet all rights acquired at a judicial sale, while the decree or judgment was in full force, and which it authorized, will be protected.⁵⁹

8. **RENDITION AND ENTRY OF JUDGMENT**⁶⁰.—*a. Rendering and Ordering Final Judgment.*—(1) *In General.*—Since this court, on reversing a judgment of the circuit court, may order such judgment for either party as the justice of the case may require,⁶¹ it may of course render such a judgment or decree as the

54. *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

55. **Effect of reversal in general.**—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 80, 27 L. Ed. 47; *Montana Min. Co. v. St. Louis Min., etc., Co.*, 186 U. S. 24, 46 L. Ed. 1039.

The general doctrine is well settled that if the original judgment upon which the proceedings in the record took place be reversed, this requires the reversal of the dependent judgment. Thus, if the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows, of course; but a special certiorari is necessary to bring up the execution upon which the bond was given so as to show the connection between the two judgments. *Barton v. Petit*, 7 Cranch 288, 3 L. Ed. 347.

Thus, where appeals are taken from a decree to foreclose a mortgage and sell the mortgaged property, and also from decrees in execution of that decree, and the prior decree is reversed, it was held that the latter appeals having been annulled by operation of law their subject matter is withdrawn, and the appeal must be dismissed for lack of anything on which they can operate. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47, followed in *Mills v. Green*, 159 U. S. 651, 655, 40 L. Ed. 293; *Lewisburg Bank v. Sheffey*, 140 U. S. 445, 452, 35 L. Ed. 493.

And when under the confiscation act of July 17th, 1862, an information has been filed in the district court and a decree of

condemnation and sale of the land seized been made, and the money has been paid into the registry of the court, and on error to the circuit court, that court, reversing the decree, has dismissed the information but confirmed the sale, and ordered the proceeds to be paid to the owner of the land—if on error by the United States to this court, this court reverse the decree of the circuit court, and affirm the decree of the district court, that reversal will leave nothing on which a writ of error by the owner can act. The judgment having been reversed, the confirmation of the sale and order to pay the proceeds fall. The only judgment can be reversal again. *Conrad's Lots*, 20 Wall. 115, 22 L. Ed. 328.

56. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 48, 27 L. Ed. 47; *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 29 L. Ed. 589; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572; *Kimball v. Kimball*, 174 U. S. 158, 163, 43 L. Ed. 932.

57. *Wilson v. Deen*, 121 U. S. 525, 30 L. Ed. 980.

58. **On judicial sales.**—*McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

59. *Gray v. Brignardello*, 1 Wall. 627, 634, 17 L. Ed. 693, citing *Voorhees v. Bank*, 10 Pet. 449, 9 L. Ed. 490; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

60. See the title **MANDATE AND PROCEEDINGS THEREON**.

61. **Rendering and ordering final judgment in general.**—Rev. Stat., § 701; In-

lower court ought to have rendered,⁶² even in admiralty cases,⁶³ or cases removed to this court from the territories.⁶⁴ This same power is conferred on the supreme court of New Mexico by statute,⁶⁵ and was frequently exercised by the circuit court when appeals were allowed from the district to the circuit court.⁶⁶

Illustrative Cases.—Where the lower court has erred in rendering a joint judgment instead of a separate judgment,⁶⁷ or where it appears conclusively that the original plaintiffs cannot maintain their action, upon the facts found by the court below,⁶⁸ or upon the death of the defendant in a tort action,⁶⁹ or where a judgment of a state court, which is set up as an estoppel in a federal court and sustained, is reversed by this court on writ of error,⁷⁰ in all such

Insurance Cos. *v.* Voykin, 12 Wall. 433, 20 L. Ed. 442; *Cragin v. Lovell*, 109 U. S. 194, 199, 27 L. Ed. 903; *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. Ed. 573; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920.

Arrest of judgment.—In accordance with this rule, the order may be that the judgment below be arrested, and the case remanded with directions that judgment be arrested. *Cragin v. Lovell*, 109 U. S. 194, 199, 27 L. Ed. 903, citing *Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205.

62. May render decision that court below ought to have rendered.—*Wickliffe v. Owings*, 17 How. 47, 15 L. Ed. 44; *Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193; *Chouteau v. United States*, 9 Pet. 137, 9 L. Ed. 78.

In the language of Mr. Justice Miller: "While we are bound, therefore, to reverse the judgment of that court, the foregoing statement indicates very clearly the judgment which this court must render under the twenty-fourth section of the judiciary act. That section enacts that where a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the supreme court shall do the same in reversals therein, except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain; in which case they shall remand the cause for final decision. As the case before us does not come within the exception above mentioned, it is our duty to render the judgment which we have shown that the circuit court should have rendered." *Insurance Companies v. Boykin*, 12 Wall. 433, 437, 20 L. Ed. 442, approved in *Cragin v. Lovell*, 109 U. S. 194, 200, 27 L. Ed. 903.

63. Rendering final judgment in admiralty cases.—*Penhallow v. Doane*, 3 Dall. 53, 54, 1 L. Ed. 507.

64. Rendering final judgment in cases from the territories.—*Stringfellow v. Cain*, 99 U. S. 610, 619, 25 L. Ed. 421.

65. Power of supreme court of New Mexico to render final judgment.—*Hopkins v. Orr*, 124 U. S. 510, 31 L. Ed. 523, followed in *Kennon v. Gilmer*, 131 U. S. 22, 30, 33 L. Ed. 110.

66. Power of circuit courts to render final judgment.—*Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193.

67. Where the lower court erred in rendering a joint judgment instead of a separate judgment, it was held that this court, instead of awarding a *venire facias de novo* must, under the 24th section of the judiciary act, as well as by the common-law powers of a court of error, render the judgment which the circuit court ought to have rendered. *Insurance Cos. v. Boykin*, 12 Wall. 433, 20 L. Ed. 442.

68. Where it conclusively appears, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it will be ordered that the judgment be reversed, and the case remanded to the circuit court, with directions to enter judgment for the original defendant. *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920; *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. Ed. 573.

69. Upon an appeal from a judgment, sustaining a demurrer in an action, which must be treated as a tort action, in order to sustain the jurisdiction of the lower court, this court will, on the death of defendant, reverse the judgment of the lower court, and remand the cause with instructions to set aside its judgment and enter judgment abating the action by reason of the death of the defendant. *Bank of Iron Gate v. Brady*, 184 U. S. 665, 46 L. Ed. 739.

70. Where a judgment of the state court is set up as an estoppel in a circuit court of the United States and the defense is held to be good, but such judgment of the state court is subsequently brought before this court by writ of error and reversed, this court, upon an appeal from the decision of the circuit court, will reverse the judgment of the circuit court, and order the judgment to be entered up for the plaintiff in error against the defendant in error. *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713.

cases this court may either enter up judgment here, or remand the cause with directions to enter judgment below.

(2) *In Criminal Cases.*—At common law the general rule undoubtedly was that where an erroneous judgment was entered by a trial court, or an erroneous sentence imposed, on a valid indictment, the appellate court, on error, could not itself render such a judgment as the trial court should have rendered or remit the case to the trial court with directions for it to do so, but the only thing it could do was to reverse the judgment and discharge the defendant.⁷¹ This conclusion rested upon the theory that a court of error was confined exclusively to the determination whether error existed, and if it found that it did, its duty was to reverse and discharge the prisoner.⁷²

Some of the states in which the common law prevails, or is adhered to, have adopted the same rule, but in most of the states it is expressly provided by statute that when there is an error in the sentence which calls for a reversal, the appellate court is to render such judgment as the court below should have rendered, or to remand the record to the court below with directions for it to render the proper judgment. And this practice seems to prevail in the state of Washington.⁷³

In Federal Courts.—The statutes in reference to the power of federal appellate tribunals upon reversal to remand the cause to the lower court with such directions for further proceedings as would promote substantial justice have from the beginning dealt with the subject.⁷⁴

By the judiciary act of September 24, 1789, c. 20, 1 Stat. 73, 85, it was provided in § 24 "that when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed, and the supreme court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner, in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision."⁷⁵

It is clear that by § 24 of the judiciary act of 1789, power was conferred upon the circuit courts when reviewing the judgments or decrees of district courts to render such judgment or pass such decree as the district court should have rendered or passed, and that upon this court was conferred the same power. True, at the time the judiciary act was passed no jurisdiction to review final judgments in criminal cases was vested in circuit courts or in this court, except in cases of error to courts of last resort of a state, but as the power on writs of error to state courts embraced criminal cases, it could not have been contemplated that the general grant of authority on such writs to render the judgment required by the justice of the case was restricted to civil cases alone. The subsequent statutes add cogency to the view that this was not contemplated.⁷⁶

71. Power of federal supreme court to remand with directions to enter judgment in criminal cases.—In *re Frederick*, 149 U. S. 70, 74, 37 L. Ed. 653.

It was held in England that at common law a reviewing court upon a writ of error in a criminal case had not the power, upon a reversal, to enter a proper judgment or to remand the cause for that purpose. In *re Frederick*, 149 U. S. 70, 74, 37 L. Ed. 653, citing *Rex v. Bourne*, 7 Ad. & El. 58; *Ballew v. United States*, 160 U. S. 187, 198, 40 L. Ed. 388.

This rule was recognized in England in the case of *The King v. Bourne*, 7 Ad. & El. 58, where the Court of King's Bench reversed the judgment of the Court of Quarter Sessions, and discharged the

defendants because the sentence imposed upon them by that court was of a lower grade than that which the law provided for the crime of which they had been convicted. In *re Frederick*, 149 U. S. 70, 74, 37 L. Ed. 653.

72. Ballew v. United States, 160 U. S. 187, 198, 40 L. Ed. 388.

73. Rule in state courts.—In *re Frederick*, 149 U. S. 70, 74, 37 L. Ed. 653.

74. Rule in federal courts.—*Ballew v. United States*, 160 U. S. 187, 198, 40 L. Ed. 388.

75. Construction of § 24 of the judiciary act.—*Ballew v. United States*, 160 U. S. 187, 198, 40 L. Ed. 388.

76. Ballew v. United States, 160 U. S. 187, 199, 40 L. Ed. 388.

The second section of the act of June 1, 1872, c. 255, 17 Stat. 196, provides that the appellate court (referring to this court and circuit courts) may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.⁷⁷

Criminal Cases.—The subsequent embodiment of the provision just quoted in § 701 of the Revised Statutes makes clear the fact that congress in conferring the power to review on error did not intend that the power, on reversal, to make such order as was called for by the nature of the error found to exist, should be limited to civil cases. Section 701 reads as follows: "The supreme court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require."⁷⁸

It conclusively appears from an examination of the statutes that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require upon writs of error in criminal cases, to state courts and to the circuit courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the circuit courts of appeals and circuit courts in cases where they exercised jurisdiction by error in criminal cases over the district court.⁷⁹

(3) *Appeals in Equity.*—Upon an appeal in equity, the whole case is before this court and we can render such decree as under all the circumstances may be proper.⁸⁰ If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented, this court has the power to forbear a determination of the merits and remand the cause for further preparation.⁸¹

77. Construction of act of June 1, 1872. —Ballew v. United States, 160 U. S. 187, 199, 40 L. Ed. 388.

78. Section 701 of the Revised Statutes includes criminal cases.—Ballew v. United States, 160 U. S. 187, 200, 40 L. Ed. 388.

79. Ballew v. United States, 160 U. S. 187, 201, 40 L. Ed. 388.

"From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require. To contend otherwise presupposes that congress had conferred this power upon this court on writs of error to state courts, on writs of error to the circuit courts in capital cases, and had also conferred like power upon circuit courts and the circuit courts of appeals, and yet had denied it to this court in a class of criminal cases where jurisdiction was conferred by writ of error under the act of 1891. To so conclude would work out an absurdity, and would destroy the unity of the federal judicial system. The contrary conclusion finds support only in the contention that because in each concession of jurisdiction, by writ of error, there was not a re-expression of the general method by which such writ should be exercised, therefore the grant of power was divested of its

efficacy. But this is fully answered by the entire history of the legislation which demonstrates that the general grant of power to render a proper judgment on writs of error was evidently not reiterated in express terms when new subjects-matter of jurisdiction were vested in this court, because such authority was deemed to be already adequately provided by the general statutes on the subject." Ballew v. United States, 160 U. S. 187, 202, 40 L. Ed. 388.

Where the court of first instance of the Philippine Islands in a trial for murder convicts of assault, and the defendants appeal to the supreme court of the Philippine Islands, that court may reverse the judgment appealed from and itself convict the defendants of homicide. Trono v. United States, 199 U. S. 521, 50 L. Ed. 292, citing Kepner v. United States, 195 U. S. 100, 49 L. Ed. 114.

80. Appeals in equity.—Ridings v. Johnson, 128 U. S. 212, 32 L. Ed. 401; United States v. Rio Grande, etc., Irrigation Co., 184 U. S. 416, 423, 46 L. Ed. 619.

81. United States v. Rio Grande, etc., Irrigation Co., 184 U. S. 416, 423, 46 L. Ed. 619, following Estho v. Lear, 7 Pet. 130, 8 L. Ed. 632; United States v. Galbraith, 22 How. 89, 96, 16 L. Ed. 321; Illinois Central R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018.

(4) *Special Findings*.—Where all the facts of the case are ascertained by the special finding of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial but this court will order judgment for the defendant without awarding a new trial.⁸² But the rule is otherwise where the facts set forth in the special findings are not sufficient to support the judgment.⁸³

b. *Necessity for Presence of Parties*.—This court will not make a final decree upon the merits of the case, unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court.⁸⁴

c. *Entry Nunc Pro Tunc*.—**In General**.—A decree heretofore entered in a case may be vacated and set aside by this court on rehearing, and a new decree entered nunc pro tunc.⁸⁵

Death after Submission of Cause.—Where the plaintiff in error,⁸⁶ or defendant in error,⁸⁷ has died after the commencement of the term,⁸⁸ judgment will be entered as of the date of the submission of the cause in this court.⁸⁹

9. **RESTITUTION**⁹⁰.—a. *Right to Restitution*.—(1) *In General*.—It is a settled rule of law that upon an erroneous judgment, if there be a regular execution, the party may justify under it until the judgment is reversed, for an erroneous judgment is the act of the court.⁹¹ But on the reversal of an erroneous judgment, the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost.⁹² The right of restitution of what one has lost by the enforce-

82. Special findings.—*Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 21, 30 L. Ed. 573; *Seeberger v. Schweyer*, 153 U. S. 609, 612, 38 L. Ed. 839.

83. Saltonstall v. Britwell, 150 U. S. 417, 37 L. Ed. 1128; *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 273, 3 L. Ed. 220; *Harden v. Fisher*, 1 Wheat. 300, 303, 4 L. Ed. 96; *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *McArthur v. Porter*, 1 Pet. 606, 1 L. Ed. 290; *Ex parte French*, 91 U. S. 423, 23 L. Ed. 249; *Ryan v. Carter*, 93 U. S. 78, 81, 23 L. Ed. 807; *Hodges v. Easton*, 106 U. S. 408, 411, 27 L. Ed. 169; *Fort Scott v. Hickman*, 112 U. S. 150, 165, 28 L. Ed. 636; *Chicago Tyre & Spring Works Co. v. Spalding*, 116 U. S. 541, 545, 546, 29 L. Ed. 720; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30, 40, 30 L. Ed. 573; *Raimond v. Terrebonne Parish*, 132 U. S. 192, 33 L. Ed. 309; *Lloyd v. McWilliams*, 137 U. S. 576, 34 L. Ed. 788.

84. Necessity for presence of parties.—*Russell v. Clark*, 7 Cranch 69, 3 L. Ed. 271.

85. Entry nunc pro tunc.—*New Orleans v. Warner*, 176 U. S. 92, 44 L. Ed. 385.

86. Thus, where the plaintiff in error has died while the cause is held under advisement, the judgment will be entered nunc pro tunc, as on the first day of this term. *Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723.

87. So also, where the appellee has died after the commencement of the term, and the court not knowing his decease has decided upon the case, after argument, the court will order the decree to be entered as of the first day of the term.

Bank v. Weisiger, 2 Pet. 481, 7 L. Ed. 492.

88. If one of two defendants in error has died since the commencement of the term, the judgment may be entered against both defendants, on a day prior to the death of such plaintiff in error nunc pro tunc. But if he died before the commencement of the term, then upon a suggestion of his death before the term being entered of record, the cause of action surviving, the judgment may be entered against the surviving defendant. *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159, opinion of Mr. Justice Story.

89. Death after submission of cause.—Where one of the parties to the cause has died since the submission of the case, a decree of reversal and removal for further proceedings should be entered as of the date of the submission of the cause in this court. *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309.

Upon the suggestion of the death of a party, this court will order its judgment to be entered nunc pro tunc as of the date prior to such death. *Bank v. Weisiger*, 2 Pet. 481, 7 L. Ed. 492.

90. See generally, the title RESTITUTION.

91. Right to restitution in general.—*United States Bank v. Washington Bank*, 6 Pet. 8, 8 L. Ed. 299.

92. United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. Ed. 151.

In *Ex parte Morris*, 9 Wall. 665, 607, 19 L. Ed. 799, the United States filed an information in the district court for the

ment of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution.⁹³

So, also, all the state courts of the country recognize the power of a court, whose judgment is set aside on its own motion or reversed by order of an appellate tribunal, to direct restitution, so far as practicable, of all property and rights which have been lost by the erroneous judgment.⁹⁴

But in Pennsylvania, restitution is within the discretion of the court, under all the circumstances of the case, and will be refused where it would work an injustice to grant the writ.⁹⁵

If the subject in controversy be a fund lately in the registry of the court, but which has been distributed, so that a new trial would be useless unless the fund was restored to the registry where it was before the decree of distribution was executed, it will direct that a writ of restitution issue to the proper parties to restore the fund to the registry.⁹⁶

Where New Trial Is Ordered.—It seems that the writ of restitution may be granted though a new venire has been directed.⁹⁷

(2) *In Case of Reversals for Want of Jurisdiction.*—The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction. Accordingly, this court has the jurisdiction to render judgments for restitution of the money collected on the reversed judgment, although the reversal by this court is for want of jurisdiction in the circuit court, such jurisdiction not affirmatively appearing.⁹⁸

(3) *In Prize Causes.*—No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made.⁹⁹

b. *Who Liable to Make Restitution.*—(1) *In General.*—It is the duty of a court below to obey and give effect to the mandate of this court, as far as practicable. Where the mandate is for restitution of moneys, recovered by persons under a decree of the court below, all persons within the reach of the territorial jurisdiction of that court should be required by the proper order to re-

middle district of Alabama, against certain bales of cotton, which it was alleged were liable to seizure and confiscation, and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. On appeal, this court reversed the judgment and remanded the cause to the district court with directions "to cause restitution to be made to the appellants of whatever they have been compelled to pay under that decree." *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 221, 35 L. Ed. 151.

93. English rule.—*Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 35 L. Ed. 151, citing *Anonymous*, 2 Salkeld 588.

94. Rule in the state courts.—*Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 221, 35 L. Ed. 151.

95. Rule in Pennsylvania.—*Fitzalden v. Lee*, 2 Dall. 205, 1 L. Ed. 350.

96. Morris's Cotton, 8 Wall. 507, 19 L. Ed. 481.

97. Where new venire is granted.—*Gregg v. Forsyth*, 2 Wall. 56, 57, 17 L. Ed. 782.

98. In case of reversals for want of jurisdiction.—*United States Bank v. Washington Bank*, 6 Pet. 8, 8 L. Ed. 299; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. Ed. 151.

In the case of *Morris's Cotton*, 8 Wall. 507, 19 L. Ed. 481, property on land was seized under the acts of 1861 and 1862, passed for suppression of the rebellion, according to which the claimants were entitled to a trial by jury. Such trial was not allowed, but a decree forfeiting the property was passed by the court below. This was reversed by this court, which held that the district court had no jurisdiction to proceed in the case in the manner in which it did; and, although the proceeds of the sale of the property had been distributed, it directed, in its decree of reversal, that the court below should grant a new trial and issue a writ for restitution of the proceeds to the registry of the court.

99. In prize causes.—*The Schooner Rachel*, 6 Cranch 329, 3 L. Ed. 239. See the title PRIZE.

fund what they have received.¹ And if a party within the jurisdiction is in possession of any part of the fund ordered to be paid back, which was received by another who is out of the jurisdiction, the rights of the petitioners follow the money into his hands, and he is liable for it. Such party, within the jurisdiction, should, on an allegation of his possession, be required to disclose the facts touching that subject, and if he is in such possession, he should be required to restore the money so received.²

(2) *Agents*.—Where an agent is party to a suit and has received money under the judgment, which he has paid over to his principal, although he had knowledge that an appeal was to be taken, he can be compelled to make restitution when the judgment is reversed.³

(3) *Assignees of Judgment*.—It is doubtful whether the assignees of the judgment incur the same liability upon reversal as the original parties.⁴

(4) *The United States*.—But the United States cannot be ordered to make restitution.⁵

(5) *Third Parties or Strangers*.—But as it respects third persons, whatever has been done under the judgment while it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties. The writ of error may be so taken out as to operate as a supersedeas. Or, if a proper case can be made for the interference of the court of chancery, the execution may be stayed by injunction.⁶ The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost, by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers, there is no such privity; and if no legal right existed, when the money was paid, to recover it back, no such right could be created by notice of an intention so to do.⁷

(6) *Purchasers at Judicial Sales*.—In many of the states it is the law that a purchaser at a judicial sale loses his title upon a reversal of the judgment or

1. Who liable to make restitution in general.—Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799.

2. Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799.

3. Agents.—Penhallow v. Doane, 3 Dall. 53, 54, 1 L. Ed. 507.

4. Assignees of judgment.—United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299.

5. The United States.—Where a marshal, who is bound under a mandate from this court to make restitution, returns that he has deposited the money in bank pursuant to directions from the United States, the circumstances of the deposit should be inquired into. If the money was deposited, pursuant to instructions from the proper authority, he is exonerated, and in that event the proper certificate should be given by the court to the petitioners, and they be left to seek re-

dress in the appropriate manner. The court has no authority to order the United States to refund. Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799.

6. Third parties or strangers.—United States Bank v. Washington Bank, 6 Pet. 8, 17, 8 L. Ed. 299, 304; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

7. United States Bank v. Washington Bank, 6 Pet. 8, 19, 8 L. Ed. 299.

The defendants in an execution paid to the agents of plaintiff the amount of the debt, and give a verbal notice that it was their intention to sue out a writ of error to reverse the judgment. This was afterwards done, and the judgment was reversed. The agents of the plaintiff paid over to him forthwith the amount received, and the defendants instituted a suit against the agents to recover the sum paid to them. Held, that they could not recover. United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299.

decree under which the sale was made, where such purchaser is a party to the judgment or decree.⁸

California Rule.—Thus the title of an attorney purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney, falls by the law of California, with the reversal of the decree directing the sale, independent of defects in the proceedings; and conveyances after such reversal pass no title as against a grantee of the original owner of the property.⁹

c. *Extent of Restitution.*—**In General.**—The restitution, to which the party is entitled upon the reversal of an erroneous judgment, is of everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie; not the value of them, but the things themselves. There is an exception where the sale is to a stranger bona fide, or where a third person has bona fide acquired some collateral right before the reversal.¹⁰

Upon the reversal of a judgment in an action of ejectment, the plaintiffs in error are entitled to a restitution both of the premises and costs.¹¹

d. *Proceedings to Obtain Restitution.*—(1) *Scire Facias.*—The earlier and more formal remedy was by *scire facias*.¹²

(2) *Summary Proceedings by Motion.*—But the modern practice is to apply to the court on the coming down of the mandate from the appellate tribunal and the entry of the judgment of reversal for a writ of restitution, setting forth the facts entitling the party to the remedy and giving notice of the motion to the adverse party.¹³ And a proceeding to enforce the restitution is under the control of the court, and all needed inquiry can be had to guide its judgment in a summary proceeding upon motion of the parties, the only requisite being that the opposite party shall be held, so that in directing restitution no further wrong may be committed.¹⁴

(3) *Assumpsit.*—Circumstances may exist where an action may be sustained to recover back the money.¹⁵

(4) *Attachment for Contempt.*—Persons failing to comply with an order to refund what they have received, should be dealt with promptly by an attachment for contempt. This in no wise interferes with common law remedies except that the parties entitled to restitution cannot be paid twice.¹⁶

e. *The Motion.*—The court will refuse a motion for a writ of restitution, although the mandate of this court reversing the judgment has been sent down to the court below, if the motion was made before the mandate had been filed there or a rule entered in pursuance of its directions reversing the judgment, because the court had not in such case obtained possession of the cause.¹⁷

8. **Purchasers at judicial sales.**—Galpin v. Page, 18 Wall. 350, 374, 21 L. Ed. 959.

9. **Rule in California.**—Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

10. **Extent of restitution.**—Galpin v. Page, 18 Wall. 350, 374, 375, 21 L. Ed. 959; United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299.

11. **Extent of restitution upon reversal in ejectment.**—Gregg v. Forsyth, 2 Wall. 56, 17 L. Ed. 782.

12. **Scire facias to compel restitution.**—Gregg v. Forsyth, 2 Wall. 56, 57, 17 L. Ed. 782; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. Ed. 151.

The mode of proceedings to effect this object may be regulated according to circumstances. Sometimes it is done by writ of restitution, without a *scire facias* when

the record shows the money has been paid, and there is certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299.

13. **Summary proceeding by motion.**—Gregg v. Forsyth, 2 Wall. 56, 57, 17 L. Ed. 782.

14. **Northwestern Fuel Co. v. Brock,** 139 U. S. 216, 35 L. Ed. 151.

15. **Assumpsit.**—United States Bank v. Washington Bank, 6 Pet. 8, 8 L. Ed. 299; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 220, 35 L. Ed. 151.

16. **Attachment for contempt.**—Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799.

17. **The motion.**—Gregg v. Forsyth, 2 Wall. 56, 17 L. Ed. 782.

R. Affirmance—1. *In General*.—Legal presumption being in favor of a judgment of the court below, this court, where it does not reverse, nor dismiss for want of jurisdiction, might in regard to a case which it refused to consider on evidence adduced, affirm simply.¹⁸

Affirmance or Remand.—Where error exists in the proceedings of the circuit court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require; but if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it; this court cannot, with propriety, reverse a decision which conforms to law, and remand the cause for further proceedings.¹⁹

2. **Grounds for Affirmance**—a. *In General*.—A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error.²⁰

b. *Where Proceedings Below Were Correct*—(1) *In General*.—When a cause was brought into this court upon a writ of error sued out under the twenty-second section of the judiciary act, and all the proceedings were regular and correct, the judgment of the court below was affirmed, although there was no question presented in the record for revision,²¹ and this is the well-settled rule under existing provisions.²² In other words, if the transcript does not show that any

18. **Affirmance in general**.—*Burr v. Des Moines, etc.*, R. Co., 1 Wall. 99, 17 L. Ed. 561, distinguished in *Pomeroy v. State Bank*, 1 Wall. 592, 603, 17 L. Ed. 638.

19. *Binney v. Chesapeake, etc.*, Canal Co., 8 Pet. 214, 8 L. Ed. 921.

20. **Affirmance on grounds not taken at the trial**.—*Deery v. Cray*, 5 Wall. 795, 808, 18 L. Ed. 653; *Vicksburg, etc.*, R. Co. v. O'Brien, 119 U. S. 99, 103, 30 L. Ed. 299; *Peck v. Heurich*, 167 U. S. 624, 629, 42 L. Ed. 302.

21. **Construction of 22nd section of judiciary act**.—*Pomeroy v. State Bank*, 1 Wall. 592, 17 L. Ed. 638, following *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *Guild v. Frontin*, 18 How. 135, 15 L. Ed. 290.

22. **Affirmance where judgment below is correct**.—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 660, 27 L. Ed. 211; *Deputron v. Young*, 134 U. S. 241, 260, 33 L. Ed. 923; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472; *Evans v. State Nat. Bank*, 141 U. S. 107, 35 L. Ed. 654; *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. Ed. 111; *Chicago, etc.*, R. Co. v. Third Nat. Bank, 134 U. S. 276, 290, 33 L. Ed. 900; *DeWitt v. Berry*, 134 U. S. 306, 316, 33 L. Ed. 896; *Egan v. Clabsey*, 137 U. S. 654, 34 L. Ed. 822; *Moore v. United States*, 150 U. S. 57, 37 L. Ed. 996; *McGuire v. Massachusetts*, 3 Wall. 382, 18 L. Ed. 164; *Hecker v. Fowler*, 1 Black 95, 17 L. Ed. 45; *Suydam v. Williamson*, 20 How. 427, 440, 15 L. Ed. 978; *Dufau v. Couprey*, 6 Pet. 170, 8 L. Ed. 359; *Crompton v. United States*, 138 U. S. 361, 34 L. Ed. 958; *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134; *Stevens v. Gladding*, 19 How. 64, 15 L. Ed. 569; *New Orleans, etc.*, R. Co. v. Morgan, 10 Wall. 256, 260, 19 L. Ed. 892; *Powerskie County Supervisors v. United States*, 154

U. S., appx., 576, 19 L. Ed. 813; *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *The Eutaw*, 12 Wall. 136, 141, 20 L. Ed. 278; *Nutt v. Minor*, 18 How. 287, 15 L. Ed. 378.

A writ of error, when issued to a circuit court, removes the whole record into this court, and if all the proceedings in the suit were correct, it follows, if not from the very words of the section, certainly from the necessary construction of the same, that the judgment must be affirmed. *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *New Orleans, etc.*, R. Co. v. Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

If the cause is brought up from a circuit court it is to be either affirmed or reversed, and it will of course be affirmed if the record does not present some ground of reversal. *Taylor v. Morton*, 2 Black 481, 17 L. Ed. 277.

Where no error appears upon the record in the proceedings of the circuit court, the case having been left to a jury, and no instructions asked from the court, the judgment below must be affirmed. *Stevens v. Gladding*, 19 How. 64, 15 L. Ed. 569.

Where a case comes into this court from a circuit court on a writ of error sued out under the 22d section of the judiciary act, which provides in effect that final judgments in a circuit court, brought there by original process, may be re-examined and reversed or affirmed in this court upon a writ of error. Consequently, when a cause is brought into this court upon a writ of error, sued out under that section, and all the proceedings are regular and correct, it follows from the express words of the section that the judgment of the court below must be affirmed, although there is no question presented in the record for revision. *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134; *Stevens*

error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mistrial.²³

Where the only assignments of error are without foundation,²⁴ or where the record presents no question of law calling for the exercise of our right of review,²⁵ the judgment will be affirmed.

(2) *Error to State Court.*—Upon a writ of error to a state court, if this court finds no error in the record, judgment will be affirmed.²⁶

c. *Where Record Is Defective.*—In General.—In accordance with the general rule that error must be shown and that it cannot be presumed, it is held that where the record before the appellate court is so defective as not to properly present the propositions upon which the plaintiff in error insists, the judgment will be affirmed.²⁷

Illustrative Cases.—Thus, where, from the imperfect way in which the record is sent up, the court cannot discover satisfactory evidence of error,²⁸ or where the record fails to present in proper form the questions argued by counsel,²⁹ or where a case is brought here upon a writ of error, issued under the twenty-second section of the judiciary act, and there is no bill of exceptions, agreed statement, or special verdict in the transcript,³⁰ in all such cases the judgment will be affirmed.

v. Gladding, 19 How. 64, 15 L. Ed. 569; *Suydam v. Williamson*, 20 How. 427, 440, 15 L. Ed. 978; *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277.

Where the case presents only a question of fact, that this court is satisfied in the decided right of the court below, and that is the only matter in dispute, the judgment will be affirmed. *Ponder v. Delauney*, 154 U. S. 651, 38 L. Ed. 1092.

Where proceedings were had in Minnesota for the sale of property mortgaged to secure a debt, and the judgment of the court below was, that the property should be sold, there appears to be no error in the judgment, and it must therefore be affirmed. *Lawler v. Clafin*, 22 How. 23, 16 L. Ed. 239.

Latitude of cross-examination.—Where there is nothing in the bill of exceptions which enables a revising court to say that questions objected to have exceeded the reasonable license which a court, in its discretion, may allow in cross-examination no error is shown, and the judgment must be affirmed. *Nailor v. Williams*, 8 Wall. 107, 19 L. Ed. 348.

23. *Minor v. Tillotson*, 1 How. 287, 11 L. Ed. 134; *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277; *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267; *Baltimore, etc., R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127, 131, 23 L. Ed. 260.

"Where a case is brought into this court from the circuit courts by a writ of error, regular in form, if there is no error in the record the judgment will be affirmed. Affirmance in such a case is the proper judgment, because the writ of error, being addressed to the record, brings up the whole case, and the court, under the twenty-second section of the judiciary act, has jurisdiction to re-examine the record in such cases and to reverse or affirm; and if there is no error in the record, of

course the judgment must be affirmed. *Taylor v. Morton*, 2 Black 481, 484, 17 L. Ed. 277." *Barton v. Forsyth*, 5 Wall. 190, 194, 18 L. Ed. 545.

24. **Assignments of error without foundation.**—*Gila Bend Reservoir, etc., Co. v. Gila Water Co.*, 202 U. S. 270, 50 L. Ed. 1023.

25. *Stevenson v. Barbour*, 140 U. S. 48, 35 L. Ed. 338, citing *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60, 34 L. Ed. 585; *Pacific Express Co. v. Malin*, 132 U. S. 531, 538, 33 L. Ed. 450.

26. **Error to state court.**—*Plant v. Stovall*, 154 U. S. 584, 20 L. Ed. 538. See vol. 1, p. 546.

27. **Judgment affirmed when record is insufficient.**—*James v. Mobile Bank*, 7 Wall. 692, 19 L. Ed. 275; *Genes v. Campbell*, 11 Wall. 193, 20 L. Ed. 110; *Stevens v. Gladding*, 19 How. 64, 15 L. Ed. 569; *Greenhood v. Randall*, 111 U. S. 775, 28 L. Ed. 596.

Thus, a judgment will be affirmed where the only ruling of the court, to be found in the record, was a judgment rendered in favor of a plaintiff for the recovery of a sum of money; where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court; and where what purported to be a statement of facts, signed by the judge, was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued. *Genes v. Bonnemmer*, 7 Wall. 564, 19 L. Ed. 227.

28. *The Cayuga*, 16 Wall. 177, 21 L. Ed. 354.

29. *Greenhood v. Randall*, 111 U. S. 775, 28 L. Ed. 596.

30. *Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Minor v. Tillotson*, 2 How. 392, 11 L. Ed. 312; *Kelsey v. Forsyth*, 21 How. 85, 16 L. Ed. 32; *Guild v.*

d. *Causes Tried by the Court.*—In cases coming up from Louisiana it is well settled that a judgment will be affirmed where there was no finding of facts in the case.³¹

e. *Where Errors Below Were Committed by Jury.*—Where the charge of the court below covers the whole ground necessary to enable the jury to apply the law to the matters in issue, and is not subject to any just exception, so that, if there be any error in the proceedings, it was committed solely by the jury, this court has no jurisdiction to retry the cause as if it were both court and jury, but must affirm the judgment.³²

f. *Where Writ of Error Is Frivolous or Taken for Delay.*—See ante, "Uniting Motion to Affirm with Motion to Dismiss," XIV, A, 6, a.

Where the appeal is frivolous,³³ or it appears that the writ of error was taken merely for delay,³⁴ the judgment will be affirmed. And this same rule applies upon writ of error to the circuit court of appeals.³⁵

Illustrative Cases.—A writ is frivolous and taken for delay where the question has already been decided in another case,³⁶ where it appears that a defense to a suit on a policy of marine insurance has no foundation whatever,³⁷ and to the prosecution of writs of error to the execution of process to enforce judgments when no real ground exists therefor.³⁸

Frontin, 18 How. 135, 15 L. Ed. 290; Stevens v. Gladding, 19 How. 64, 15 L. Ed. 569; Taylor v. Morton, 2 Black 481, 484, 17 L. Ed. 277; Pomeroy v. State Bank, 1 Wall. 592, 604, 17 L. Ed. 638.

Where there is no bill of exceptions, and nothing upon which error can be assigned, the regular practice is to affirm the judgments, not to dismiss. James v. Mobile Bank, 7 Wall. 692, 19 L. Ed. 275.

31. Causes tried by the court.—Reilly v. Golding, 10 Wall. 56, 19 L. Ed. 858.

32. Where errors below were committed by jury.—Woodruff v. Hough, 91 U. S. 596, 23 L. Ed. 332.

33. Where writ of error is frivolous or taken for delay.—Terry v. Sharon, 131 U. S. 40, 33 L. Ed. 94.

In Chanute City v. Trader, 132 U. S. 210, 33 L. Ed. 345, Trader recovered a judgment in the circuit court for damages and costs on certain bonds and coupons issued by a municipality. Trader applied to the circuit court for a writ of mandamus requiring the officers of the city to levy a tax to satisfy the judgment. An alternative writ was issued, and in answer to the writ the city set up by way of plea in bar, that the original judgment was void because the circuit court had no jurisdiction of the subject matter of the action, on the ground that the bond was not payable to order nor to bearer, but that only the interest was payable to the bearer. On a hearing on the writ and return, the circuit court rendered a judgment granting a peremptory writ commanding the officers of the city to levy the tax. The defendant in error now moved to dismiss the writ of error and unites with it a motion to affirm the judgment. It was held, that although there does not appear to be any ground for contending that this court has no jurisdiction, yet as the reasons assigned for tak-

ing the writ of error are frivolous, and it was taken for delay only, the judgment must be affirmed.

34. Micas v. Williams, 104 U. S. 556, 26 L. Ed. 842; **Jenkins v. Banning,** 23 How. 455, 16 L. Ed. 580; **Palmer v. Arthur,** 131 U. S. 60, 33 L. Ed. 87.

35. Error to circuit court of appeals.—Although this court might have jurisdiction of a writ of error to the circuit court of appeals, yet under clause 5, Rule 6, of this court, the judgment of the circuit court of appeals must be affirmed on a motion to dismiss and affirm, where there is color for the motion to dismiss, but the writ of error was taken for delay only. Northern Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. Ed. 506.

36. Stare decisis.—An appeal was held to be taken for delay and affirmed where the question had already been decided in another case. The Alaska, 130 U. S. 201, 32 L. Ed. 923, citing The Steamer Harrisburg, 119 U. S. 199, 30 L. Ed. 358; **Foree v. McVeigh,** 131 U. S., appx. cxlii, 23 L. Ed. 1010.

37. Where in a suit on a policy against perils of the sea and barratry, the defense that the sale of the cargo after loss of the vessel was made with a want of diligence which the evidence in the case showed was equivalent to barratry, it sufficiently appears from the record that the writ of error must have been sued out for delay only. New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. Ed. 809.

38. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This court, in the exercise of its inherent power and duty to administer

g. *Division of Opinion*—(1) *In General*.—The rule of practice is well settled that when the judges of the supreme court of the United States are equally divided in opinion upon the questions of law or fact involved in the case before the court on appeal or writ of error, the practice is to affirm the judgment of the court below,³⁹ so far as the point of division goes.⁴⁰

Illustrative Cases.—And this rule applies equally to the judgments of the court of claims,⁴¹ and to decrees in chancery.⁴²

(2) *Applications of Rule in Particular Cases*—aa. *Division on Questions of Jurisdiction*.—Where the judges are equally divided on a question of jurisdiction, the judgment will be affirmed.⁴³

bb. *Division on Motion in Arrest of Judgment*.—Likewise on a motion in arrest of judgment, there will be an affirmance of the judgment below, upon an equal division among the judges.⁴⁴

justice, ought, independently of subdivision 5 of Rule 6, to reach the mischief by affirming the action below. *Chanute City v. Trader*, 132 U. S. 210, 214, 33 L. Ed. 345.

39. Upon equal division among judges, judgment is affirmed.—*Benton v. Woolsey*, 12 Pet. 27, 9 L. Ed. 987; *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Reeside v. United States*, 8 Wall. 38, 19 L. Ed. 318; *Bauer v. Texas*, etc., R. Co., 131 U. S. 430, 33 L. Ed. 209; *Moffitt v. Miller*, 34 L. Ed. 539; *Bingham v. Cabbot*, 3 Dall. 19, 1 L. Ed. 491; *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419; *Strout v. Foster*, 1 How. 89, 11 L. Ed. 58; *Ellis v. Taylor*, 1 How. 197, 201, 11 L. Ed. 100; *Lessieur v. Price*, 12 How. 59, 13 L. Ed. 893; *Albany Bridge Case*, 2 Wall. 403, 17 L. Ed. 876; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *United States v. Worrall*, 2 Dall. 384, 396, 1 L. Ed. 426; *Mobile v. Emanuel*, 1 How. 95, 11 L. Ed. 60; *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *District of Columbia v. Murdock*, 127 U. S. appx., 782, 32 L. Ed. 332; *Continental Ins. Co. v. Wright*, 131 U. S. 432, 33 L. Ed. 210; *Miller v. Richard*, 131 U. S. 429, 33 L. Ed. 212; *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108; *Ellis v. Taylor*, 11 L. Ed. 197, 11 L. Ed. 100.

When affirmative action necessary.—“It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.” *Durant v. Essex Co.*, 7 Wall. 107, 110, 19 L. Ed. 154.

40. *The Antelope*, 10 Wheat. 66, 67, 6 L. Ed. 268; *Washington Bridge Co. v.*

Stewart, 3 How. 413, 424, 11 L. Ed. 658; *Durant v. Essex Co.*, 7 Wall. 107, 112, 19 L. Ed. 154; *Selma*, etc., R. Co. v. *United States*, 122 U. S. 636, 30 L. Ed. 1249.

41. *United States v. Reeside*, 8 Wall. 38, 19 L. Ed. 318.

42. Rule applies to decrees in chancery.—There is no difference between a decree in chancery and a judgment at law as to its affirmance on a division of the court. In both cases the motion is to reverse, and if that fails, the judgment or decree necessarily stands. *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *Brown v. Aspden*, 14 How. 25, 28, 14 L. Ed. 311.

There is no difference between a decree in chancery and a judgment at law, as to its affirmance on a division of the court. “In both cases, the motion is to reverse; and if that fails, the judgment or decree necessarily stands, and must therefore be affirmed. And in most of the cases affirmed in this manner, a majority, in fact, of the judges, who act judiciously upon the case, concur in the judgment. For the circuit court is composed of two members, and if both are on the bench, they must concur in the judgment or decree; otherwise it could not be passed, and the point would be certified by a divided court.” *Brown v. Aspden*, 14 How. 25, 28, 14 L. Ed. 311.

43. Division on question of jurisdiction.—Where the judges of this court are equally divided on the question of jurisdiction of an appeal from a sentence passed by the lower court, the judgment will be affirmed. *United States v. Worrall*, 2 Dall. 384, 1 L. Ed. 426.

Extradition.—For example, a writ of error was dismissed by the supreme court on a division of opinion as to jurisdiction, where a fugitive murderer indicted in Canada was arrested in Vermont under warrant from the governor upon demand for his surrender, and the state court refused to release him on habeas corpus. *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579.

44. Division on motion in arrest of judgment.—Where on a motion for the arrest of a judgment, the judges are divided in opinion, the judgment will be af-

cc. *Division on Motion for Rehearing*.—But equal division of the court on motion for rehearing of a judgment of reversal previously rendered, leaves that judgment in force, and does not result in affirming the judgment of the lower court.⁴⁵

dd. *Division in Case of Special Verdict*.—But in the case of a special verdict, the judgment will be affirmed when there is an equal division of opinion among the judges of the appellate court.⁴⁶

ee. *Division in Case of Demurrer*.—And possibly in case of a demurrer the same course may be pursued.⁴⁷

(3) *Powers of Appellate Court*—aa. *In General*.—Where the court is equally divided, it cannot change the decree of the circuit court, or exercise the discretionary power to allow interest, for this would be a new decree.⁴⁸

bb. *Right to Grant New Trial*.—Upon reversal, a venire facias de novo cannot issue where the court is equally divided on a question of jurisdiction.⁴⁹

(4) *Force and Effect of Judgment*—aa. *As an Estoppel*.—Where the judges of the supreme court of the United States are equally divided in opinion upon the questions of law or fact involved in a case before the court on appeal or writ of error, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.⁵⁰ But though the fact of division of opinion amongst the judges does not impair the force of the judgment, yet it may prevent the decision from being authority in other cases upon the question involved.⁵¹

bb. *The Rule of Precedents or Stare Decisis*.—Although, where the court is

firm. *Durant v. Essex Co.*, 7 Wall. 107, 111, 19 L. Ed. 154, citing *Chapman v. Lamphire*, 3 Modern 155. See, also, *United States v. Worrall*, 2 Dall. 384, 1 L. Ed. 426.

45. *Division on motion for rehearing*. *Carmichael v. Eberle*, 177 U. S. 63, 44 L. Ed. 672.

46. *Division in case of special verdict*.—In the case of a special verdict, since affirmative action should be required to enter judgment, in case of an equal division of the judges, the judgment must be affirmed. *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154.

47. *Rule doubted in the case of demurrers*.—In *Durant v. Essex Co.*, 7 Wall. 107, 112, 19 L. Ed. 154, the court was in doubt as to what would be the effect of a division in the case of a demurrer. The court said: "In the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it."

48. *Powers of appellate court in general*.—*Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

No new judgment can be given.—"In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the circuit court, the justices of this court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally

divided. Upon such an affirmance, the appellee was entitled to the full benefit of the decree of the circuit court, but nothing more. The court, being equally divided, could not change the decree of the circuit court, nor exercise its discretionary power to allow interest on the decree; for this would have been a new decree." *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799, 800.

49. *Right to grant new trial*.—Opinion of Justice Cushing in *Bingham v. Cabbot*, 3 Dall. 19, 1 L. Ed. 491.

50. *As an estoppel*.—*Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268; *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Lessieur v. Price*, 12 How. 59, 13 L. Ed. 893; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271; *Durant v. Essex Co.*, 101 U. S. 555, 25 L. Ed. 961; *Brown v. Aspden*, 14 How. 25, 28, 14 L. Ed. 311; *Benton v. Woolsey*, 12 Pet. 27, 9 L. Ed. 987.

For all the purposes of the case, a judgment of affirmance here by a divided court is as effectual as if all the judges had concurred therein. *Durant v. Essex Co.*, 101 U. S. 555, 25 L. Ed. 961.

An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties. *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658.

51. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271, citing *Lessieur v. Price*, 12 How. 59, 13 L. Ed. 893; *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154.

equally divided in opinion upon a writ of error, the judgment of the court below is affirmed, no principle is settled thereby.⁵²

(5) *Necessity for Entry of Judgment*.—In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.⁵³ The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.⁵⁴

(6) *Opinion of Court*.—On a point upon which the judges are equally divided, the supreme court will pronounce no opinion.⁵⁵

(7) *Costs*.—When the court is equally divided, the judgment will be affirmed, with costs.⁵⁶

(8) *Reargument or Reharing*.—A decision by a divided court will not be reheard unless important constitutional questions were involved, or unless a member of the court, who concurred in the judgment, desires it.⁵⁷

h. *No Actual Controversy Existing*.⁵⁸—The general rule is well settled that this court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it,⁵⁹ and that where the question presented here is only a moot one, this court will affirm the judgment without set-

52. The rule of precedents or stare decisis.—Etting v. Bank, 11 Wheat. 59, 6 L. Ed. 419; Hartman v. Greenhow, 102 U. S. 672, 676, 26 L. Ed. 271.

53. Necessity for entry of judgment.—Durant v. Essex Co., 7 Wall. 107, 112, 19 L. Ed. 154.

54. Durant v. Essex Co., 7 Wall. 107, 113, 19 L. Ed. 154.

55. Opinion of court.—Benton v. Woolsey, 12 Pet. 27, 9 L. Ed. 987; Albany Bridge Case, 2 Wall. 403, 17 L. Ed. 876.

56. Costs.—Bauer v. Texas, etc., R. Co., 131 U. S. 430, 33 L. Ed. 209; Moffitt v. Miller, 34 L. Ed. 539.

57. *Reargument or rehearing*.—Shreveport v. Holmes, 125 U. S. 694, 31 L. Ed. 854; Home Ins. Co. v. New York, 119 U. S. 129, 30 L. Ed. 350; Brown v. Aspden, 14 How. 25, 14 L. Ed. 311, 312.

"Nor is the circumstance, that a decree is affirmed by a divided court any reason for ordering a reargument before a full bench in any case. In a body as numerous as this, it must often happen from various causes that the bench is not full. And experience has shown that it has rarely happened that every judge has been present every day throughout any one

entire term. The case before us is an important one in its principles and in the amount in dispute. But there are many cases on the docket at every term of the court much more important in both respects. And if it is to be understood that cases of this description are not to be finally decided without the concurrence of a majority of the whole bench, it would be an useless consumption of time to hear them in the absence of any one judge, because it would be uncertain whether a judgment could follow after the argument. And it is easy to foresee the inconvenience, delay and expenses to which a practice of that kind would subject the parties, and the uncertainty and confusion it would produce (to the great injury of other suitors) in the order of business as it stands on the docket of the court." Brown v. Aspden, 14 How. 25, 28, 14 L. Ed. 311, 312.

58. See ante, "No Actual Controversy Existing," XIV, A, 1, a.

59. Waite v. Dowley, 94 U. S. 527, 534, 24 L. Ed. 181.

This court has neither the right nor inclination to express an opinion upon moot questions. Singer Mfg. Co. v. Wright, 141 U. S. 696, 35 L. Ed. 906.

ting it.⁶⁰ Or to state the rule in its more restricted and familiar meaning, where there is no actual controversy, the judgment or decree may be affirmed.⁶¹ And this same rule has been applied to appeals from the circuit court of appeals.⁶²

i. *Want of Jurisdiction*.—Ordinarily where this court does not reverse nor dismiss for want of jurisdiction, it will affirm simply.⁶³ Though in one case at least the court "benignantly" dismissed.⁶⁴

3. *RULE IN TERRITORIAL COURTS*.—In New Mexico, that rule has been abrogated by the statute of the territory, by which "the supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."⁶⁵ The manifest object of the statute is, not merely to restrain the appellate court from going outside of the record, but to enable it to render such a judgment as upon a consideration of the whole record justice may appear to require. The supreme court of the territory is therefore authorized to affirm the judgment rendered by the district court upon the general verdict for the plaintiffs, if the facts contained in the record supported any count in the declaration.⁶⁶

4. *AFFIRMANCE BY AGREEMENT OR STIPULATION*.—A judgment may be af-

60. Chicago, etc., R. Co. v. Denver, etc., R. Co., 143 U. S. 596, 36 L. Ed. 377.

61. Glendale Elastic Fabric Co. v. Smith, 100 U. S. 110, 25 L. Ed. 547; Wilson v. Deen, 121 U. S. 525, 30 L. Ed. 980.

Where letters-patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and praying for an injunction and an account, and the court below, by its decree, sustained their validity and awarded him costs, but neither damages nor profits, and the defendant appealed, this court, as the only question now involved is that of costs, affirms the decree without examining the merits. "The appeal therefore, presents only a moot case except as to costs." Glendale Elastic Fabric Co. v. Smith, 100 U. S. 110, 25 L. Ed. 547.

Expiration of territorial court pending appeal.—By bill in a territorial court, plaintiff sought to have its title to land declared paramount, and to restrain defendant from trespassing, but the final decree was for defendant. On appeal the supreme territorial court adjudged that plaintiff had an adequate remedy at law, and affirmed the decree. Plaintiff brought an action at law, and this, after the admission of the territory as a state, was transferred to the federal court. A final judgment there rendered for defendant was affirmed by the court of appeals and the supreme court. Held, that the judgment of the supreme territorial court in the equity suit should be affirmed. Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co., 160 U. S. 101, 40 L. Ed. 335.

62. *Appeals from court of appeals*.—Where a cause is taken from a circuit court to a circuit court of appeals, and the decree of the circuit court is reversed and the case ordered to be dismissed, and pending the appeal in this court from the circuit court of appeals, the whole sub-

ject matter of litigation has disappeared by the operation of subsequent legislation, since the order of the circuit court of appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of such legislation, this court will not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the circuit court, but the judgment will be affirmed. Dinsmore v. Southern Express Co., 183 U. S. 115, 46 L. Ed. 111.

63. *Want of jurisdiction*.—Pomeroy v. State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

64. Legal presumption being in favor of a judgment of the court below, the court, where it does not reverse, nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when in fact they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this court on the case as, by common consent, they presented it,—the court benignantly "dismissed" it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be here reviewed. But the dismissal was with costs. Burr v. Des Moines, etc., R. Co., 1 Wall. 99, 17 L. Ed. 561, distinguished in Pomeroy v. State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

65. *Rule in territorial courts*.—Prince's Laws, c. 16, § 7; Comp. Stat., § 2190.

66. Hopkins v. Orr, 124 U. S. 510, 514, 31 L. Ed. 523; Kennon v. Gilmer, 131 U. S. 22, 29, 33 L. Ed. 110; Koenigsberger v. Richmond Silver Min. Co., 158 U. S. 41, 53, 39 L. Ed. 889.

firmed upon an agreement between the parties,⁶⁷ as where they stipulate that their case shall abide the event of the decision in another.⁶⁸

5. **CONDITIONAL AFFIRMANCE.**—There can be no doubt of the authority of an appellate court to make its affirmance of the judgment conditional upon the plaintiffs' remitting part of the interest awarded below.⁶⁹ Thus, where the only error committed by the court below is in the allowance of interest, this court may affirm the judgment provided the interest be remitted; otherwise, to be reversed for such error.⁷⁰ And the remittitur may be filed in this court,⁷¹ or it may be filed with the court below and a certified copy thereof filed here.⁷²

6. **SIMULTANEOUS AFFIRMANCE AND REVERSAL.**—It is error and ground of reversal for a circuit court to affirm a decree in admiralty of the district court, and at the same time dismiss the appeal.⁷³

7. **AFFIRMANCE NUNC PRO TUNC.**—Where a judgment rendered upon a verdict in favor of the plaintiff is erroneously set aside, a subsequent final judgment for the defendant must be reversed, and the former judgment for the plaintiff affirmed as of the date when it is rendered, in order to prevent the action from being abated by the subsequent death of the plaintiff.⁷⁴

8. **HEARING AND DETERMINATION OF MOTION.**—Questions involved in the merits are not such as ought to be disposed of on a motion to affirm.⁷⁵

Important Questions.—Nor should questions of great importance be considered on a motion to affirm;⁷⁶ as for example, the claim that the case was removed to the circuit court of the United States under subsec. 3. § 639 of the Revised Statutes, presents a federal question of too much practical importance to be decided on a motion to affirm.⁷⁷

9. **INTEREST AND DAMAGES ON AFFIRMANCE.**—a. *Statutes and Rules of Court Stated.*—It is provided by § 1010 of the Revised Statutes, that where, upon a writ of error, judgment is affirmed in the supreme court, or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion.^{77a} The original judiciary act of 1789 contained a similar provision to that embraced in § 1010.⁷⁸ But it was held at

67. **Affirmance by agreement or stipulation.**—Todd v. Daniel, 1 How. 289, 11 L. Ed. 135.

68. McCready v. Virginia, 154 U. S., appx., 628, 38 L. Ed. 1090.

69. **Conditional affirmance.**—Bank v. Ashley, 2 Pet. 327, 7 L. Ed. 440; Hopkins v. Orr, 124 U. S. 510, 514, 31 L. Ed. 523. See the title REMITTITUR.

70. Washington, etc., R. Co. v. Harmon, 147 U. S. 571, 37 L. Ed. 284, citing Bank v. Ashley, 2 Pet. 327, 7 L. Ed. 440; Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646, 656, 23 L. Ed. 341; Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 110.

71. Bank v. Ashley, 2 Pet. 327, 7 L. Ed. 440.

72. Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341.

73. **Simultaneous affirmance and dismissal.**—The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

74. **Affirmance nunc pro tunc.**—Coughlan v. District of Columbia, 106 U. S. 7, 27 L. Ed. 74, citing Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369, distinguished in Shepherd v. Thompson, 122 U. S. 231, 240, 30 L. Ed. 1156; Bell v. Bell, 181 U. S. 175, 45 L. Ed. 804 (decree of divorce and alimony).

75. **Hearing and determination of motion.**—Gilson v. Dayton, 122 U. S., appx., 638, 30 L. Ed. 1251.

76. Saloy v. Bloch, 122 U. S., appx., 646, 30 L. Ed. 1249.

77. Burlington, etc., R. Co. v. Dunn, 122 U. S., appx., 632.

77a. **Statutes and rules of court stated.**—Schell v. Cochran, 107 U. S. 625, 627, 27 L. Ed. 543.

78. 1 Stat. 85, § 23; West Wisconsin R. Co. v. Foley, 94 U. S. 100, 101, 24 L. Ed. 71.

The twenty-third section of the judiciary act of 1789 provided that if the judgment or decree is affirmed upon the writ of error, the court shall adjudge and decree to the respondent in error just damages for his delay, and single or double costs, at his discretion. 1 Stat. at Large 85. Jerome v. McCarter, 21 Wall. 17, 28, 22 L. Ed. 515; The Baltimore, 8 Wall. 377, 389, 19 L. Ed. 463.

Rules of court passed in pursuance thereof.—"By the judiciary act of 1789 (ch. 20, § 23), the supreme court is authorized, in cases of affirmance of any judgment or decree, to award to the respondent just damages for his delay. And by the rules of the supreme court made

an early date that the damages under this act were not peremptorily prescribed, but rested in the sound discretion of the court.⁷⁹

In 1842, congress enacted "that on all judgments in civil cases * * * recovered in the circuit and district courts of the United States, interest shall be allowed, * * * to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of" "the state in which such circuit or district court shall be held."⁸⁰

Rules of Court.⁸¹—Under these statutes rules were adopted by this court at the February term, 1803, by which it was provided that, in cases where it appeared that the writ had been sued out "merely for delay, damages shall be awarded at the rate of ten per cent. per annum on the amount of the judgment," and in cases where there existed a real controversy, "the damages shall be only at the rate of six per cent. per annum. In both cases the interest to be computed as part of the damages."⁸²

By the twenty-third rule of this court, it is provided that in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment, and the said damages shall be calculated from the date of the judgment in the court below, until the money is paid.⁸³

But the second paragraph of the 23d rule was subsequently amended so as to read as follows, viz: In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.⁸⁴

At the February term, 1807, it was ordered that the damages given by these rules should be calculated to the day of the affirmance of the judgment in this court.⁸⁵

b. *Construction of Rules.*—The word "shall" as used in amended Rule 23 is not to be construed as meaning "must," and therefore under this rule a party has not the legal right to demand a judgment for damages in excess of interest. The amount of the damages, as well as the propriety of giving any at all, is left to the judicial discretion of the court. The rule simply limits the amount beyond which we cannot go, but leaves us at liberty to give less than the full amount in cases where, in our judgment, the circumstances are such as to make it proper to do so. An inflexible rule, requiring us to award a certain specified amount, or none at all, would oftentimes operate to defeat itself. Therefore, it was held that while under this rule the court cannot award its damages for delay more

in February term, 1803, and February term, 1807, in cases where the suit is for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment to the time of the affirmance thereof. And in cases where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases the interest is to be computed as part of the damages. It is, therefore, solely for the decision of the supreme court whether any damages or interest (as part thereof) are to be allowed or not in cases of affirmance. If upon the affirmance no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the circuit court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere

execution of the decree in the terms in which it is expressed." *Boyce v. Grundy*, 9 Pet. 275, 289, 9 L. Ed. 127, 132.

79. Award of damages under § 23 discretionary.—The *Brig, Perseverance*, 3 Dall. 336, 1 L. Ed. 625.

80. 5 Stat. 518, § 8; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 101, 24 L. Ed. 71.

81. The history of these rules will be found in *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 101, 24 L. Ed. 71.

82. Rules of court.—Rules 17, 18; 1 Cranch XVIII; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 101, 24 L. Ed. 71.

83. *Jenkins v. Banning*, 23 How. 455, 457, 16 L. Ed. 580.

84. Rule No. 21, 11 Wall. X.

85. *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 101, 24 L. Ed. 71.

than ten per cent. upon the amount of the judgment, it may, in the exercise of its discretion, give less.⁸⁶

c. *Where Writ Is Sued Out Merely for Delay*—(1) *Writs of Error*.—According to the second section of the 23d rule of this court where it appears from an examination of the record that the writ of error was sued out merely for delay, the judgment will be affirmed with 10 per cent. damages.⁸⁷ The court in a late case uses the following forcible language: "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages. * * * Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."⁸⁸

Sufficiency of Showing.—But this court will refuse to allow ten per centum per annum interest, as damages for suing out the writ of error, on the amount of the judgment in the circuit court, under the 17th rule of the court, unless the case is clearly one where the writ of error was sued out merely for delay.⁸⁹ The court must be satisfied that the writ of error was sued out merely for delay.⁹⁰

(2) *Appeals*.—Formerly it was thought that this court could impose no penalties when appeals were sued out without any expectation of reversal.⁹¹

But later it was held that while § 1010 of the Revised Statutes includes, in

86. Construction of rules.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71.

87. Judgment affirmed with ten per cent. damages where writ sued out for delay.—*Phelps v. Edgerton*, 131 U. S., appx. lxxi, 16 L. Ed. 749; *Nelson v. Flint*, 166 U. S. 276, 280, 41 L. Ed. 1002; *Providence Washington Ins. Co. v. Hutchberger*, 12 Wall. 164, 20 L. Ed. 364; *Kenosha v. Campbell*, 131 U. S., appx. xcvi, 19 L. Ed. 711; *Whitney v. Cook*, 131 U. S., appx. cxcvii, 26 L. Ed. 560; *Jenkins v. Banning*, 23 How. 455, 16 L. Ed. 580; *Watterson v. Payne*, 154 U. S., appx., 534, 15 L. Ed. 899; *Texas, etc., R. Co. v. Volk*, 151 U. S. 73, 79, 38 L. Ed. 78; *Sire v. Ellithorpe Air Brake Co.*, 137 U. S. 579, 34 L. Ed. 801; *Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 35 L. Ed. 715; *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973; *Prentice v. Pickersgill*, 6 Wall. 511, 18 L. Ed. 790; *Chicago City R. Co. v. Bour*, 6 Wall. 513, 18 L. Ed. 917; *Peyton v. Heinekin*, 131 U. S., appx. ci, 20 L. Ed. 679; *Palmer v. Arthur*, 131 U. S. 60, 65, 33 L. Ed. 87.

Where it is apparent that the writ of error was sued out merely for delay, the case comes within the letter and spirit of the 23rd rule of this court, which declares that "in all cases where a writ of error shall appear to have been sued out merely for delay, damages shall be awarded at the rate of 10 per cent. per annum on the amount of the judgment." *Hall v. Jordan*, 19 Wall. 271, 22 L. Ed. 47.

We can adjudge damages, under § 1010, Rev. Stat., and Rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this

power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time. *Amory v. Amory*, 91 U. S. 356, 23 L. Ed. 436.

"As a supersedeas bond was given in this case, and thus the writ of error has delayed the proceedings on the judgment, and as it appears to us to have been sued out merely for delay, we award damages on the amount of the judgment at the rate of ten per centum, in addition to interest. Rev. Stat., § 1010; Rule 23, subd. 2; *Amory v. Amory*, 91 U. S. 356, 23 L. Ed. 436. Judgment affirmed, with 10 per cent. damages, in addition to interest." *Wilson v. Everett*, 139 U. S. 616, 621, 35 L. Ed. 286.

88. *Whitney v. Cook*, 99 U. S. 607, 25 L. Ed. 446.

89. *M'Niel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009.

90. *Kenosha v. Campbell*, 131 U. S., appx. xcvi, 19 L. Ed. 711.

91. Formerly no damages in the case of appeals.—"An appeal is a matter of right, and, if prayed, must be allowed; but should never be prayed without some expectation of reversal. We impose penalties when writs of error merely for delay are sued out, in cases of judgments at law for damages; and if the rule were applicable to the case before us we should apply it." *The Douro*, 3 Wall. 564, 566, 18 L. Ed. 168. See *The Entaw*, 12 Wall. 136, 20 L. Ed. 278.

The court reproves counsel who take appeals without any expectation of reversal, and declares that if it had power to impose a penalty in such cases, as it has when writs of error are sued out for delay merely, it would impose it. *The Douro*, 3 Wall. 564, 18 L. Ed. 168.

express terms, writs of error only. § 1012 provides that appeals from the circuit and district courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. This gives us authority to adjudge damages for delay on appeals as well as writs of error, and our power is not confined to money judgments only.⁹²

(3) *Instances of Proceedings Taken for Delay.*—Where there is nothing in the record which tends to show error in the judgment,⁹³ or where no question was raised upon the trial in the court below for the consideration of this court,⁹⁴ or where a writ of error is sued out to an order of the court granting leave to amend, the amendment having been made without objection,⁹⁵ or where the ground of action is imperfectly or inaccurately stated in the petition, but whatever defects, imperfections or omissions there may have been if not obviated by the subsequent pleadings, were cured by the verdict which must be assumed to have proceeded upon proof of facts which justified it,⁹⁶ or where there is no bill of exceptions, assignment of errors, or anything by which to revise the opinion of the court below,⁹⁷ or when a party, alleging that the stamp on a deed was too small, brings such questions here,⁹⁸ or where a case is brought here in disregard of the law as already settled by precedents of the court,⁹⁹ or where parties enter

92. Damages may be allowed even on appeals.—*Gibbs v. Diekma*, 131 U. S., appx. clxxxvi, 26 L. Ed. 176; *Whitney v. Cook*, 131 U. S., appx. cxvii, 26 L. Ed. 560.

This court under §§ 1010 and 1012 of the Revised Statutes has authority to adjudge damages for delay on appeals as well as writs of error, and this power is not confined to money judgments only. While § 1010 includes, in express terms, writs of error only, § 1012 provides that appeals from the circuit and district courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. *Gibbs v. Diekma*, 131 U. S., appx. clxxxvi, 26 L. Ed. 176.

93. No error apparent on the record.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71.

Where there is nothing in the record which tends to show error in the judgment, or to repel the inference that the writ is prosecuted merely for delay, the judgment must be affirmed with 10 per cent. damages in addition to interest, under the 23rd rule of court. *Hennessy v. Sheldon*, 12 Wall. 440, 20 L. Ed. 446.

94. Where no question was raised upon the trial in the court below, for the consideration of this court, and none was made here, and the writ of error was obviously sued out for delay, this court will affirm the judgment, with ten per cent. damages and costs. *Kilbourne v. State Savings Institution*, 22 How. 503, 16 L. Ed. 370.

95. Amendments.—*Jenkins v. Banning*, 25 How. 455, 16 L. Ed. 580.

Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and are usually granted as a matter of course, and their allowance is never the subject of error.

Jenkins v. Banning, 23 How. 455, 457, 16 L. Ed. 580.

96. Cure by verdict.—*Palmer v. Arthur*, 131 U. S. 60, 33 L. Ed. 87.

97. Where there is no bill of exceptions or assignment of errors.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71.

Where there is no bill of exceptions, assignment of error, or anything by which to revise the opinion of the court below, and the cause has been brought to this court solely for the purpose of delay, the judgment will be affirmed with ten per cent. per annum damages, and the costs in this court and in the court below. *Waterson v. Payne*, 154 U. S. 534, 15 L. Ed. 899.

98. De minimis lex non curat.—A party alleging that the stamp on a deed was too small (he being by the law of the state where the deed was made obliged to put on the stamps), who brought such a question here, delaying the judgment below for two years and a half, punished under the twenty-third rule, by a judgment of ten per cent. damages in addition to interest and costs. *Hall v. Jordan*, 19 Wall. 271, 22 L. Ed. 47.

99. Violation of rule of precedents.—*Pennywit v. Eaton*, 15 Wall. 380, 382, 21 L. Ed. 72.

A writ of error which, if sued out after certain decisions announced, might be regarded as sued out merely for delay, and be followed by an affirmance of the judgment below, with damages, at the rate of ten per cent. per annum on the amount of the judgment, as provided for by the 23d rule of court, will not be so regarded, nor the suing out of it so punished in a case where the principle which is sought to establish had not been adjudged by this court and the judgment announced, but as yet was seriously controverted. *McKee v. Rains*, 10 Wall. 22, 19 L. Ed. 860.

a false plea, refuse to plead in bar, and have judgment entered against them for want of a plea,¹ or where there has been no appearance for the plaintiff in error,² or where no counsel have appeared to prosecute the suit, no brief has been filed, and no error has been assigned,³ or where exceptions were taken in the court below to the refusal of the court to continue the case until the next term, and it appears that the continuances asked for below on the suing out of the writ of error were only for the purpose of delaying the payment of a just debt,⁴ in all such cases this court will affirm the judgment with ten per cent. damages.

d. *Decrees in Equity*.—Under the 23d section of the act of 1789 providing that when a judgment or decree is affirmed here, this court is directed to adjudge or decree to the respondent in error, just damages for his delay, and single or double costs at its discretion, there is no distinction made between cases in equity, and at law. In either of them, the damages to be allowed in addition to the amount found to be due by the judgment or decree of the court below, is confided to the judicial discretion of this court.⁵

e. *Determination of Right*.—It is solely for the decision of the supreme court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages.⁶

f. *Agreement or Stipulation of Parties*.—A stipulation between the parties regarding the affirmance of the judgment will be recognized by this court.⁷

g. *Measure and Elements of Damages*.—(1) *Measure*.—Under the twenty-third rule, in relation to damages, where a writ of error was sued out merely for delay, more than ten per cent. upon the amount of the judgment cannot be awarded, but the court may give less.⁸ For example where the prize was sold

1. *Refusal or neglect to plead*.—Where parties when sued on a promissory note executed by them, did not pretend to have any defense, entered a false plea which was overruled on demurrer, refused to plead in bar, and had judgment entered against them for want of a plea, this court will affirm the judgment with ten per cent. damages. *Sutton v. Bancroft*, 23 How. 320, 16 L. Ed. 454.

Where defendants, on refusing or neglecting to plead, were defaulted and judgment was given for plaintiff, and defendants sued out a writ of error, but failed to appear, and have not assigned error in this court, and it is obvious, from an inspection of the transcript, that there is no error in the proceedings, the judgment affirmed, with ten per cent. damages. *Jenkins v. Banning*, 23 How. 455, 16 L. Ed. 580.

2. *Where there has been no appearance for plaintiffs in error*, and the writ of error, has operated to delay proceeding on the judgment against one of the plaintiffs in error, and there is nothing whatever in the record to justify him in staying execution, and the cause has been permitted to remain on the docket for two years, the judgment will be affirmed with interest and costs, and the court will award \$250 damages against plaintiff in error on account of the delay. *Whitney v. Cook*, 131 U. S., appx., excviii, 26 L. Ed. 569.

3. *No brief filed or error assigned*.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71.

4. *Refusal of continuance*.—Where the only exceptions taken in the court below were to the refusals of the court to continue the case to the next term, and it appears that the continuance asked for below and the suing out the writ of error were only for the purpose of delaying the payment of a just debt, and no counsel appeared in this court on that side, the 17th rule will be applied and the judgment of the court below be affirmed with ten per cent. interest. *Barrow v. Hill*, 13 How. 54, 14 L. Ed. 48.

5. *Decrees in equity*.—*Perkins v. Four-niquet*, 14 How. 328, 14 L. Ed. 441.

6. *Determination of right*.—*Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127.

7. *Agreement or stipulation of parties*.—An agreement in writing between the counsel, as well for the appellant as for the appellee, that the decree of the circuit court in this case shall be affirmed with legal damages and costs for the said Daniel, having been filed; it is thereupon considered and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of 6 per centum per annum; and also that the said appellee recover of the said appellant, the further sum of \$125 for the costs of the transcript of the record in the circuit court according to the said agreement. *Todd v. Daniel*, 1 How. 289, 11 L. Ed. 135.

8. *Measure*.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 24 L. Ed. 71.

by agreement, and the money stopped in the hands of the marshal, by a third person, not a party to the agreement, on affirmance, no increase of damages for the delay by the writ of error will be allowed, but interest only upon the debt.⁹

(2) *Elements*.—In the earliest case on this subject it was held that where a judgment or decree is affirmed on a writ of error, there can be no allowance of damages but for the delay.¹⁰

In a suit for the foreclosure of a mortgage, it was held that the fact that the appellee may lose the profits by depriving him of the opportunity of bidding in the property at a reduced price and speculating upon its rise, is not recognized by the court as legitimate "damages for the delay" within the meaning of this rule.¹¹

Allowance of Counsel Fees.—Upon a writ of error, counsel fees will not be allowed as damages. Where a decree is affirmed, damages for the delay only, will be allowed.¹²

h. Computation of Damages.—By the twenty-third rule of this court, it is provided that in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out for delay, the damages to be awarded shall be calculated from the date of the judgment in the court below, until the money is paid.¹³

i. Interest—(1) *Statutory Provisions*.—**The 8th section of the act of August 23, 1842 (5 Stat. 516, 513, ch. 188)**, provided "that on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal, under process of execution issued thereon, in all cases where, by the law of the state in which such circuit or district courts shall be held, interest may be levied under process of execution, on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law, on judgments recovered in the courts of such state." This was carried forward into § 966 of the Revised Statutes.¹⁴ The purpose of this act was to bring about uniformity between the tribunals of the United States and of the states upon the subject of interest.¹⁵

But the supreme court of the District of Columbia is neither within its terms nor its object. It is wholly inapplicable. Whatever the law of the District of Columbia is, upon the subject of interest, controls of course.¹⁶

(2) *Right to Recover*—**aa. In General**.—Notwithstanding this statute, the rule adopted previously remained in force without amendment until the case of *Mitchell v. Harmony*, decided at the December term, 1851. Then it became necessary for this court to ascertain the amount due upon the judgment of the circuit court in that case after its affirmance; and the direct question was presented, whether only damages at the rate of six per cent. should be added to the amount of the judgment, in accordance with the rule, or interest at seven per cent. per

9. *The Brig Perseverance*, 3 Dall. 336, 1 L. Ed. 625, 626.

10. *Elements*.—*Cotton v. Wallace*, 3 Dall. 302, 1 L. Ed. 612.

11. *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

12. *Arcambel v. Wiseman*, 3 Dall. 306, 1 L. Ed. 613.

13. *Computation of damages*.—*Jenkins v. Banning*, 23 How. 455, 16 L. Ed. 580, 581; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71.

Information under nonimportation laws.—Decree, in an instance cause, affirmed, with damages at the rate of six per cent. per annum on the amount of the appraised value of the cargo (the same

having been delivered to the claimant on bail), including interest from the date of the decree of condemnation in the district court. *The Diana*, 3 Wheat. 58, 4 L. Ed. 333. A similar decree was entered in *The Neptune*, 3 Wheat. 601, 4 L. Ed. 469. *The Diana* was followed in *One Hundred and Ninety-Nine Barrels of Whiskey v. United States*, 94 U. S. 86, 24 L. Ed. 57.

14. **Statutory provisions**.—*Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 585, 37 L. Ed. 284.

15. *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 585, 37 L. Ed. 284.

16. **Statute does not apply to district of Columbia**.—*Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 585, 37 L. Ed. 284.

annum, that being the rate allowed by law on judgments recovered in the courts of the state. After consideration, damages only were allowed according to the rule; but during the term the rule was amended, to take effect December 1, 1852, so as to make it conform to the statute.¹⁷ At the December term, 1858, the rules were again revised and corrected. No change was made in those relating to this subject, except that in cases where the writ of error was taken for delay only, it was provided that "the damages shall be calculated from the date of the judgment in the court below until the money is paid."¹⁸ Under these rules it is apparent that "just damages for delay" were made to take the place of interest during the delay.¹⁹ And this practice continued until the December term, 1870, when the present rule, in respect to cases where the writ appeared to have been sued out for delay merely, was adopted. It is as follows: "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent. in addition to interest, shall be awarded upon the amount of the judgment."²⁰ Under this rule it was held repeatedly that interest might be allowed in addition to the damages.²¹ And under the statute allowing "just damages for the delay," interest may be allowed pending a writ of error. Such interest for the time a writ of error is pending is really damages for delay.²²

Compliance with Mandate.—The fact that the judgment of this court merely affirmed the judgment of the general term of the supreme court of the District of Columbia, with costs, and said nothing about interest, is to be taken as a declaration of this court, that, upon the record as presented to it, no interest is to be allowed. It is accordingly the duty of the general term on the presentation of the mandate to this court to enter a judgment strictly in accordance with such mandate, and not to add to it the allowance of interest.²³

bb. *Rule in Pennsylvania.*—In a very early Pennsylvania case it was held that

17. Right to recover general.—The 23d rule of this court declares: "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of 10 per centum per annum on the amount of the judgment, and the said damages shall be calculated from the date of the judgment in the court below until the money is paid." It was suggested that it may become necessary to amend the second article of this rule so that 10 per cent. damages shall be allowed in addition to the interest provided for in the first article of that rule. The *Eutaw*, 12 Wall. 136, 20 L. Ed. 278.

18. Rules of 1858 allowed no interest.—Rule 23, 21 How. XIII; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 24 L. Ed. 71.

19. "Just damages for delay" only recoverable.—*West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 24 L. Ed. 71.

20. Under rules adopted in 1870.—Rule 21, 11 Wall. X; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 103, 24 L. Ed. 71.

21. Providence Washington Ins. Co. v. Hutchberger, 12 Wall. 164, 20 L. Ed. 364; *Peyton v. Heinekin*, 131 U. S., appx., ci, 20 L. Ed. 679; *Palmer v. Arthur*, 131 U. S. 60, 33 L. Ed. 87; *Schell v. Cochran*, 107 U. S. 625, 626, 27 L. Ed. 543.

22. Interest regarded as "damages for delay."—*Schell v. Cochran*, 107 U. S. 625, 27 L. Ed. 543.

Where a suit was brought against the collector of customs to recover duties paid, and the circuit court renders a judgment for the plaintiffs, and at the trial of the action the court makes a certificate of probable cause under § 989 of the Revised Statutes, where the writ of error is affirmed by this court, such judgments will bear interest at the same rate per annum that similar judgments bear in the courts of the state from which the cause came. "The interest allowed in the present case, in the judgment of this court, was allowed under Rule 23, which in its provisions as to interest, is in harmony with § 936 of the Revised Statutes, originally enacted as § 8 of the act of August 23, 1842, ch. 188. Such interest, for the time a writ of error is pending, is really damages for delay." *Schell v. Cochran*, 107 U. S. 625, 27 L. Ed. 543, distinguishing *United States v. Sherman*, 98 U. S. 565, 25 L. Ed. 235.

23. In re Washington, etc., R. Co., 140 U. S. 91, 35 L. Ed. 339, citing *Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127.

The original judgment having omitted to name interest, and this court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest. *Early v. Rogers*, 16 How. 599, 14 L. Ed. 1074.

in all cases, where judgments were affirmed upon writs of error, the execution may include the interest, from the date of the original judgment.²⁴

cc. *Cases Removed by Appeal*.—It will be observed by reference to the 17th rule, to which the 18th refers, that these rules are in express terms confined to cases brought here by writ of error. And it is true that, by the original judiciary act of 1789, decrees in chancery and admiralty, as well as judgments at common law, in the circuit courts, were removable to this court by writ of error—and were not made removable in any other manner.²⁵ But the writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a superior court. The ordinary and uniform mode of removing such decrees to the appellate and revising court, wherever such jurisdictions have been established, has been by appeal, with the single exception of this act of congress. And, in order to remove the inconvenience and embarrassment which this provision in the act of 1789 created, it was repealed by the act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error.²⁶ It may be proper to add that the eighteenth and twentieth rules are no longer in force, even in common-law cases. They have been superseded and annulled by the 62nd rule (23rd rule) adopted in 1851.²⁷

dd. *Rule in Chancery and Admiralty*.—The seventeenth and eighteenth rules were not intended to apply to chancery or admiralty decrees. Moreover the eighteenth rule was itself repealed by the sixty-second or twenty-third rule.²⁸ It is well settled that whether interest shall be allowed a party by the appellate court, in admiralty, on the amount of damages awarded in a collision case, is one in the discretion of the court.²⁹ Nor does § 966 of the Revised Statutes apply to decrees in equity.³⁰

ee. *On Judgments of This Court*.—The present rule of court as to payment of interest on judgments in case of affirmance, applies to decrees in equity as well as judgments at law, and to judgments of this court as well as to the judgments in the circuit and district courts.³¹

24. Rule in Pennsylvania.—*Respublica v. Nicholson*, 2 Dall. 256, 1 L. Ed. 371.

25. Cases removed by appeal.—*Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

26. *Hemmenway v. Fisher*, 20 How. 255, 258, 259, 15 L. Ed. 799.

27. *Hemmenway v. Fisher*, 20 How. 255, 259, 15 L. Ed. 799.

28. Rule in chancery and admiralty.—*Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

No rule, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved to add to the damages awarded by the court below further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. This allowance of interest, pro tanto, is a new judgment. *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included. *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799; *The Scotland*, 118 U. S. 507, 519, 30 L. Ed. 153.

It was held in *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 779, which was an appeal from the circuit court sitting as a court of admiralty, that where such decree was affirmed here by an equal division of the justices of this court, interest was not to be calculated upon such decree. The case was decided under the 18th rule, and the court held that it never applied to admiralty cases. Besides, the 18th rule had been repealed by the 62nd rule, approved in *The Scotland*, 118 U. S. 507, 519, 30 L. Ed. 153.

29. *Hemmenway v. Fisher*, 20 How. 255, 258, 15 L. Ed. 799; *The Schooner, Ann Caroline*, 2 Wall. 538, 17 L. Ed. 833; *The Scotland*, 118 U. S. 507, 30 L. Ed. 153.

30. Construction of act of 1841.—*Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441.

31. On judgments of this court.—*Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441.

In *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441, a judgment of the circuit court of Mississippi had been affirmed at the December term, 1851, and damages adjudged at the rate of six per cent. per annum, as given by the rule, while the laws of Mississippi allowed interest on

But the act of 1842 does not extend to either judgments or decrees, in this court. It is confined, in plain terms, to judgments at law, in the circuit and district courts. It places the judgments of these courts, in respect to interest, upon the same footing with the judgments of the state courts. And where, by the law of the state, the judgment of a court carries a certain interest until paid, the former rule and the same rate of interest it to be allowed in the circuit and district courts of the United States. And the marshal is directed to levy it on process of execution, wherever it can be so levied on a judgment in the state court. In such cases the judgment bears interest by force of the law, although, upon the face of it, it may not purport to carry interest. Upon common-law principles, a judgment does not carry interest. It is true that damages may be recovered for the detention of the debt, in an action on the judgment. But previous to the act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a circuit or district court of the United States.³²

ff Determination of Right.—By the 23d section of the judiciary act of 1789, now § 1010 of the Revised Statutes, it was declared: "Where, upon such writ of error, the supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion." And by various rules of this court, promulgated from time to time, this jurisdiction has been regulated. Thus, in cases of *affirmance*, where the writ is for mere delay, ten per cent. damages may be awarded in addition to interest, and interest is given at the same rate that similar judgments bear interest in the courts of the state where the judgment was rendered; and the same rule is applied to decrees for the payment of money, unless otherwise ordered by this court. (Rule 23.) But the question of interest is solely for the court to determine, as the act of 1842 did not repeal the 23d section of the judiciary act.³³

(3) *Computation of the Interest*—*aa. Time from and to Which Computed.*—The rule now is that judgments at common law and decrees in chancery, upon *affirmance* in this court, carry interest until paid, and the interest is to be calculated according to the rate of interest allowed in the state in which the judgment or decree of the court below was given.³⁴ But under former rules interest was calculated to the date of the *affirmance* in this court,³⁵ or from the day when

judgments in the state courts at eight per cent. per annum. When the execution went out from the court below, it required the collection of the judgment with interest at the rate of eight per cent. per annum, and the damages at the rate of six per cent. in addition. This action of the circuit court having been brought here for review, the recovery was limited to the amount of the judgment and the damages given by the rule. The opinion of the court, by Mr. Chief Justice Taney, proceeded upon the ground that the act of 1842 did not apply to judgments in this court, but to those in the circuit and district courts alone. The rules had been changed at the previous term, he said, not because of "any supposed repugnancy between them and the act of 1842, but because the court deemed it just to place the judgments in this court upon the same footing with the judgments in the circuit and district courts; and that suitors in the courts of the United States should stand on the same ground with suitors in the state courts, in its appellate as well as in its inferior tribunals." West Wisconsin

R. Co. v. Foley, 94 U. S. 100, 102, 24 L. Ed. 71.

32. Perkins v. Fourniquet, 14 How. 328, 331, 14 L. Ed. 441, cited in West Wisconsin R. Co. v. Foley, 94 U. S. 100, 102, 24 L. Ed. 71.

33. *Determination of right.*—Boyce v. Grundy, 9 Pet. 275, 9 L. Ed. 127; Mitchell v. Harmony, 13 How. 115, 149, 14 L. Ed. 75; Perkins v. Fourniquet, 14 How. 328, 331, 14 L. Ed. 441; In re Washington, etc., R. Co., 140 U. S. 91, 35 L. Ed. 339; Washington, etc., R. Co. v. Harmon, 147 U. S. 571, 588, 37 L. Ed. 284.

34. *Present rule as to calculation of interest.*—Hemmenway v. Fisher, 20 How. 255, 259, 15 L. Ed. 799.

Under the sixty-second rule on the *affirmance* of a judgment, interest should be computed as six per cent. per annum, from the day when judgment was signed in the court below, until paid. Perkins v. Fourniquet, 14 How. 313, 14 L. Ed. 435.

35. *Interest calculated to date of affirmance.*—Likewise, before the sixty-second rule, interest was to be calculated at six per cent., from the date of the judg-

judgment was signed in the court below, until paid.³⁶

bb. *Rate of Interest*.—aaa. *Statutes and Rules of Court Stated*.—In 1842, Congress enacted "that on all judgments in civil cases * * * recovered in the circuit and district courts of the United States, interest shall be allowed, * * * to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of" "the state in which such circuit or district court shall be held."³⁸

Rule 23 of this court, which took effect on the first day of December term, 1852, and which is called Rule 62 as it appears in 13 Howard, provides that in cases where a writ of error is prosecuted to the supreme court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.³⁸

bbb. *Object of Rule*.—The object of the rule was to place the suitors in the courts of the United States upon the same footing with the suitors in the state courts in like cases. For the interest allowed in the several states differs, and in many of them it is higher than six per cent., and in most, if not all of them, a judgment or decree in a court of the state carries interest until it is paid.³⁹

ccc. *Rules as to Decrees in Chancery*.—It was held that the act of 1842 did not embrace cases in equity.⁴⁰ But they are expressly included by the rule of court which provides that the same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court.⁴¹

ddd. *Rule as to Cases in Admiralty*.—Cases in admiralty, however, are not embraced in the sixty-second rule. It applies to cases of law and equity only. And indeed, cases in admiralty could not have justly included. For there could be no reason for giving one rate of interest where a case of collision or salvage was in the first instance tried and decided in Louisiana, and another rate of in-

ment in the circuit court to the day of affirmance here; and the confirmation of the report of the clerk, in the case of *Mitchell v. Harmony* (13 How. 115, 149, 14 L. Ed. 75), was under the rules then existing. *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441, cited in *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 24 L. Ed. 71.

So, also, where a case from Mississippi was affirmed at December term, 1851, the mandate from this court should have been construed to allow interest at six per cent. from the date of the decree in the court below, to the date of the affirmance in this court. Therefore, it was erroneous either to allow six per cent. until paid, or to allow the current rate of interest in Mississippi, in addition to the six per cent. allowed by this court. *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441, cited in *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 102, 24 L. Ed. 71.

In a very early case it was held that interest is to be calculated to the affirmance but no further, or the aggregate sum of the principal and interest in the judgment below. The calculation of interest cannot be extended to the term of the circuit court when the mandate will operate in that court, as the party has the right to pay the money immediately. *Brown v. Van Braam*, 3 Dall. 344, 1 L. Ed. 629.

36. Under the 18th rule of this court the mode of calculating interest when the

judgment of the circuit court is confirmed is to compute it at the rate of six per cent. per annum, from the day when judgment was signed in the circuit court until paid. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

But the 18th rule has been superseded by the 23rd rule. See *Hemmenway v. Fisher*, 20 How. 255, 259, 15 L. Ed. 799.

37. *Statutes and rules of court stated*.—5 Stat. 518, § 8; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 L. Ed. 71; *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

38. 21 How. XIII; *Schell v. Cochran*, 107 U. S. 625, 627, 27 L. Ed. 543; *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441; *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

39. *Object of rule*.—*Hemmenway v. Fisher*, 20 How. 255, 259, 15 L. Ed. 799.

40. *Act of 1842 does not apply to decrees in chancery*.—*Perkins v. Fourniquet*, 14 How. 328, 330, 14 L. Ed. 441.

41. 21 How. XIII.

The supreme court, by the sixty-second rule, adopted in 1851, made provision that both judgments as common law and decrees in chancery upon affirmance in that court carry interest until paid, the interest to be calculated according to the rate of interest allowed in the state in which the judgment or decree of the court below was given. *Hemmenway v. Fisher*, 20 How. 255, 259, 15 L. Ed. 799.

terest where it was tried and decided in New York, or in any other state where the interest allowed by the state laws was different.⁴²

Moreover, in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.⁴³

Reason of Rule.—And it will sometimes happen in an admiralty case, that this court will think that the damages estimated and allowed in the circuit court are too high, and yet the opinion here may approximate so nearly to that of the court below that this court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court, it must be in the exercise of its discretionary power, and pro tanto, is a new judgment.⁴⁴

(4) *Amendments.*—Undoubtedly where an error is committed by the clerk in omitting to allow interest in entering the judgment, it is in the power of the court to correct such clerical error.⁴⁵

(5) *Mandate.*—When the mandate of this court goes to the court below, it is necessary that that court, with a view to execution, should enter a further judgment in accordance with the mandate, covering the direction of this court as to interest and as to costs in this court on the writ of error.⁴⁶

10. **POWER TO CHANGE JUDGMENTS OF DISMISSAL TO JUDGMENTS OF AFFIRMANCE.**—This court has no power to vary its judgments or mandates, after the close of the term, to the extent of changing its judgment from one dismissing

42. Rate of interest in admiralty cases.—*Hemmenway v. Fisher*, 20 How. 255, 259, 15 L. Ed. 799.

43. *Hemmenway v. Fisher*, 20 How. 225, 260, 15 L. Ed. 799.

44. Reason of rule.—*Hemmenway v. Fisher*, 20 How. 255, 260, 15 L. Ed. 799.

45. Clerical errors of clerk.—*Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

Where the clerk of the court had omitted to enter the judgment of this court, allowing to the defendant in error, on the affirmance of the judgment of the circuit court, interest at the rate of six per centum per annum as damages, and the mandate of this court, although issued, had not been presented to the circuit court; the court ordered the judgment to be reformed, allowing interest at the rate of six per cent. The omission is a mere clerical error. It is a rule of this court that where there are no special circumstances, six per cent. interest is allowed upon the amount of the judgment, in the court below. Under special circumstances, damages to the amount of ten per cent. are allowed. *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731.

46. Mandate.—The plaintiff in the judgment being stayed as to execution while the case is in this court, and there being a new judgment rendered by this court in the suit, "the final judgment" referred to in § 989 is the judgment as it stands after its affirmance by this court, and after the court below has rendered such judgment as the mandate of this court requires. Therefore, the interest allowed in this case is interest before final judgment, and is of the same character as the interest allowed before judgment in a suit against a collector where there is no writ of error. In both cases, when there is a final judgment, the principle applies, declared by this court in *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63, that it is to be presumed the government is always ready and willing to pay its ordinary debts. But, where there is a judgment and a certificate of probable cause, and thus a case of payment out of the treasury under § 989, and then, by direction of the government, a writ of error is taken which operates as a stay, interest on the judgment during the stay ought to be allowed, and the statutes not only do not forbid such allowance, but permit it. *Schell v. Cochran*, 107 U. S. 625, 628, 27 L. Ed. 543.

the writ of error, to a judgment of affirmance, so as to award interest as such or as damages for delay.⁴⁷

S. Modification.—In General.—The act of congress to further the administration of justice, 17 Stat. at Large 197, provides that the appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.⁴⁸ Accordingly, this court, in affirming the decree of the court below, may modify it so as to conform to the law and justice of the case.⁴⁹

Decree of Dismissal.—Where the decree of the circuit court dismissing the case was general, this court will modify the decree for dismissal to one without prejudice.⁵⁰

In criminal cases it is not always necessary to reverse the judgment in its entirety, but this court may merely modify the same.⁵¹

T. Opening, Amending and Vacating⁵²—1. **CONTROL OF COURT OVER ITS JUDGMENTS**—a. *In General.*—The power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.⁵³ But it is too late

47. Power to change judgments of dismissal to judgments of affirmance.—"It has always been held by this court that it has no power, after the term has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of the judgment below, with its legal consequences and not an error of mere form or a clerical error, or a misprision of the clerk, or the like. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331." *Schell v. Dodge*, 107 U. S. 629, 27 L. Ed. 601.

48. Power of court to modify judgment.—*New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358; *Coggeshall v. Hartshorn*, 154 U. S., appx., 533, 15 L. Ed. 261; *Spalding v. Mason*, 161 U. S. 375, 396, 40 L. Ed. 738; *Mormon Church v. United States*, 140 U. S. 665, 35 L. Ed. 592.

It has been held that error on the part of the jury in allowing a party to recover damages for the detention of money beyond legal interest, does not require a venire de novo, but to be such that, under the "Act to further the administration of justice" (17 Stat. at Large, 197), the court could reverse the judgment and modify it by disallowing the \$5,000, and remanding the case with directions to enter judgment for the residue found by the jury with interest—the case being one where all the facts were apparent in the record, though not by a special verdict in form. *New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

49. *Flagg v. Walker*, 113 U. S. 659, 28 L. Ed. 1072; *Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 43 L. Ed. 941.

The time fixed by the decree in the court below for payment by appellant to appellee of a sum named in the decree, in order to secure a reconveyance of the property in litigation having expired pending the appeal, and without payment, and the appellants having given an appeal bond which superseded the decree, in affirming the judgment the court modifies the decree, so as to extend the time of payment. *Flagg v. Walker*, 113 U. S. 659, 28 L. Ed. 1072.

50. Power to modify decree of dismissal.—*Gregory v. Boston Safe Deposit, etc., Co.*, 144 U. S. 665, 36 L. Ed. 585; *Lockhard v. Johnson*, 181 U. S. 516, 45 L. Ed. 979.

Upon a writ of certiorari to the circuit court of appeals, where this court is of opinion that the decree of the court of appeals should be one of affirmance rather than a dismissal, it may be to that extent modified. *Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 43 L. Ed. 941.

51. Modification of judgment in criminal cases.—Rev. Stat., § 707; *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388; *United States v. Eaton*, 169 U. S. 331, 352, 42 L. Ed. 767.

52. See generally, the title JUDGMENTS AND DECREES.

53. Control of court over its judgments.—*Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 35 L. Ed. 151.

The court does not doubt its power to open its judgment rendered at the present term and continue or rehear the cause, if, upon the record, one of the judges who

after a case has been decided and judgment pronounced by this court to move to open the judgment.⁵⁴

b. *At Subsequent Term.*—It has been repeatedly decided as to judgments of this court, that they cannot be changed at a subsequent term, in matters of law, whether attempted on motion, or a new writ of error, or appeal, on the mandate to the court below,⁵⁵ except for clerical errors;⁵⁶ as, for example, a clerical omission of the clerk, in entering the mandate of this court, to allow interest and damages on the judgment of affirmance,⁵⁷ or where a cause is appealed to this court under an erroneous description of its title.⁵⁸

But it is held to be beyond the power of this court, at a subsequent term, to alter its judgment of dismissal to one of affirmance.⁵⁹

concurrent in the decision supposes it to be erroneous. *United States v. Knight*, 1 Black 488, 17 L. Ed. 80.

Judgment of dismissal.—A court has a right to set aside its own judgment or decree, dismissing a bill in chancery, at the same term in which the judgment or decree was rendered, on discovering its own error in the law, or that the consent of the complainants to such dismissal was obtained by fraud, and in such case the decree does not become appealable until the order of the court is entered of record. It does not require an original bill. *Doss v. Tyack*, 14 How. 297, 14 L. Ed. 428.

54. But after a case has been decided and judgment pronounced by this court, it is too late to move to open the judgment for the purpose of amending the bill of exceptions, upon the ground that material evidence which might have influenced the judgment of this court was omitted in the bill. If there was any error or mistake in framing the exception, it might have been corrected by a certiorari, if the application had been made in due time and upon sufficient cause. But after the parties have argued the case upon the exception, and judgment has been pronounced, it is too late to reopen it. *Gayler v. Wilder*, 10 How. 509, 13 L. Ed. 517.

55. At subsequent term.—*Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220; *Martin v. Hunter*, 1 Wheat. 304, 354, 4 L. Ed. 97; *The Santa Maria*, 10 Wheat. 431, 442, 6 L. Ed. 359; *Davis v. Packard*, 8 Pet. 312, 323, 8 L. Ed. 957; *Boyce v. Grundy*, 9 Pet. 275, 290, 9 L. Ed. 127; *Ex parte Story*, 12 Pet. 339, 343, 9 L. Ed. 1108; *Sibbald v. United States*, 12 Pet. 488, 491, 9 L. Ed. 1167; *Mitchell v. United States*, 15 Pet. 52, 84, 10 L. Ed. 658; *Bank v. Moss*, 6 How. 31, 40, 12 L. Ed. 331, 335; *Rice v. Minnesota, etc., R. Co.*, 21 How. 82, 16 L. Ed. 31.

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (*Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731), or to reinstate a cause dismissed by mistakes. (*The Palmyra* 12

Wheat. 1, 10, 6 L. Ed. 531); from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review, in cases of equity, and writs of error, *coram vobis*, at law, are exceptions which cannot affect the present motion." *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167, 1169.

This court, subsequent to the term when a judgment or decree is rendered, possesses no power to review its own final judgments or decrees. *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279.

After a cause has been argued and decided, the court will not hear a motion at a subsequent day of the term to change or modify the decree based on affidavits taken to show facts which do not appear in the record. *United States v. Hensley*, 1 Black 35, 17 L. Ed. 29; *United States v. Knight*, 1 Black 488, 17 L. Ed. 80.

56. Clerical errors amendable at subsequent term.—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.

Where error has been committed by the clerk of the circuit court in entering up the mandate of this court, it is undoubtedly in the power of this court to amend such a clerical error at a subsequent term. *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

57. Hemmenway v. Fisher, 20 How. 255, 15 L. Ed. 799.

Omission of interest on affirmance.—Where the clerk of the court had omitted to enter the judgment of this court, allowing to the defendant in error, on the affirmance of the judgment of the circuit court, interest at the rate of six per centum per annum, as damages, and the mandate of this court, although issued, had not been presented to the circuit court; the court will order the judgment to be reformed, allowing interest at the rate of six per cent. The omission is a mere clerical error. *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731.

58. Erroneous entitling of cause.—*Killian v. Ebbinghaus*, 141 U. S. 798, 28 L. Ed. 593.

59. Altering judgment of dismissal to judgment of affirmance.—"It has always been held by this court that it has no power, after the term has passed, and a

Conformity of Mandate to Opinion.—It would seem that this court will at any time entertain a motion to amend its mandate so as to conform to the opinion delivered by the court.⁶⁰

2. **Grounds for Amending and Vacating.**—Where a judgment or decree of this court ordering a sale of land is defective in its directions, this court may amend.⁶¹ Where it is discovered by this court after reversal, that the appeal or writ of error was not properly perfected, the judgment previously rendered may be vacated.⁶²

U. Force and Effect of Decision⁶³—1. **ON SECOND APPEAL**—a. *In General.*—Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate courts.⁶⁴ Accordingly, it is settled in this court, that whatever has been decided here upon one appeal or writ of error cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the circuit court, after the mandate of this court.⁶⁵ None of the questions which were before the court on

cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmation of a judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprison of the clerk, or the like. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331." *Schell v. Dodge*, 107 U. S. 629, 630, 27 L. Ed. 601.

60. Conformity of mandate to opinion.—We have no doubt of our power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which we intended it. As said by Mr. Justice Strong, delivering the opinion of the court in the case of *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395: "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time." *Elizabeth v. American, etc., Pavement Co.*, 131 U. S., appx. cxlviii, 24 L. Ed. 1059.

61. Grounds for amending and vacating.—*United States v. De Morant*, 124 U. S. 647, 31 L. Ed. 565.

62. Failure to perfect appeal.—Where it is discovered by this court after the judgment has been reversed, that the writ of error was sued out and the citation directed and served against only one of the plaintiffs below; that the preliminary appeal bond for costs was also made to only one of the plaintiffs; but the bond for supersedeas, subsequently executed, was made to all the plaintiffs by name, this court will enter a rule on the plaintiff in error to show why the judgment previously rendered should not be vacated and the writ of error dismissed. But the court may, on consideration of the special circumstances of the case, allow the writ of error to be amended, and a new citation to be issued to all the plaintiffs below, set aside their previous judgment, and direct the cause to be restored to the

docket for reargument. *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. Ed. 32.

63. See the title **FORMER ADJUDICATION OR RES ADJUDICATA.**

64. On second appeal in general.—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Washington Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Clark v. Keith*, 106 U. S. 464, 27 L. Ed. 302; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. Ed. 727; *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 259, 40 L. Ed. 414; *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 344, 40 L. Ed. 991; *Peck v. Sanderson*, 18 How. 42, 15 L. Ed. 262; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279.

65. Re-examination of case on subsequent appeal not allowable.—*Himely v. Rose*, 5 Cranch 313, 314, 3 L. Ed. 111; *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97; *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397; *Sibbald v. United States*, 12 Pet. 448, 492, 9 L. Ed. 1167; *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 466, 14 L. Ed. 768; *Sizer v. Many*, 16 How. 98, 103, 14 L. Ed. 861; *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Board of Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Gaines v. Rugg*, 148 U. S. 228, 242, 37 L. Ed. 432; *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382; *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 91, 46 L. Ed. 440; *Clark v. Keith*, 106 U. S. 464, 27 L. Ed. 302; *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 259, 40 L. Ed. 414; *Cook v. Burnley*, 11 Wall. 659, 672, 20 L. Ed. 29; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Humphrey v. Baker*, 103 U. S. 736, 26 L. Ed. 456; *Texas, etc., R. Co. v. Anderson*, 149 U. S. 237, 242, 37 L. Ed. 717; *The Lady Pike*, 96 U. S. 461, 24 L. Ed. 672; *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 284, 41 L. Ed. 1004; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100;

Browder v. McArthur, 7 Wheat. 58, 59, 5 L. Ed. 397; *Wheeler v. Harris*, 13 Wall. 51, 20 L. Ed. 531, citing *Providence Rubber Co. v. Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *Silshy v. Foote*, 20 How. 378, 15 L. Ed. 953; *Kerr v. South Park Commissioners*, 117 U. S. 388, 29 L. Ed. 927; *Chaffin v. Taylor*, 116 U. S. 567, 572, 29 L. Ed. 727; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279; *United States v. The Neustra Senora De Regla*, 108 U. S. 92, 27 L. Ed. 662; *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Northern Pac. R. Co. v. Ellis*, 144 U. S. 458, 36 L. Ed. 504; *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 343, 40 L. Ed. 991; *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456, 42 L. Ed. 539, reaffirmed in *Bent v. Miranda*, 168 U. S. 471, 42 L. Ed. 547.

A writ of error sued out under the 22nd section of the judiciary act, brings up the whole record, but the second writ of error, if issued under that section, does not bring up the whole record for examination. "On the contrary, it is equally well-settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that if those proceedings are merely such as the mandate commanded, and were necessary to the execution of the mandate, the writ of error will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be admitted." *Cook v. Burnley*, 11 Wall. 677, 20 L. Ed. 84.

To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation. It is said by this court, in *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97. A final judgment of the court is conclusive upon the rights which it decides and no statute has provided any process, by which this court can revise its judgment." (See, also, *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.) *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 466, 14 L. Ed. 768, 775.

Where this court has held when a case was here for the first time that there is no error on the part of the circuit court in refusing to remand the case to the state court, this question cannot be further litigated between the parties. *Ayers v. Watson*, 137 U. S. 584, 34 L. Ed. 803.

"This court has repeatedly held that a second writ of error does not bring up the whole record for re-examination, but only the proceedings subsequent to the mandate, and if those proceedings are merely such as the mandate command, and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Roberts v. Cooper*, 20 How. 467, 15

L. Ed. 969; *Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576; *The Lady Pike*, 96 U. S. 461, 24 L. Ed. 672; *Board of Supervisors of Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044." *United States v. New York Indians*, 173 U. S. 464, 472, 43 L. Ed. 769.

"In *The Santa Maria*, 10 Wheat. 431, 444, 6 L. Ed. 359, it was said by Mr. Justice Story: 'We think, therefore, that upon principle every existing claim which the party has omitted to make at the hearing upon the merits, and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the court, if they had been previously brought to its notice.' See, also, *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775." *United States v. New York Indians*, 173 U. S. 464, 471, 43 L. Ed. 769.

Judicial rebuke.—The court—deciding that the present case is the same in fact as one already twice before it and already twice decided in the same way—rebukes, with some asperity, the practice of counsel who attempt to make the judges bear the "infliction of repeated arguments" challenging the justice of their well-considered and solemn decrees; and sends the case represented by them out of court with affirmance and costs. *Minnesota Min. Co. v. National Min. Co.*, 3 Wall. 332, 18 L. Ed. 42.

A decree of this court affirming a decree of the United States circuit court in all matters except one, and remanding the case for further investigation on that one point, is conclusively determined by such affirmance as between the parties, hence is not open to re-examination on a second appeal. *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 46 L. Ed. 440.

Proceedings subsequent to mandate reviewable on second appeal.—*Mackall v. Richards*, 112 U. S. 369, 28 L. Ed. 737.

Entry of decree in admiralty.—Upon a second appeal to this court in an admiralty case, an objection to the entry of a decree against a stipulator because of a mistake as to his Christian name, made by the the attorney who affixed the appellant's name to the stipulation, comes too late, in a case where no excuse is shown for not having taken steps to have the correction made in the court where his attorney made it. *The Lady Pike*, 96 U. S. 461, 24 L. Ed. 672.

Bills of review.—In *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969, this court said: "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a

the first writ of error can be reheard or examined upon the second⁶⁶ except in

second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." It is obvious that the same principle must apply where a party, instead of prosecuting a second appeal, attempts by a bill of review, or by a new bill in the nature of a bill of review, to reach errors apparent upon the face of the record. *Kingsbury v. Buckner*, 134 U. S. 650, 670, 33 L. Ed. 1047.

It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. See *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861; *Corning v. Troy Iron Nail Factory*, 15 How. 451, 466, 14 L. Ed. 768; *Himely v. Rose*, 5 Cranch 313, 3 L. Ed. 111; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969.

Among the cases cited in *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052, was that of *Brewer v. Bowman*, 3 J. J. Marsh. 492, in which the court, after observing that the remedy by bill of review for errors apparent upon the record was analogous to that of a writ of error, said: "Hence, an affirmance in this court upon writ of error would bar a bill of review for any error which might exist in the record, but which was not assigned nor inquired into by this court. It follows that a reversal by this court, upon a writ of error (and we perceive no reason why a reversal upon an appeal should not have the same effect) with directions how to render the decree, and the rendition of the decree by the circuit court in pursuance of the mandates of this, would equally bar an attempt by bill of review

to inquire into errors which be on the record, but which were not noticed by this court." *Kingsbury v. Buckner*, 134 U. S. 650, 672, 33 L. Ed. 1047.

⁶⁶ *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861, 863; *Corning v. Troy Iron and Nail Factory*, 15 How. 451, 457, 466, 14 L. Ed. 768; *Himely v. Rose*, 5 Cranch 313, 315, 3 L. Ed. 111; *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97; *Tyler v. Magwire*, 17 Wall. 253, 284, 21 L. Ed. 576; *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100; *Board of Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167; *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397.

"We cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. * * * We can now notice, therefore, only such errors as are alleged to have occurred in the decisions on questions which were peculiar to the second trial. *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969; *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97; *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397; *Washington Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Chaires v. United States*, 3 How. 611, 620, 11 L. Ed. 749; *Corning v. Troy Iron and Nail Factory*, 15 How. 451, 14 L. Ed. 768; *Peck v. Sanderson*, 18 How. 42, 15 L. Ed. 262; *Whyte v. Gibbes*, 20 How. 541, 15 L. Ed. 1016; *Ex. parte Dubuque, etc.*, R. Co., 1 Wall. 69, 73, 17 L. Ed. 514; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279; *Board of Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Brooks v. Burlington, etc.*, R. Co., 102 U. S. 107, 26 L. Ed. 91; *Northern, Pac. R. Co. v. Ellis*, 144 U. S. 458, 464, 36 L. Ed. 504; *Gaines v. Rugg*, 148 U. S. 298, 241, 37 L. Ed. 432; *Last Chance Min. Co. v. Tvler Min. Co.*, 157 U. S. 683, 691, 39 L. Ed. 859; *New Orleans v. Citizens'*

cases of fraud.⁶⁷

A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error,⁶⁸ but will not be allowed on the ground that some important and controlling fact was misapprehended, or did not sufficiently appear in the case upon the former hearing, where the court is not convinced that there was any such misapprehension, or that any important fact escaped the observation of the court.⁶⁹

To What Extent Original Proceedings Examina-ble.—But the original proceedings are always before the court, so far as is necessary to determine any new points in controversy between the parties, which are not terminated by the original decree.⁷⁰

Cross Appeals.—When a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals; if the complainant desires a more favorable decree, he must enter a cross appeal, that when the decree comes before the appellate court, he may be heard. For, when the decree is either affirmed or reversed by the appellate court, it becomes the decree of that court and cannot be the subject of another appeal.⁷¹

b. Application of Rule to Decrees in Chancery.—A final decree in chancery is as conclusive as a judgment at law, and both are conclusive on the rights of the parties thereby adjudicated.⁷²

c. Application of Rule to Judgments by Divided Courts.—If when a cause was before this court on a former occasion, the decree was affirmed by a divided court, if it is again brought up on a second appeal, the fact that it has been affirmed by a divided court, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties.⁷³

Bank, 167 U. S. 371, 396, 42 L. Ed. 202; *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 40 L. Ed. 414." *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 91, 46 L. Ed. 440; *United States v. Camou*, 184 U. S. 572, 574, 46 L. Ed. 694.

67. Exception in cases of fraud.—*Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576.

68. Himely v. Rose, 5 Cranch 313, 3 L. Ed. 111; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Corning v. Troy Iron and Nail Factory*, 15 How. 451, 466, 14 L. Ed. 768, 775; *Mackall v. Richards*, 112 U. S. 369, 28 L. Ed. 737.

69. Kenosha v. Campbell, 131 U. S., appx. xcvi, 19 L. Ed. 711.

70. How far original proceedings open.—*The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359, cited in *Mitchel v. United States*, 15 Pet. 52, 83, 10 L. Ed. 658.

71. Cross appeals.—*Corning v. Troy Iron and Nail Factory*, 15 How. 451, 14 L. Ed. 768.

72. Application of rule to decrees in chancery.—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 46 L. Ed. 440; *Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97; *Hopkins v. Lee*, 6 Wheat. 109, 113, 116, 5 L. Ed. 218; *Washington Bridge Co. v. Stewart*, 3 How. 413, 424, 11 L. Ed. 658; *Peck v. Sanderson*, 18 How. 42, 15 L. Ed. 262; *Hudson v. Guestier*, 7 Cranch 1, 3 L. Ed. 249; *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Noonan v. Bradley*, 12 Wall. 121, 20 L. Ed. 279.

The superior court have no power to review their decisions, whether in a case at law or equity. A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows that no change or modification can be made which may substantially vary or affect it, in any material thing. Bills of review in cases of equity, and writs of error, *coram vobis*, at law, are exceptions. *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.

Where a decree complained of has already been argued before this court on a former occasion, if it appears on a second appeal to this court, on the same questions which were open to dispute on the first, the court below has not acted upon the mandate of this court, and entered a final decree in pursuance thereof, there is no final decree from which an appeal may be taken. *Corning v. Troy Iron and Nail Factory*, 15 How. 451, 14 L. Ed. 768, citing *The Palmyra*, 10 Wheat. 502, 6 L. Ed. 376; *Chace v. Vasquez*, 11 Wheat. 429, 6 L. Ed. 511.

73. Application of rule to judgments by divided courts.—*Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658.

Where the judges of the supreme court of the United States are equally divided

d. *Persons Concluded*.—The judgment or decree of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. It does not conclude the rights of third parties not before the court, or in any respect affect their rights. It acquires no additional efficacy by its affirmation. As an adjudication upon the rights of the parties between themselves it has the same operation before as after its affirmation.⁷⁴

e. *Matters Concluded*.—**In General**.—The rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. But all questions which appear upon the record and have not already been decided are open for consideration.⁷⁵

(1) *Jurisdictional Matters*.—After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.⁷⁶ For example, although this court, when a cause is tried upon a first appeal, renders a decree upon an interlocutory and not a final decree, yet if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.⁷⁷

(2) *Matters Unnecessary to the Decision*.—A decision on matters the disposition of which is not required for the decision is not binding upon the appellate court on the second appeal of the same case.⁷⁸

(3) *Priority of First Judgment*.—In ordinary cases a second writ of error has never been supposed to draw in question the priority of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle.⁷⁹

in opinion upon the questions of law or fact involved in a case before the court on appeal or writ of error, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case. *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154.

74. Persons concluded.—In the *Matters of Howard*, 9 Wall. 175, 19 L. Ed. 634.

The judgment of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. Viewed simply as an adjudication between them, it is not open to question. It must be followed and obeyed. The inferior court cannot reopen the case and allow new proceedings to be taken, or further evidence to be given, or new defenses to be offered, upon any ground whatever. It must execute the judgment or decree, and only for that purpose has it any authority over it. In the *Matters of Howard*, 9 Wall. 175, 183, 19 L. Ed. 634.

Accordingly, where a decree of a circuit court of the United States, affirmed by this court, had determined that the complainants and certain intervening claimants were entitled to a fund in the hands of the receiver of the court, and ordered the distribution of the fund among them, it was held that it did not preclude third parties from proceeding by bill to assert their claims to share in the fund, before its distribution; and to pre-

vent such distribution, before their claims could be considered and determined, they were entitled, upon presenting a prima facie case, to a restraining order or injunction from the court. In the *Matter of Howard*, 9 Wall. 175, 19 L. Ed. 634.

75. Matters concluded.—*Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, 48 L. Ed. 788.

76. Jurisdictional matters.—*Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658.

77. Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658.

78. Obiter dicta.—*Barney v. Winona, etc.*, R. Co., 117 U. S. 228, 29 L. Ed. 858.

"We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision." *Barney v. Winona, etc.*, R. Co., 117 U. S. 228, 231, 29 L. Ed. 858.

Opinions on matters beyond the scope of the case and not necessary to its determination are obiter dicta, and have no weight beyond mere indications of law in the decision of subsequent cases. *Barney v. Winona, etc.*, R. Co., 117 U. S. 228, 29 L. Ed. 858.

79. Priority of first judgment.—*Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. Ed. 97, 110.

(4) *Allowance of Interest and Damages.*—The court will refuse to allow interest, which was given by the circuit court in executing the mandate, if it was not awarded by the supreme court upon the first appeal.⁸⁰

(5) *How Determined.*—We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for the further disposition of the case.⁸¹

f. *When Second Appeals Allowed.*—Although no appeal will be entertained from a decree rendered by the court below in accordance with our mandate on a previous appeal; yet second appeals have always been allowed to bring up proceedings subsequent to the mandate, and not settled by the terms of the mandate itself.⁸² But they do not authorize an inquiry into the merits of the original judgment or decree.⁸³

Where Mandate Not Properly Executed.—Second appeals will lie in certain cases, where it is alleged that the mandate of the appellate court has not been properly executed; but the appeal in such a case will bring up nothing for re-examination except the proceedings subsequent to the mandate. Needful explanation may be derived from the original record; but the re-examination cannot extend to anything that was decided in the antecedent appeal.⁸⁴

Dismissal of Appeal for Informality.—So, also, a party may, after an

80. Allowance of interest and damages.—“The same point was fully examined in the case of *The Santa Maria* (10 Wheat. 431, 442, 6 L. Ed. 359), where the court held that interest or damages could not be given by the circuit court in the execution of a mandate, where the same had not been decreed by the supreme court upon the original appeal.” *Boyce v. Grundy*, 9 Pet. 275, 290, 9 L. Ed. 127, 132.

81. How determined.—*Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456, 42 L. Ed. 539, reaffirmed in *Bent v. Miranda*, 168 U. S. 471, 42 L. Ed. 547.

82. When second appeals allowed.—*Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 458, citing *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Board of Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576.

Second appeals or writs of error are allowed, but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud. *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397; *The Santa Maria*, 10 Wheat. 431, 442, 6 L. Ed. 359; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279.

There are cases in which a second appeal may be taken, but it must be founded on a procedure subsequent to the original decree, and in a matter not concluded by it. *McMicken v. Perin*, 20 How. 133, 15 L. Ed. 857.

This court, when acting as a court of errors, can only legitimately revise the questions of law that have been raised and decided in the circuit courts. Therefore it must of necessity, on a second writ of error being prosecuted, have power to revise such rulings of the court below on the second trial as effect the merits of the controversy, and to pass on the questions not previously presented, as open questions in the particular cause. “However high the regard of judges that did not concur may be for the views entertained and expressed by other judges, on a question of law not brought up for decision, still it is impossible to recognize such views as binding authority, consistently with the due administration of justice; as by doing so the merits of the controversy might be forestalled, without proper examination.” *United States v. Bank*, 5 How. 389, 395, 12 L. Ed. 199.

After a new trial has been had, pursuant to the mandate of the court, and a second judgment rendered, no errors other than those committed after the mandate was received below can be considered here. *Ames v. Quimby*, 106 U. S. 342, 27 L. Ed. 100; *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969; *Board of Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark v. Keith*, 106 U. S. 464, 27 L. Ed. 302; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. Ed. 727.

83. *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576.

84. *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969; *The Lady Pike*, 96 U. S. 461, 462, 24 L. Ed. 672.

appeal has been dismissed for informality, if within two years, brings up the case again.⁸⁵

2. OPERATION OF APPEALED JUDGMENT AS AN ESTOPPEL.—A decree cannot be used as *res judicata* pending an appeal to a higher court.⁸⁶

In admiralty cases an appeal suspends the sentence altogether, and it is not *res adjudicata*, until the final sentence of the appellate court is pronounced.⁸⁷

Nor can a reversal in a court of last resort, remanding a case, be set up as a bar to a judgment in an inferior court on the same case.⁸⁸

Effect of Failure to Perfect Appeal.—The authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below, have no application to a case where application for an appeal was filed, but the appeal was never allowed or perfected, and it does not appear that the transcript of the record was ever filed in this court.⁸⁹

Decision on Question of Jurisdiction.—Where an appellate court decides a case on the ground that the inferior court had no jurisdiction, it in some mode indicates that it was not a decision on the merits, to prevent the judgment being used as a bar in some court which might have jurisdiction.⁹⁰

3. RULE OF PRECEDENTS OR STARE DECISIS.⁹¹—A question repeatedly argued and decided must be considered as no longer open for discussion, whatever differences of opinion may once have existed on the subject in this court.⁹² But an order entered through inadvertence by this court in a case previously before it, cannot be drawn into a precedent.⁹³

XVIII. Costs.⁹⁴

A. Nature and Extent of Right to Costs—1. DISCRETION OF COURT.—Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court.⁹⁵

2. ON AFFIRMANCE—*a. In General.*—In all cases of affirmance, costs go of course.⁹⁶

85. *Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889.

A party may take a second appeal where the first has not been legally prosecuted. But in the present case, the order of the court cannot be construed as a grant of a second appeal. The appeal must therefore be dismissed, on motion. "The right of a party to take a second appeal where the first had not been legally prosecuted was decided in the case of *Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889. In that case, the first appeal was dismissed by the court, for the want of a proper citation. And the appellant, before the expiration of the time limited by law for appealing, entered a second appeal in the circuit court, and cited the adverse party to appear at the term of this court next following the second appeal; and the second appeal was held good." *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

86. No estoppel pending appeal.—*Bryar v. Campbell*, 177 U. S. 649, 654, 44 L. Ed. 926.

Where a plaintiff filed a bill in the district court of the United States and a decree was entered in his favor from which an appeal is taken to the circuit court by the defendant, but the plaintiff without pressing the appeal in the circuit court brings an action in the state court and judgment is rendered against him, the

judgment of the state court is *res adjudicata* of all the issues between the parties. *Bryar v. Campbell*, 177 U. S. 649, 44 L. Ed. 926.

87. Rule in admiralty.—*Yeaton v. United States*, 5 Cranch 281, 3 L. Ed. 101, opinion of Mr. Chief Justice Marshall.

88. Judgment of reversal and remand.—*Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42.

89. Effect of failure to perfect appeal.—*Hubbell v. United States*, 171 U. S. 203, 210, 43 L. Ed. 136.

90. *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Keith v. Clark*, 97 U. S. 454, 456, 24 L. Ed. 1071.

91. See the title STARE DECISIS.

92. *Wright v. Sill*, 2 Black 544, 17 L. Ed. 333; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713.

93. Order entered through inadvertence.—*James v. Mobile Bank*, 7 Wall. 692, 19 L. Ed. 275.

94. See generally, the title COSTS.

95. Discretion of court.—*Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688, 689; *Rogers v. Durant*, 106 U. S. 644, 646, 27 L. Ed. 303. See "Discretionary Matters," IV, D. vol. 1, p. 983.

96. Costs allowed appellee on affirm-

And the rule of court provides that in all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the court.⁹⁷ But this rule shall not apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.⁹⁸

Division of Opinion.—An affirmance upon an equal division of opinion among the judges is with costs.⁹⁹

b. *Affirmance upon Agreement of Parties.*—Upon agreement of counsel of plaintiff and defendant in error, the court may affirm the judgment of the circuit court with costs, including costs of the transcript.¹

3. ON REVERSAL.—a. *In General.*—The rule as to costs was established by the forty-seventh rule of this court as follows: In all cases of reversal of any judgment or decree in the supreme court, except where the reversal shall be for want of jurisdiction, costs shall be allowed for the plaintiffs in error or appellants, as the case may be, unless otherwise ordered by the court.² But this rule does not apply to cases where the United States are a party; in such cases no costs shall be allowed in this court for or against the United States.³

Reversal on Stipulation.—Where the judgment is reversed in accordance with the stipulation of the parties, costs in this court may be assessed against the plaintiff in error,⁴ though the reversal may be without costs.⁵

b. *For Want of Jurisdiction.*⁶—In an early case the rule was announced that: In cases of reversal, costs do not go of course, but in all cases of affirmance they do. Therefore when a judgment is reversed for want of jurisdiction, it must be without costs.⁷ But the better rule is that when there has been a

ance.—*Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545.

As a general rule where this court finds no error in the record, the judgment below must be affirmed with costs allowed against the appellant. *Johnston v. Jones*, 1 Black 209, 17 L. Ed. 117.

Where a decree dismissing a bill was amended so as to be without prejudice generally, and not be restricted to saving the complainant's right to bring an action at law only, yet if the appellants have not made a motion to that effect in the court below, when it may be presumed that court would have readily conceded such amendment, this court will not relieve them from the costs of the appeal, upon its affirmance. *Texas, etc., R. Co. v. Interstate Transp. Co.*, 155 U. S. 585, 39 L. Ed. 271.

Error to state court.—Where the judgment of the high court of appeals of Maryland was reversed, and that of the general court of the state affirmed, costs in both the courts of Maryland and in this court were allowed to the plaintiff in error, and the mandate for execution issued to the general court. *Clerke v. Harwood*, 3 Dall. 342, 1 L. Ed. 628.

97. Rule of Court No. 24, § 2, 21 How. xiv.

98. Rule where United States is a party.—Rule No. 24, § 4, 21 How. xiii.

99. Affirmance on equal division among judges.—*Moffitt v. Miller*, 34 L. Ed. 539; *Bauer v. Texas, etc., R. Co.*, 131 U. S. 430, 33 L. Ed. 209.

1. Affirmance upon agreement of parties.—*Todd v. Daniell*, 1 How. 289, 11 L. Ed. 135.

2. Costs allowed plaintiff in error on reversal.—*Bradstreet v. Potter*, 16 Pet. 317, 10 L. Ed. 978; *Baldwin v. Ely*, 9 How. 580, 13 L. Ed. 266; *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393, 34 L. Ed. 385.

Error to state court.—It was held in *Clerke v. Harwood*, 3 Dall. 342, 1 L. Ed. 628, which was a writ of error to review the proceedings in a state court under the 25th section of the judiciary act, that where a judgment of the court of appeals of Maryland, reversing a judgment of the general court was reversed, and the judgment of the general court affirmed, the mandate of execution issued to the latter court, which expressly included the costs in this court. But this decision is criticised and disapproved by Justice Baldwin in Rule 37, 5 Pet. 724, 8 L. Ed. 288.

3. Where United States is a party.—Rule No. 24, § 4, 21 How. xiii.

4. Reversal on stipulation of parties.—*Union Mutual Life Ins. Co. v. Waters*, 124 U. S. 369, 31 L. Ed. 474.

5. *Bond v. Davenport*, 123 U. S. 619, 31 L. Ed. 279.

6. See the title REMOVAL OF CAUSES.

7. Early rule as to costs on reversal for want of jurisdiction.—*Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545, following *Winchester v. Jackson*, 3 Cranch 514, 2 L. Ed. 516.

In *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545, the judgment was reversed,

reversal here because the circuit court did not have jurisdiction, judgment may be given for costs, as this court has authority to correct the error of the circuit court in taking jurisdiction.⁸ And the general rule is well settled that where the judgment of the court below is reversed for want of jurisdiction, such reversal will be at the costs of the plaintiff in error, or appellant,⁹ both in this court and in the court below.¹⁰

because it did not appear from the record that the circuit court had jurisdiction, and with costs, following *Winchester v. Jackson*, *ubi supra*, and thereupon, it is stated in the report, that, "on the last day of the term, the court gave the following general directions to the clerk; that in cases of reversal, costs do not go of course, but in all cases of affirmance they do; and that when a judgment is reversed for want of jurisdiction, it must be without costs." No formal rule of the court covers the case of a reversal on that ground, although paragraph 3 of Rule 24, which provides, that in "cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court," leaves room for the exercise of discretion in its application to such cases. Cited in *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 388, 28 L. Ed. 462.

8. The better rule given.—*Turner v. Enrille*, 4 Dall. 7, 1 L. Ed. 717; *Winchester v. Jackson*, 3 Cranch 514, 2 L. Ed. 516; *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 387, 28 L. Ed. 462; *Bradstreet Co. v. Higgins*, 114 U. S. 263, 29 L. Ed. 176.

9. Costs awarded against plaintiff in error.—*Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *La Confrance Compagnie Anonyme D'Assurance v. Hall*, 137 U. S. 61, 34 L. Ed. 573; *Kellam v. Keith*, 144 U. S. 568, 36 L. Ed. 544; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Torrence v. Shedd*, 144 U. S. 527, 36 L. Ed. 528; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 38 L. Ed. 511; *Hanrick v. Hanrick*, 153 U. S. 192, 198, 38 L. Ed. 685; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623, citing *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. Ed. 623; *Jackson v. Allen*, 132 U. S. 27, 33 L. Ed. 249; *Graves v. Corbin*, 132 U. S. 571, 33 L. Ed. 462; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. Ed. 70; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885.

Where the transcript of the record does not show that the circuit court had jurisdiction of the suit, which depended upon the citizenship of the parties, and as coun-

sel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the circuit court for further proceedings. *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657. See, also, *Cooper v. Newell*, 155 U. S. 532, 39 L. Ed. 249, applying and affirming *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197.

It is again held that when the jurisdiction of a circuit court depends alone on citizenship, an averment that the plaintiff is a "resident" in one state named, and that the defendant is a "resident" in another state named confers no jurisdiction; and a judgment rendered below in such case in favor of the defendant and brought up in error by the plaintiff, is reversed with costs in this court against the plaintiff in error. *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914, citing *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Halstead Buster*, 119 U. S. 341, 30 L. Ed. 462; *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. Ed. 623; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714.

It results, that from any view of the case, as presented by the record, it is one in respect to which the plaintiff could not, under the act of 1875, invoke the original jurisdiction of the circuit court. The judgment must, therefore, be reversed, and the cause remanded with direction for such further proceedings as may be consistent with law, the plaintiff in error to pay the costs in this court. It will be for the court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction. *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 227, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Metcalf v. Watertown*, 128 U. S. 586, 590, 32 L. Ed. 543.

When a cause is removed into the circuit court at the instance of plaintiff in error and the judgment is reversed for lack of jurisdiction of the circuit court, the costs in this court and also the lower court will be imposed on plaintiff in error. *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061.

10. Costs of both courts awarded against appellant.—*Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462;

The rule as more properly stated, however, is that the reversal will be at the costs in this court of that party who wrongfully invoked the jurisdiction of the court below, and whose duty it was to make the jurisdiction appear.¹¹ In other words, where a decree is reversed because the record fails to show the jurisdiction of the court below, the reversal will be at the costs in this court of that party whose duty it was to put on the record the facts necessary to show jurisdiction.¹² This will account for rulings, apparently contrary to the rule stated above, to the effect that where the judgment of the circuit court is reversed for want of jurisdiction in that court, the reversal will be at the costs in this court of the defendant in error.¹³ Accordingly, it has been held, that upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require.¹⁴

Equal Division of Costs.—Where the error is attributable equally to both parties, the costs of this court will be divided equally between the parties, each paying half.¹⁵

c. Where Judgment Is Affirmed in Part and Reversed or Modified in Part.—**In General.**—Formerly, by the established rules and practice of this court, where the judgment was reversed in part and affirmed in part, the appellant was entitled to recover the costs in this court, and they were to be charged against the appellee.¹⁶ But the rule now is that where a judgment is affirmed in part and modified or reversed in part, costs will be taxed half to the plaintiffs in error and half to the defendants in error.¹⁷ Accordingly, where the decrees are reversed in part and affirmed in part, as each one of the two principal appellants

Stevens v. Nichols, 130 U. S. 230, 232, 32 L. Ed. 914; *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 39 L. Ed. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. Ed. 85; *Hanrick v. Hanrick*, 153 U. S. 192, 198, 38 L. Ed. 685.

11. *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. Ed. 623; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 30 L. Ed. 1020.

"Where the record fails to show the jurisdiction of the circuit court, but as the fault rests alone on Everhart, the complainant in the original bill, whose duty it was to put on record the facts necessary to show the jurisdiction, the reversal will be at his costs in this court. *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435." *Everhart v. Huntsville Female College*, 120 U. S. 223, 224, 30 L. Ed. 623.

12. *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. Ed. 623, citing *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *King Bridge, etc., Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 30 L. Ed. 1020.

13. **When costs awarded against defendant in error.**—*Turner v. Enrille*, 4 Dall. 7, 8, 1 L. Ed. 717; *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800, citing *Hancock v. Holbrook*, 112 U. S. 229,

28 L. Ed. 714; *Halstead v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 39 L. Ed. 654.

Where the record fails to show jurisdiction, the judgment of the circuit court will be reversed, with instructions to remand the case to the state court with costs against defendant in error, which must also pay the costs in this court. *Hanrick v. Hanrick*, 153 U. S. 192, 198, 38 L. Ed. 685; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 154, 39 L. Ed. 654.

14. *Peper v. Fordyce*, 119 U. S. 469, 471, 30 L. Ed. 435; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714; *Gaylord v. Kelshaw*, 1 Wall. 81, 83, 17 L. Ed. 612.

15. *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714.

16. **Early rule as to costs upon partial reversal.**—*Baldwin v. Ely*, 9 How. 580, 13 L. Ed. 266.

17. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 593, 37 L. Ed. 292.

Present rule as to costs upon partial reversal.—*Silsby v. Foote*, 20 How. 373, 15 L. Ed. 953; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954.

Where a decree is reversed as to one of the appellants, but in all other respects affirmed, the costs may be taxed one-half against the appellants and one-half against the appellees. *Jaeger v. Moore*, 154 U. S., appx., 641, 38 L. Ed. 1090.

has succeeded in part on his appeal, no costs will be allowed in this court for or against any party, and the expense of printing the record will be charged equally on such two appellants.¹⁸ But where a decree is affirmed in part and reversed in part, and remanded to the court below with directions to dismiss the suit, if the plaintiffs fail in this court on both appeals, they must pay the costs of this court on both appeals.¹⁹

Where, upon error to a state court, the judgment of the highest court is reversed, and that of the lower state court affirmed, the costs of both courts will be allowed.²⁰

d. *Where Remittitur Is Enticed.*²¹—**In General.**—Where a remittitur is filed in this court, the party remitting must pay the costs.²² For example, where the judgment of the court below was rendered on the verdict in excess of the ad damnum, the defendants in this court were permitted to enter a remittitur, and upon such entry the judgment was affirmed without costs in error.²³ Though some cases hold that whether the judgment be affirmed or reversed, the costs must be paid by the defendant in error.²⁴

Rule in Pennsylvania.—And this is the rule in Pennsylvania.²⁵ •

e. *Apportionment.*—Where the court below awards substantial damages, and this court, while sustaining the interlocutory decree, reverses the final decree so far as the awarding of damages is concerned, this court may remand the case with instructions to allow the defendant a recovery of his costs after the interlocutory decree, and to the plaintiff his costs up to and including the interlocutory decree.²⁶ But full costs may be awarded to the plaintiff in the court below, where he was awarded only nominal damages, and the defendant is not entitled to his costs after the interlocutory decree.²⁷

f. *Enforcement.*—The court below, upon a mandate, on reversal of its judgment, may award execution for the costs of the appellant in that court.²⁸

g. *Entry of Judgment Below.*—In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.²⁹

4. ON DISMISSAL.—a. *In General.*—In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.³⁰

b. *For Want of Prosecution.*—(1) *In General.*—If the appeal is dismissed for want of prosecution, the appellant must pay the costs.³¹

18. *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 437, 29 L. Ed. 963; *Silsby v. Foote*, 20 How. 378, 387, 15 L. Ed. 953; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 554, 29 L. Ed. 954.

19. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168.

20. **Error to state court.**—*Clerke v. Harwood*, 3 Dall. 342, 1 L. Ed. 628. But this case is criticised and disapproved by Justice Baldwin in Rule No. 37, 5 Pet. 724, 8 L. Ed. 288.

21. See the title REMITTITUR.

22. *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284; *Fury v. Stone*, 2 Dall. 184, 1 L. Ed. 341.

Where the damages found by the jury exceed those laid in the declaration, and the defendant takes out a writ of error, a remittitur will be entered for the excess, upon payment of costs of the writ of error. *Fury v. Stone*, 2 Dall. 184, 1 L. Ed. 341.

23. *Bank v. Ashley*, 2 Pet. 327, 7 L. Ed. 140.

24. *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284.

25. **Rule in Pennsylvania.**—*Fury v. Stone*, 2 Dall. 184, 1 L. Ed. 341.

26. **Apportionment of costs on reversal.**—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177; *Dobson v. Dornan*, 118 U. S. 10, 30 L. Ed. 63.

27. *Dubois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895, distinguishing *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177; *Dobson v. Dornan*, 118 U. S. 10, 30 L. Ed. 63.

28. **Enforcement.**—*Riddle v. Mandeville*, 6 Cranch 86, 3 L. Ed. 161.

29. **Entry of judgment below.**—*McKnight v. Craig*, 6 Cranch 183, 187, 3 L. Ed. 193.

30. **On dismissal in general.**—Rule of Court No. 24, § 1, 21 How. xiii.

31. **Dismissal for want of prosecution.**—*Mayer v. The Venelia*, 131 U. S., appx. lxx, 15 L. Ed. 41; *Montalet v. Murray*, 3 Cranch 249, 2 L. Ed. 429.

(2) *Failure to Appear*.—If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record, and go for an affirmance.³²

No Appearance of Either Party.—When a case is reached in the regular call of the docket and no appearance is entered for either party, the case shall be dismissed, at the costs of the plaintiff.³³

c. *For Want of Jurisdiction*.—(1) *In General*.—Costs cannot be awarded upon a judgment of dismissal for want of jurisdiction.³⁴ And the same rule applies in cases of dismissal by the circuit court for want of jurisdiction.³⁵ In other words, when a case is dismissed for want of jurisdiction in the circuit court to entertain the action, or render the judgment entered, the power of that court to award costs is gone.³⁶

(2) *Exceptions to General Rule*.—Costs will be allowed upon a dismissal of a writ of error for want of jurisdiction, if the original defendant is also defendant in error.³⁷ Likewise, where the question is not as to the right of the defendant in error to recover his costs in the suit, but only such as are incident to his motion to dismiss, they may be allowed. The right to decide implies the right to adjudge as to all costs which are incident to the motion.³⁸ So, also, where a case is dismissed without prejudice for want of jurisdiction, for lack of proper allegations of citizenship, and remanded with leave to amend, costs may be allowed the defendant.³⁹

32. Failure to appear.—*Montalet v. Murray*, 3 Cranch 249, 2 L. Ed. 429.

33. Rule of Court No. 18, 21 How. xi.

34. No costs awarded on dismissal for want of jurisdiction.—*Nashville v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Elk v. Wilkins*, 112 U. S. 94, 98, 28 L. Ed. 643; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Smith v. Whitney*, 116 U. S. 167, 175, 29 L. Ed. 601; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *McIver v. Wattles*, 9 Wheat. 650, 6 L. Ed. 182; *Strader v. Graham*, 18 How. 602, 15 L. Ed. 464; *Hornthall v. Keary*, 9 Wall. 560, 19 L. Ed. 560; *Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176; *Maxfield v. Levy*, 4 Dall. 330, 1 L. Ed. 854; *Houston v. Moore*, 3 Wheat. 433, 435, 4 L. Ed. 428.

35. No costs where circuit court dismisses for want of jurisdiction.—*Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. Ed. 451, citing *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *Hornthall v. Keary*, 9 Wall. 560, 19 L. Ed. 560; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. Ed. 70; *Nashville v. Cooper*, 6 Wall. 247, 18 L. Ed. 851.

36. Nashville v. Cooper, 6 Wall. 247, 250, 18 L. Ed. 851; *Hornthall v. Keary*, 9 Wall. 560, 566, 19 L. Ed. 560; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 387, 28 L. Ed. 462; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 35 L. Ed. 151.

37. When costs awarded on dismissal for want of jurisdiction.—*Winchester v. Jackson*, 3 Cranch 514, 2 L. Ed. 516; *Gaylord v. Kelshaw*, 1 Wall. 81, 83, 17 L. Ed. 612; *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545. See *Burr v. Des Moines Co.*, 1 Wall. 99, 103, 17 L. Ed. 561.

"Costs were improperly allowed in the court below, as the case was dismissed for the want of jurisdiction, on the face

of the pleadings, and in such cases the general rule is that costs will not be allowed in this court. *McIver v. Wattles*, 9 Wheat. 650, 6 L. Ed. 182; *Strader v. Graham*, 18 How. 602, 15 L. Ed. 464; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *Montalet v. Murray*, 4 Cranch 46, 47, 2 L. Ed. 545; *Bradstreet v. Potter*, 16 Pet. 317, 318, 10 L. Ed. 978. Sometimes an exception to that rule is admitted, as where the defendant in the court below is the defendant in this court, but inasmuch as the costs were improperly awarded in his favor by the circuit court, the better opinion is that he is not entitled to the benefit of that exception, as the decree in his favor must be reversed to correct that error. *Winchester v. Jackson*, 3 Cranch 514, 2 L. Ed. 516." *Hornthall v. Keary*, 9 Wall. 560, 566, 19 L. Ed. 560.

38. Bradstreet Co. v. Higgins, 114 U. S. 262, 264, 29 L. Ed. 176.

The costs incident to the motion to dismiss for want of jurisdiction may be recovered by the movant. For example, where a writ of error was dismissed at a former day on motion of the defendant in error, for want of jurisdiction, because the matter in dispute did not exceed \$5,000, and in order to present his motion to dismiss, it became necessary for the defendant in error to cause the record to be printed, and to do that he was compelled to pay the cost of printing and the fee of the clerk for supervising, such costs may be taxed against the plaintiff in error. *Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176.

39. Dismissal without prejudice for want of jurisdiction.—*Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612. See *Burr v. Des Moines, etc., R. Co.*, 1 Wall. 99, 103, 17 L. Ed. 561.

d. *No Actual Controversy Existing*.—Where an appeal is dismissed because the subject matter of the controversy has been settled elsewhere, only the disposition of costs being involved, the dismissal will be without costs to either party.⁴⁰

e. *Dismissal upon the Merits*.—Where a bill is dismissed generally, when it should have been dismissed without prejudice, the decree will be reversed and the cause remanded, and in accordance with the twenty-fourth general rule of this court, and under the discretionary power therein reserved, costs should not be allowed to the plaintiff, where the decree is wholly against the relief that he seeks; but the dismissal is to be with the costs in the court below, and each party is to pay his own costs on this appeal.⁴¹

Citizenship of Parties.—Where the alleged fraudulent grantor is made defendant in a bill to set aside a conveyance as made without consideration and in fraud of creditors, but his citizenship is not set forth on record, the bill must be remanded or dismissed, in which case costs are allowed in this court to the codefendant, he being the person charged with having received the fraudulent conveyances.⁴²

5. **ON MODIFICATION**.—Where a decree of dismissal by the circuit court was general when it should have been without prejudice, this court may order the decree below to be modified, adjudging the costs of this court to the appellee.⁴³

B. Right to and Liability for Costs—1. **WHO ENTITLED TO COSTS**.—Congress has repeatedly recognized the right of the prevailing party to costs in this and the circuit courts.⁴⁴

2. **WHO LIABLE FOR COSTS**—a. *In General*.—Only parties to the decree can be made responsible for costs.⁴⁵

In some cases each party is decreed to pay one half the costs in this court.⁴⁶

Upon Decision of New or Novel Questions.—Thus, where the question before the circuit court is a new one upon which there was wide room for difference of opinion, and neither court nor parties had any precedents to guide or direct them as to the mode of proceeding, no costs should be decreed to either party against the other, but each party will be decreed to pay his own costs on the appeal.⁴⁷

Equally Divided between Parties.—Frequently the costs are equally divided between the parties.⁴⁸

40. **No actual controversy existing**.—*Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. Ed. 572.

41. **Dismissal upon the merits**.—*Rogers v. Durant*, 106 U. S. 644, 27 L. Ed. 303.

42. **Suit to set aside fraudulent conveyance**.—*Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612.

43. **Costs on modification of decree of dismissal**.—*Gregory v. Boston Safe Deposit, etc., Co.*, 144 U. S. 665, 36 L. Ed. 585.

44. **Who entitled to costs**.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

45. **Only parties to decree liable for costs**.—Where a motion was made to dismiss an appeal as to all the parties named in the citation, who were not parties to the decree, and the names in the citation are found on the record, as parties to one or more of the several decrees entered, the court held that the parties to the decrees only can be made responsible for the costs of this appeal. *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398.

Appeals from District of Columbia.—Where a decree of the court of appeals

of the District of Columbia affirming a decree of the supreme court of the district in a suit to construe a will, is affirmed by this court on appeal from the court of appeals, costs will be taxed against the unsuccessful appellants, where the executor did not appeal from the original decree nor from the decree of affirmance by the court of appeals. *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

46. **One-half of costs decreed to each party**.—*Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110; *Pearson v. Duane*, 4 Wall. 605, 18 L. Ed. 447; *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876; *The Sterling and The Equator*, 106 U. S. 647, 27 L. Ed. 98; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231.

47. **Costs upon deciding cases of first impression**.—*The Scotland*, 105 U. S. 24, 36, 26 L. Ed. 1001.

48. **Costs may be equally divided between the parties**.—*McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876.

Where both parties have appealed from a decree of the circuit court, and each of them has succeeded in obtaining a re-

Each Liable to Pay His Own Costs.—In still others, each party is decreed to pay his own costs on the appeal,⁴⁹ as where both parties have appealed from a decree on grounds which have not been sustained.⁵⁰

Refusal to Award Costs to Either Party.—In a few instances the court has refused to award costs to either party,⁵¹ as where the court has been misled by counsel into rendering a judgment that they might have the satisfaction of reversing it.⁵²

b. *Appeals in Forma Pauperis.*⁵³—It is well settled that the act of July 20, 1892, which provides when a plaintiff may sue in forma pauperis, does not apply to an appellate proceeding. And the rule is the same whether leave is sought to prosecute writs of error to a state court, or for the review of a judgment or decree of a court of the United States, and the same ruling must necessarily obtain in the circuit courts of appeals, because the statute applies only to a court of original jurisdiction.⁵⁴ Hence, the circuit court of appeals has no authority to permit the prosecution of a writ of error in forma pauperis.⁵⁵

3. **THE UNITED STATES.**—The rule of court provides that in no case whether of dismissal, reversal or affirmance, shall costs be allowed in this court for or against the United States.⁵⁶ If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs.⁵⁷

versal of an important part of the decree, the costs of the appeal will be equally divided between them. *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 117 U. S. 406, 29 L. Ed. 928; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963.

Where there is a collision between ships employed in navigation, and it appears that both vessels were in fault, the damages and the costs in both of the courts below should be equally apportioned between the two vessels. *The America*, 92 U. S. 432, 23 L. Ed. 724, citing *The Schooner Catharine v. Dickinson*, 17 How. 170, 173, 15 L. Ed. 233; *Rogers v. The St. Charles*, 19 How. 108, 109, 15 L. Ed. 563; *The Maria Martin*, 12 Wall. 31, 43, 20 L. Ed. 251; *The Brig Morning Light*, 2 Wall. 550, 557, 17 L. Ed. 862. See the title **COLLISION**.

49. **Each party may be decreed to pay his own costs.**—*Rogers v. Durant*, 106 U. S. 644, 27 L. Ed. 303; *The Sterling and The Equator*, 106 U. S. 647, 27 L. Ed. 98.

Where there is a suit in admiralty against two vessels equally in fault for damages sustained by a collision, and they are condemned in solido for the whole amount of the costs, the decree should not be against both vessels for the full amount of the loss, but it should be modified so as to be against the two and their respective stipulators severally, each for one-half of the entire damage and costs, etc. But where it does not appear from the record that the attention of the court below was called to this objection to the form of the decree, each party will be required to pay his own costs in this court. *The Sterling and the Equator*, 106 U. S. 647, 27 L. Ed. 98.

50. **The North Star**, 106 U. S. 17, 27 L. Ed. 91.

51. **May refuse to award costs to either party.**—*The Niagara v. Van Pelt*, 154 U. S. 533, 15 L. Ed. 152; *Coggeshall v. Harts-horn*, 154 U. S., appx. 533, 15 L. Ed. 261; *Plano Mfg. Co. v. Graham*, 140 U. S. 694, 35 L. Ed. 599.

52. *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. Ed. 685.

53. See generally, the title **COSTS**.

54. **No appeals to this court in forma pauperis allowed.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178, citing *Galloway v. State Nat. Bank*, 186 U. S. 177, 46 L. Ed. 1111 (error to state court).

55. **Appeals in forma pauperis to court of appeals.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178.

The court of appeals has no power to permit the prosecution of a writ of error in forma pauperis, unless derived from statute, and we find no statute authorizing any order to that effect. Costs are the creatures of statute, and it is settled that authority to permit prosecution in forma pauperis must be given by statute. *Bradford v. Southern R. Co.*, 195 U. S. 243, 251, 49 L. Ed. 178.

56. **The United States.**—Rule 24, § 4, 21 How. xiv.

United States never pay costs.—Rule 24, § 4, 21 How. XIV; *United States v. Barker*, 2 Wheat. 395, 4 L. Ed. 271; *United States v. Hooe*, 3 Cranch 73, 91, 92, 2 L. Ed. 370; *The Antelope*, 12 Wheat. 546, 550, 6 L. Ed. 723; *United States v. Ringgold*, 8 Pet. 150, 163, 8 L. Ed. 899; *United States v. Boyd*, 5 How. 29, 51, 12 L. Ed. 36; *Stanley v. Schwalby*, 162 U. S. 255, 272, 40 L. Ed. 960.

57. *United States v. Boyd*, 5 How. 29, 12 L. Ed. 36; *United States v. Barker*, 2 Wheat. 395, 4 L. Ed. 271; *The Antelope*, 12 Wheat. 546, 6 L. Ed. 723; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977.

4. AS AFFECTED BY NEGLIGENCE OR OMISSION OF PARTY.—A party may, by his own acts and omissions deprive himself of the right to costs, or incur liability for them in this court.⁵⁸ Thus, if the plaintiff in his pleadings falsely overstates the amount in controversy, he cannot, when his judgment is obtained, recover costs, and at the discretion of the court he may be adjudged to pay costs.⁵⁹ And another rule growing out of the general rule just stated is that where the error in the judgment is of such a nature that it would have been corrected by the lower court, had its attention been called to it, the costs must be borne by the appellants.⁶⁰

A receiver appellant may render himself liable to pay the costs of appellate proceedings by his admissions.⁶¹

5. WHERE JUDGMENT SILENT AS TO COSTS.—Where the judgment is silent as to costs in this court, neither party recovers his costs here, but must pay, if he has not already, whatever is properly chargeable to him according to law and the practice.⁶²

6. ASSIGNEES.—Costs cannot properly be taxed to the assignee in bankruptcy before he became a party to the suit. But, if it was the assignee that removed the cause to the federal supreme court, he is liable for the costs in this court.⁶³

C. Particular Items—1. PRINTING—*a. In General.*—There can be no allowance of costs for printing, where there is no rule authorizing it.⁶⁴

b. Printing the Record.—See ante, "The Record or Transcript," IX, H.

c. Printing Briefs.—It has never been the practice of this court, in cases brought before it under its appellate jurisdiction, to tax as costs disbursements by counsel or parties for printing briefs.⁶⁵ And the same rule applies in cases within our original jurisdiction.⁶⁶

d. Printing Objections.—In a case within our original jurisdiction, disbursements for printing objections to the filing of pleadings are taxable as costs of printing the record.⁶⁷

58. As affected by negligence or omission of party.—Special circumstances of an alleged misleading of the court and opposite counsel by a statement of counsel, considered as a reason for refusing to reverse a judgment manifestly erroneous, and found to be insufficient. But though the judgment is reversed and there does not appear to have been any intent to deceive, the plaintiff in error, under the circumstances, recovers no costs in this court. *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. Ed. 685.

59. Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719, citing *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900.

The damages claimed in the writ and declaration were, unquestionably, the sum in controversy. This is not an open question. It has been often decided, that if the plaintiff shall recover less than \$500, it cannot affect the jurisdiction of the (circuit) court; a greater sum being claimed in his writ. But in such case, the plaintiff does not recover his costs; and at the discretion of the court, he may be adjudged to pay costs. *Gordon v. Longest*, 16 Pet. 97, 98, 104, 10 L. Ed. 900.

60. Where the error in the judgment is a mere matter of interest, not affecting the real merits of the controversy, and which would have been corrected by the lower court, had its attention been called to it, the costs of this appeal must be

borne by appellants. *Spalding v. Mason*, 161 U. S. 375, 396, 40 L. Ed. 738.

61. Liability of receiver to pay costs.—*Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 43 L. Ed. 941.

62. Where judgment silent as to costs.—*Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

63. Costs cannot be taxed against assignees.—*Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903.

64. Right to allow costs for printing.—The cost of a printed state of the case for the use of the judges cannot be taxed as costs. Nor is a copy of the record a part of the taxable costs. *Jennings v. The Brig Perseverance*, 3 Dall. 336, 1 L. Ed. 625, 626.

65. Costs of printing briefs.—*Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

66. *Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

67. Costs of printing objections may be taxed as costs.—*Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

A proceeding in this court, under its original jurisdiction, against a judge of an inferior court of the United States to obtain a writ of mandamus requiring him to proceed in a cause pending in court before him, is a civil cause, and a docket fee is, therefore, taxable in favor of the attorney of the prevailing party as part of the costs. The objections to the filing of the reply were in the nature of pleadings

2. **DOCKET FEES.**—In a proceeding in this court under its original jurisdiction, a docket fee is taxable in favor of the attorney of the prevailing party as part of the costs.⁶⁸

3. **COUNSEL FEES.**—In an admiralty case, counsel fees have been allowed as expenses attending the prosecution of an appeal to the circuit court and to the supreme court.⁶⁹

4. **TRANSCRIPT OR COPY OF THE RECORD.**—A copy of the record is not a part of the taxable costs of the suit, to be recovered by one party against the other; but the party who requests the copy, must pay the clerk for it.⁷⁰

Fees for Exemplifications and Copies of Papers.—It has been held in a number of cases that § 983, providing that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by the judge or clerk of the court," does not include a transcript of the evidence for the personal use of counsel in preparing a case for an appellate court.⁷¹ Accordingly, fees for a transcript of the record used by the plaintiff in preparing his bill of exceptions on a former appeal, are not properly taxable as costs.⁷²

But the rule of court provides that in cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.⁷³

D. Taxation.—1. **IN GENERAL.**—When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.⁷⁴ For where the judgment is silent as to costs in this court, neither party recovers his costs here, but must pay, if he has not already, whatever is properly chargeable to him according to law and the practice.⁷⁵

2. **TIME OF TAXING COSTS.**—The costs are perhaps never in fact taxed until after the judgment is rendered; and in many cases, cannot be taxed until afterwards. And where this is the case, the amount ascertained is usually, under the direction of the court, entered nunc pro tunc as a part of the original judgment.⁷⁶

Taxation Nunc Pro Tunc.—It is proper for circuit courts to allow costs to be taxed, nunc pro tunc, after the receipt of the mandate from this court.⁷⁷

3. **RETAXATION.**—A motion to retax the costs will be granted, where the decree of this court has been misinterpreted.⁷⁸

E. Proceedings for Enforcement.—**By Attachment.**—Upon the clerk of

in the cause. The disbursements for printing such objections are, therefore, taxable as costs of printing the record. *Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

68. **Docket fee may be taxed as costs.**—*Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

69. **Counsel fees.**—*Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688.

70. **Transcript or copy of the record.**—*Caldwell v. Jackson*, 7 Cranch 276, 3 L. Ed. 341.

71. **Fees for exemplifications and copies of papers.**—*Pine River Logging, etc., Co. v. United States*, 186 U. S. 279, 297, 46 L. Ed. 1164.

72. *Pine River Logging, etc., Co. v. United States*, 186 U. S. 279, 297, 46 L. Ed. 1164.

73. Rule 24, 3 Sup. Ct. Rep. XIII.

74. **Manner of taxing costs stated.**—Rule No. 24, § 6, 21 How. XIII.

75. *Osborn v. United States*, 131 U. S., appx. cxxxvii, 23 L. Ed. 871.

76. **Time of taxing costs.**—*Sizer & Many*, 16 How. 98, 104, 14 L. Ed. 861.

77. *Sizer & Many*, 16 How. 98, 14 L. Ed. 861.

78. **Retaxation of costs may be allowed.**—*Sully v. American Nat. Bank*, 179 U. S. 68, 45 L. Ed. 89.

Where a bill of costs is taxed by the clerk under the order of the court, either party may file exceptions; but if both parties, by written agreement, waive all exceptions, and the court confirms the report it is too late to object; therefore a motion to file a bill of review upon a subject of costs, and also for a retaxation of them, will be overruled. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said fees.⁷⁹ This court has power, and it is its duty, to issue writs of attachment, for costs here against persons who intervene in this court by leave of court, and also against their sureties, in bonds for costs furnished by them by order of court on intervening.⁸⁰

By Execution.—And the court below may issue execution therefor upon the coming down of the mandate from this court reversing its judgment.⁸¹

F. Reversal.—An improper allowance of costs will not necessitate a reversal of the judgment of the court below, when it may be deducted from the judgment.⁸²

APPEAL BONDS.—See the title APPEAL AND ERROR, ante, p. 333.

79. Proceedings for enforcement.—Rule of Court No. 10, § 7, 21 How. IX.

80. Craig v. Leitensdorfer, 127 U. S. 764, 32 L. Ed. 322.

81. Issuance of execution by court below.—Riddle v. Mandeville, 6 Cranch 86,

3 L. Ed. 161.

82. No reversal for improper allowance of costs.—Pine River Logging, etc., Co. v. United States, 186 U. S. 279, 297, 46 L. Ed. 1164.

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BANKS AND BANKING; CONFLICT OF LAWS; CONSTITUTIONAL LAW; CORPORATIONS; COURTS; DIVORCE; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS; GUARDIAN AND WARD; INFANTS; JUDGMENTS AND DECREES; JURISDICTION; PARTIES; PARTNERSHIP; PLEADING; REMOVAL OF CAUSES; STATES; VENUE.

I. Definition and Classification.

Definition.—An appearance is a coming into court as party to a suit whether as plaintiff or defendant. But ordinarily by the term appearance is meant the formal proceedings by which a defendant submits himself to the jurisdiction of the court.¹

Classification.—An appearance may be of the following kinds:

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event.

General.—A simple and absolute submission to the jurisdiction of the court.

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit.

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff.

Voluntary.—That which is made in answer to a subpoena or summons, without process.²

II. Persons Who May Appear.

A. Natural Persons Generally.—Natural persons may appear in court either by themselves, or by their attorney.³

B. Infants.—The appearance of an infant to a suit brought against him is not a judicial act, but will be reversed on error, after he attains the age of twenty-one.⁴

1. **Definition.**—Bouv. L. Dic., p. 150.

2. **Classification.**—1 Bouv. L. Dic., p. 150.

3. **Natural persons.**—Osborn v. Bank, 9 Wheat. 738, 828, 6 L. Ed. 204; Shelton v. Tiffin, 6 How. 163, 186, 12 L. Ed. 387; Sliver v. Shelback, 1 Dall. 165, 1 L. Ed. 84; Harris v. Hardeman, 14 How. 334, 399, 14 L. Ed. 444; Habich v. Folger, 20 Wall. 1, 7, 22 L. Ed. 307. See post, "Attorney," II, J.

"Any individual may waive process, and appear voluntarily." Shelton v. Tiffin, 6 How. 163, 186, 12 L. Ed. 387.

4. **Infants.**—Sliver v. Shelback, 1 Dall. 165, 1 L. Ed. 84.

The appointment of a guardian to defend the suit, and the taking his examination, when a fine is to be levied, a recovery to be suffered, or a statute staple, etc., to be acknowledged, are judicial acts. The authorities to the effect that after his full age, the party cannot take advantage of his previous infancy, appear to be restricted to real actions, and to fines and recoveries, which are, in their operation, mere modes of assurance. In other cases, a judgment against an infant may be re-

versed after full age, and the fact must be tried per pais and not by inspection. Sliver v. Shelback, 1 Dall. 165, 166, 1 L. Ed. 84.

California.—Sections 372 and 373 of the California Code of Civil Procedure providing for the appearance of an infant party to an action, have reference to civil actions as distinguished from special proceedings. Robinson v. Fair, 128 U. S. 53, 32 L. Ed. 415.

Probate proceedings are not civil actions within the meaning of § 372 of the California Civil Code providing for the appearance of an infant party to such actions. Robinson v. Fair, 128 U. S. 53, 32 L. Ed. 415.

Under §§ 372 and 373 of the California Code of civil procedure an appearance in behalf of minor defendants to partition proceedings—who are not shown to have had, at the time, any general or special guardian in the county or state—by an attorney, appointed by the court to represent them, is sufficient to bring them into court, a suit for partition in a probate court being a special proceeding. Robinson v. Fair, 128 U. S. 53, 32 L. Ed. 415.

C. Guardian.—See ante, "Infants," II, B. See the title GUARDIAN AND WARD.

D. Husband and Wife.—See post, "Persons Not Made Party," II, H. See the title HUSBAND AND WIFE.

E. Partners—1. ON HIS OWN BEHALF.—If a suit be brought against a partnership, any one of the partners may enter his appearance and, in his own defense, show, if he can, that the firm is not liable.⁷

2. ON BEHALF OF COPARTNER—*a. Pending Partnership.*—The law does not seem entirely clear that a partner may enter an appearance for his copartners without special authority, even during the continuance of the firm.⁸

b. After Dissolution.—After the dissolution of a partnership, one partner

7. On his own behalf.—Hall v. Lanning, 91 U. S. 160, 165, 23 L. Ed. 271.

8. Pending partnership.—Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Hills v. Ross, 3 Dall. 331, 1 L. Ed. 623. See D'Arcy v. Ketchum, 11 How. 174, 13 L. Ed. 648. See post, "After Dissolution," II, E, 2, b.

The supreme court cannot affirm the decree, against persons who were not before the court that pronounced it; and the record must show, that they actually did appear. A bare implication, the entitling of the plea, or a general statement, that one of the partners acts on behalf of them all, is not sufficient; for, though partners, in a course of trade, may bind each other, they cannot compel each other to appear to suits, nor undertake to represent each other in courts of law. Chase, Justice. Hills v. Ross, 3 Dall. 331, 1 L. Ed. 623.

"It is well known that by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to outlawry against him before he can prosecute the action; and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. 1 Chitty's Plead. 42; Tidd's Prac., ch. VII, p. 423, 9th ed. A shorter method by distringas in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbrous and dilatory proceeding should be necessary in the case of partners, if one partner has a general authority to appear in court for his copartners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted; but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually

served." Hall v. Lanning, 91 U. S. 160, 166, 23 L. Ed. 271.

"It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his copartners during the continuance of the firm, has been asserted by several text writers. Gow on Partn. 163; Collyer on Partn., § 441; Parsons on Partn. 174, note. But the assertion is based on somewhat slender authority. We find it first laid down in Gow, who refers to a dictum of Sergeant Dampier, made in the course of argument (7 T. R. 207), and to the case of Morley v. Strombong, 3 Bos. & Pull. 254, where the court refused to discharge partnership goods taken on a distringas to compel the appearance of an absent partner, unless the partner who was served would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear in suits for his copartner; for, in a subsequent case (Goldsmith v. Levy, 4 Taunt. 299), a distringas, issued under the same circumstances, was discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his copartner. These seem to be the only authorities relied on." Hall v. Lanning, 91 U. S. 160, 166, 23 L. Ed. 271.

"These authorities, and one or two American cases which follow them, refer only to appearances entered whilst the partnership was subsisting; and it is pertinent also to add, that they only refer to the validity and effect of judgments in the state or country in which they are rendered." Hall v. Lanning, 91 U. S. 160, 167, 23 L. Ed. 271.

"Where an appearance has been entered by authority of one of several copartners on behalf of all, it may well be that the courts of the same jurisdiction will be slow to set aside the judgment, unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages." Hall v. Lanning, 91 U. S. 160, 168, 23 L. Ed. 271. See, also, D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648.

has no implied authority to voluntarily enter the appearance of a copartner to a suit brought against the firm.⁹

F. Receiver.—a receiver appointed by a state court cannot appear in an action in a foreign jurisdiction without the express authority of the court which appointed him.¹⁰

G. Corporation.—See post, "Authority to Appear," II, J, 2; "Corporation," III, A, 3.

H. Persons Not Made Party.—A person who has not been named as defendant to a bill may appear at the hearing with the consent of all the parties to the cause.¹²

9. After dissolution.—Hall *v.* Lanning, 91 U. S. 160, 169, 23 L. Ed. 271. See *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Karthauss v. Ferrer*, 1 Pet. 232, 7 L. Ed. 121; *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 175.

A member of a partnership, residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought authorized such judgment. Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271.

"Appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may undoubtedly, in his own defense, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question whether they were partners or not when the debt was incurred as on that of the validity of the debt, would, as it seems to us, be carrying the power of a partner, after a dissolution of the partnership, to an unnecessary and unreasonable extent." Hall *v.* Lanning, 91 U. S. 160, 165, 23 L. Ed. 271.

"In the case of Bell *v.* Morrison, 1 Pet. 351, 7 L. Ed. 175, this court decided, upon elaborate examination, that, after a dissolution of the partnership, one partner cannot by his admissions or promises, bind his former copartners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt." Hall *v.* Lanning, 91 U. S. 160, 169, 23 L. Ed. 271.

"On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his copartners in a suit brought against the firm. It may, in some in-

stances, be convenient that one partner should have such authority; and, when such authority is desirable, it can easily be conferred, either in the articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread of impending evil, than that of accepting service of process for their former associates, and of rendering them liable, without their knowledge, to the chances of litigation which they have no power of defending." Hall *v.* Lanning, 91 U. S. 160, 170, 23 L. Ed. 271.

"In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners. Duncan *v.* Tombeckbee Bank, 4 Port. 184; Demott *v.* Swaim, 5 Stew. & Port. 293." Hall *v.* Lanning, 91 U. S. 160, 171, 23 L. Ed. 271.

Massachusetts.—"The point was raised in Phelps *v.* Brewer, 9 Cush. 390; but the court, being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it." Hall *v.* Lanning, 91 U. S. 160, 170, 23 L. Ed. 271.

South Carolina.—"In the case of Loomis & Co. *v.* Pearson & McMichael, Harper (S. C.), 470, it was decided, that, after a dissolution of partnership, one partner cannot appear for the other; although it is true that it had been previously decided by the same court, in Haslet *v.* Street, 2 McCord 311, that no such authority exists even during the continuance of the partnership." Hall *v.* Lanning, 91 U. S. 160, 171, 23 L. Ed. 271.

10. Receiver.—Pendleton *v.* Russell, 144 U. S. 640, 36 L. Ed. 574.

12. Persons not made party.—Anderson *v.* Watt, 138 U. S. 694, 705, 34 L. Ed. 1078. See the titles INTERVENTION; PARTIES.

A foreclosure suit was brought against

I. In Suits in Rem.—In suits in rem, if a claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in; it is a waiver of the preliminary inquiry as to the claimant's right to appear, in virtue of his proprietary interest in the thing in controversy, or of his obligation to put in his claim, upon oath, or prove his authority, and an admission that the claimant is rightly in court and capable of contesting the merits.¹³

J. Attorneys—1. **IN GENERAL.**—A party may appear by attorney.¹⁴

2. **AUTHORITY TO APPEAR**—a. *Necessity.*—No man has a right to appear as the attorney of another, without the authority of that other. And an attorney who appears for a corporation must receive the authority of the corporation to enable him to represent it.¹⁵

b. *Form and Requisites.*—The authority of a corporation, to enable an attorney at law to appear for it, need not be under seal.¹⁶

c. *Presumption as to Authority.*—Presumptively, an attorney of a court of record who appears for a party has authority to appear for him.¹⁷

d. *Production of Authority.*—In ordinary cases, the authority must be produced, because there is, in the nature of things, no prima facie evidence that one man is in fact the attorney of another.¹⁸

The case of an attorney at law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is some-

a married woman. The complainants did not originally, or by amendment after answer, in terms make the husband of the defendant a party to their bill, but he joined his wife in an answer to the bill. To this answer the complainants filed their replication describing the answer as that of those two defendants. The names of both parties defendant were set forth in the titles of the decree. The bond of appeal was signed by each of them, as principals; recited that the appeal had been taken by both; and was conditioned for the prosecution of the appeal by both. The husband appears to have been a necessary party. It was held that upon this record the husband must be held to have become a party and the effect of what was done was such as bound him by the decree; and in this instance the objection of want of consent to his appearing at the hearing cannot be taken. *Anderson v. Watt*, 138 U. S. 694, 704, 34 L. Ed. 1078.

13. In suits in rem.—*United States v. 422 Casks of Wine*, 1 Pet. 547, 7 L. Ed. 257.

14. In general.—*Habich v. Folger*, 20 Wall. 1, 7, 22 L. Ed. 307; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Osborn v. Bank*, 9 Wheat. 738, 828, 6 L. Ed. 204; *Shelton v. Tiffin*, 6 How. 163, 186, 12 L. Ed. 387; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Sliver v. Shelback*, 1 Dall. 165, 1 L. Ed. 84.

"At the common law, there could be no appearance in any suit, real, personal or mixed, whether as plaintiff or defendant, but in proper person; except where the King, by virtue of his prerogative, granted his writ for an attorney; and where an infant appeared to defend a suit by his guardian." *Sliver v. Shelback*, 1 Dall. 165, 1 L. Ed. 84.

The statute of West. II, ch. 10, enables all persons of full age to sue and defend suits by attorney. *Sliver v. Shelback*, 1 Dall. 165, 1 L. Ed. 84.

Attorney for the United States.—See post, "Special Appearance," III, B.

15. Necessity.—*Osborn v. Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204.

16. Form and requisites.—*Osborn v. Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204.

In regard to the sufficiency, in itself, of a power to enable an attorney to represent a corporation, the court said: "It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted, that this authority must be under seal. On the contrary, the principle decided in the cases of the *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351, is supposed to apply to this case, and to show that the seal may be dispensed with." *Osborn v. Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204.

17. Presumption as to authority.—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60; *Shelton v. Tiffin*, 6 How. 163, 186, 12 L. Ed. 387; *Ritchie v. McMullen*, 159 U. S. 235, 40 L. Ed. 133.

"When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority." *Hill v. Mendenhall*, 21 Wall. 453, 454, 22 L. Ed. 616. See post, "Production of Authority," II, J, 2, d.

18. Osborn v. Bank, 9 Wheat. 738, 829, 6 L. Ed. 204.

what different. The power must indeed exist, but its production has not been considered as indispensable.¹⁹ The warrant of attorney need not be spread on the record, to enable counsel to appear for a corporation; and if the dismissal of the suit be not ordered, the consent of the corporation will be presumed, after verdict.²⁰

Not Ground for Reversal That Authority Not Apparent of Record.—Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of reversal for error, in an appellate court, that such authority does not appear on the face of the record; if a defect at all, it is a formal defect, which is cured by the statute of jeofails, and the 32d section of the judiciary act of 1789, ch. 20.²¹

e. *Dismissal Where Want of Authority Appears.*—If in its progress the court shall perceive that the suit is brought without authority the proper course would seem to be to dismiss it; not to render judgment for the defendant, which might, where no special breach is assigned, bar any other action.²²

3. UNAUTHORIZED APPEARANCE—a. *Presumption.*—See ante, "Presumption as to Authority," II, J, 2, c; post, "Against Foreign Judgment," II, J, 3, d, (2).

b. *Effect.*—A defendant is not bound by an unauthorized appearance, and may be relieved against a judgment rendered against him on such appearance.²⁴

19. **Attorney at law.**—*Osborn v. Bank*, 9 Wheat. 738, 830, 6 L. Ed. 204.

"Certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of anyone of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union." *Osborn v. Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204.

20. *Washington v. Young*, 10 Wheat. 406, 6 L. Ed. 352; *Osborn v. Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204.

Corporation.—"The argument supposes some distinction, in this particular, between a natural person and a corporation; but the court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived, why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required, if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear, without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a

warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the court. The usage, then, is as full authority for the case of a corporation, as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the court, in a case in which no doubt of the legality of the appearance had ever been suggested." *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204.

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney, under the corporate seal. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204. See, also, the title CORPORATIONS.

21. **A formal defect cured by statute of jeofails.**—*Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204. See the titles AMENDMENTS, vol. 1, p. 288; APPEAL AND ERROR, vol. 1, p. 333.

Court of Chancery.—"No reason is perceived why the courts of chancery should be more rigid in exacting the exhibition of a warrant of attorney than a court of law; and since the practice has, in fact, been the same in both courts, an appellate court ought, * * * to be governed in both by the same rule." *Osborn v. Bank*, 9 Wheat. 737, 831, 6 L. Ed. 204.

22. *Washington v. Young*, 10 Wheat. 406, 6 L. Ed. 352. See, generally, the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

24. *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52; *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387; *United States v. Throckmorton*, 98 U. S. 61, 66, 25 L. Ed. 93; *Hatfield v. King*, 184 U. S. 162, 46 L. Ed. 481. See

c. *Ratification*.—The act of an attorney in entering an unauthorized appearance for a defendant may be subsequently ratified by such defendant.²⁵

d. *Mode of Relief*—(1) *Against Domestic Judgment*.—Domestic judgments, undoubtedly, if regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, will not necessarily be set aside; but the defendant will sometimes be left to his remedy against the attorney in an action for damages; otherwise, the plaintiff might lose his security by the act of an officer of the court. But, even in this case, it is the more usual course to suspend proceedings on the judgment, and allow the defendants to plead to the merits, and prove any just defense to the action.²⁶

Jurisdiction.—Where the proceedings are regular upon their face, and extrinsic evidence required to show their invalidity, a court of equity is the proper tribunal to afford effectual relief against a judgment or decree based upon an unauthorized and fraudulent appearance of the attorney for the defendant.²⁷

A circuit court of the United States may, if the citizenship of the parties permits, grant relief against a judgment in a state court, which was obtained upon a fraudulent and unauthorized appearance of the attorney for the defendant. The granting of such relief would not be an interference with the jurisdiction of the state court.²⁸

Audita Querela, or Petition and Motion.—If the judgment is voidable for want of notice, and false statements on its face, "that the parties appeared by their attorneys," etc., it may be set aside by audita querela, or on petition and motion in the usual way.²⁹

Relief on Appeal.—Relief against a judgment based upon an unauthorized appearance may be granted on appeal.³⁰

post, "Mode of Relief," II, J, 3, d. And see, generally, the title JUDGMENTS AND DECREES.

25. Ratification.—Robb v. Vos, 155 U. S. 13, 39 L. Ed. 52.

Where an attorney entered a fraudulent and unauthorized appearance for defendants and they, after knowledge of the facts appeared in an action to which they had been summoned, and claim the proceeds of a judicial sale, founded upon the prior proceedings; such defendants are estopped from proceeding in equity to annul the sale on the ground that the attorney had no authority to appear for them in the proceedings under which the sale was made. The fact that defendants withdrew their pleading in the proceedings for the sale, and filed a demurrer on the ground that they were not necessary parties, which was sustained, and they dismissed, with their costs, does not affect the estoppel. Robb v. Vos, 155 U. S. 13, 39 L. Ed. 52.

26. Domestic judgments.—Hall v. Lanning, 91 U. S. 160, 167, 23 L. Ed. 271; Thompson v. Whitman, 18 Wall 457, 21 L. Ed. 897. See Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Knowles v. Logansport Gaslight Co., 19 Wall. 58, 22 L. Ed. 70. See the title JUDGMENTS AND DECREES.

Where an attorney fraudulently or without authority appears for or assumes to represent a party and connives at his defeat, there having never been a real contest in the trial or hearing of the case,

a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. United States v. Throckmorton, 98 U. S. 61, 66, 25 L. Ed. 93. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

27. Jurisdiction.—Robb v. Vos, 155 U. S. 13, 39 L. Ed. 52.

28. Circuit court of United States.—Robb v. Vos, 155 U. S. 13, 39 L. Ed. 52, citing Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, and Arrowsmith v. Gleason, 129 U. S. 86, 32 L. Ed. 630.

29. Audita querela, or petition and motion.—Landes v. Brant, 10 How. 348, 371, 13 L. Ed. 449; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897.

30. Relief on appeal.—Hatfield v. King, 184 U. S. 162, 46 L. Ed. 481.

Where it is shown on appeal to the supreme court of the United States from a decree of a circuit court that the appellants were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights, the case was remanded to the circuit court with instructions to set aside the decree as well as the appearance of the defendants and to proceed thereafter in accordance with law. The question was raised in the appellate court by motion supported by affidavits. The evidence was principally in ex parte affi-

(2) *Against Foreign Judgment.*—When a judgment rendered in one state is sued upon in another, a defendant, for whom an attorney at law has appeared in the court rendering such judgment may prove that, having never been served with process, such attorney had no authority to appear for him. If such showing is made, the judgment will be regarded as null and void for want of jurisdiction of the person; and the action must fail, since a judgment obtained under such circumstances has no effect outside of the state in which it was rendered.³¹

Record Only Prima Facie Evidence.—If the record recites that the defendant appeared, it is only prima facie evidence of such fact and may be contradicted.³²

davits and clearly show that the counsel was not authorized to appear for one of the defendants. *Hatfield v. King*, 184 U. S. 162, 46 L. Ed. 481. See, also, *Hatfield v. King*, 186 U. S. 178, 46 L. Ed. 112. See the title APPEAL AND ERROR, vol. 1, p. 333.

31. Foreign judgment.—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Hill v. Lanning*, 91 U. S. 160, 167, 23 L. Ed. 271; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. Ed. 565; *Shelton v. Tiffin*, 6 How. 163, 164, 12 L. Ed. 387; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444. See the title FOREIGN JUDGMENTS.

"In any other state, however, except that in which the judgment was rendered * * * the fact could be shown, notwithstanding the recitals of the record; and the judgment would be regarded as null and void for want of jurisdiction of the person." *Hill v. Lanning*, 91 U. S. 160, 167, 23 L. Ed. 271, citing *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70.

In *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, it is said: In *Landes v. Brant*, 10 How. 348, 13 L. Ed. 449, a judgment relied on by the defendant was rendered in the territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the parties aforesaid by their attorneys," etc. The court pertinently remarked, p. 371, that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, "and could not be impeached collaterally." Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant. The re-

mark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decisions, and was in effect overruled by the subsequent cases of *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648, and *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761.

Where a citizen of Virginia sued, in the circuit court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity. *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387.

In *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387, the question was as to the validity of a judicial sale. It appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvertently and without authority. It was held that such defendant is not bound by the proceedings; and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection." The judgment, therefore, against him must be considered a nullity, and consequently did not authorize the seizure and sale of his property. *Hatfield v. King*, 184 U. S. 162, 165, 46 L. Ed. 481.

32. Record prima facie evidence.—*Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70; *Hill v. Mendenhall*, 21 Wall. 453, 455, 22 L. Ed. 616; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628; *Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. Ed. 565; *German Sav., etc., Society v. Dormitzer*, 192 U. S. 125, 48 L. Ed. 373; *Hill v. Lanning*, 91 U. S. 160, 165, 23 L. Ed. 271.

If the defendant were estopped from asserting the contrary against the allegation contained in the record, it would, in effect,

Manner of Disproving Authority—Pleading.—Though the party for whom an attorney at law has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear, yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading, is the equivalent of such plea.³³

K. State.—See the title STATES.

enable the plaintiff to declare to the defendant—"The paper declared on is a record because it says you appeared and you appeared because the paper is a record." *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Thompson v. Whitman*, 18 Wall. 457, 467, 21 L. Ed. 897; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Hall v. Lanning*, 91 U. S. 160, 165, 23 L. Ed. 271; *Pennoyer v. Neff*, 95 U. S. 714, 730, 24 L. Ed. 565.

Suit was brought in the circuit court of Louisiana by citizens of Virginia, against John M. Perry, a citizen of Louisiana, and L. P. Perry, of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants, and defense was made to the action. It was held that this being done by a regularly practicing attorney, it affords prima facie evidence, at least, of an appearance in the suit by both the defendants. *Shelton v. Tiffin*, 6 How. 163, 186, 12 L. Ed. 387.

John M. P. acted in some matters as the agent of L. P. P.; but it did not appear that he had authority to waive process and defend the suit. C., the attorney, testified, that he had no recollection of having received any authority directly or indirectly from L. P. P., or from anyone in his behalf, to defend the suit. He received a letter from John M. P., informing him that he would see upon the records of the court of the United States a suit commenced against him, and others by M. and B., and he wished to employ him to defend it. C. further testified that he regards his appearance on behalf of any other person than John M. P. in said suit as an inadvertence on his part. It was held that this evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. Had the entry been that L. P. P. came personally into court and waived process, it could not have been controverted. But the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. P., may be explained. *Shelton v. Tiffin*, 6 How. 163, 186, 12 L. Ed. 387.

33. Manner of disproving authority.—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616. See *Maxwell v. Stewart*, 21 Wall. 71, 72, 22 L. Ed. 564; *German Sav. etc., Society v. Dormitzer*, 192 U. S. 125, 127, 48 L. Ed. 373.

"In *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70, the issue was directly made by an averment of jurisdiction in the complaint and a denial in the answer, and in *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, by plea and replication." *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

The writ was returned, "not served." Thereupon an attachment was issued and levied on the defendant's property. A bond was then entered into by which the property was released. The judgment entered recited that the plaintiff appeared by his attorney, H., and the defendant by his attorneys M. and S. There was no plea alleging that the attorneys who were represented by the record of the judgment to have appeared for the defendant were not authorized to appear. It was held, that the trial court had jurisdiction. *Maxwell v. Stewart*, 21 Wall. 71, 72, 22 L. Ed. 564.

Allegation of want of authority.—In a suit on a foreign judgment the answer expressly admitted that certain attorneys entered, or undertook to enter, the appearance of the defendant in said action; but it did not allege that the attorneys were not authorized to enter the defendant's appearance in that action. It was held that in the absence of allegations of want of authority they must be taken to have been authorized by him to do so. *Ritchie v. McMullen*, 159 U. S. 235, 241, 40 L. Ed. 133, citing *Osborn v. Bank*, 9 Wheat. 738, 830, 6 L. Ed. 204; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

Not to be shown under plea of nul tiel record.—Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him by an attorney of the court, it is not allowable, under a plea of nul tiel record only, to prove that the attorney had no authority to appear. *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

Under the plea of nul tiel record, judgment should have been given for the plaintiff after proof of the record, showing as it did jurisdiction of the defendant by reason of his appearance by attorney. As both parties, however, submitted evidence without objection upon the question of the authority of the attorneys so to appear, the appellate court would have held them to a waiver of the proper pleadings to present that issue if it appeared affirmatively that this evidence had been

III. Mode of Making and Acts Which Constitute.

A. General Appearance.—1. IN GENERAL.—A general or voluntary appearance may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended.³⁴

2. RIGHT OF STATE TO PRESCRIBE.—A state may, by legislation, prescribe what shall constitute an appearance in its courts,³⁵ but such legislation is not binding on the Federal courts and confers no authority upon them,³⁶ nor upon the courts of another state.³⁷

3. CORPORATION.—A corporation can appear only by attorney.³⁸

considered and passed upon by the court below. Such, however, is not the case. Judgment was given for the defendant upon the sole ground that it did not appear from the record or the evidence that summons had been served. This was error if the defendant had in fact voluntarily appeared. The record upon its face furnished evidence of such appearance. Judgment reversed. *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

34. In general.—*Wabash, etc., R. Co. v. Brow*, 164 U. S. 271, 278, 41 L. Ed. 431.

In admiralty.—An entry on the record of an admiralty case, that on the return of a process of attachment Mr. B. "appears for the respondent, and has a week to perfect an appearance and to answer," is a general appearance, the entry being followed by the execution by the respondent or his agents of different bonds, reciting "that an appearance in the case had been entered." *Atkins v. Fiber, etc., Co.*, 18 Wall. 272, 21 L. Ed. 841.

Submission to jurisdiction of a foreign court.—"Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England." *Hilton v. Guyot*, 159 U. S. 113, 203, 40 L. Ed. 95.

"But it is now settled in England that while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance." *Hilton v. Guyot*, 159 U. S. 113, 204, 40 L. Ed. 95.

The defendants, although they were not citizens or residents of France, were citizens and residents of the state of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property in their storehouse at Paris, belonging to them and within the jurisdiction, but not in the custody, of those

courts, from being taken in satisfaction of any judgment that might be recovered against them, would not show that those courts did not acquire jurisdiction of the person of the defendants. Such appearance and conduct of litigation amount to a voluntary appearance which gives jurisdiction of their person. *Hilton v. Guyot*, 159 U. S. 113, 204, 40 L. Ed. 95.

In a suit on a foreign judgment it was nowhere alleged that the defendant appeared or answered in the foreign court under compulsion, or for any purpose except to contest his personal liability. It was held that he must therefore be taken to have voluntarily submitted himself to the jurisdiction of the court. *Ritchie v. McMullen*, 159 U. S. 235, 241, 40 L. Ed. 133.

35. Right of state to prescribe.—*Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604; *Kauffman v. Wooters*, 138 U. S. 285, 34 L. Ed. 962; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248. See *Suggs v. Thornton*, 132 U. S. 524, 33 L. Ed. 447; *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Chappell v. United States*, 160 U. S. 499, 514, 40 L. Ed. 510; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964.

36. Mexican Central R. Co. v. Pinkney. 149 U. S. 194, 37 L. Ed. 699; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248. See *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Railway Co. v. Whitton*, 13 Wall. 270, 271, 20 L. Ed. 571; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Mercer County v. Cowles*, 7 Wall. 118, 19 L. Ed. 86. See post, "Not Binding on Federal Courts," IV, B, 2, c.

37. D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; *Thompson v. Whitman*, 18 Wall. 454, 21 L. Ed. 897.

38. Corporation.—*Osborn v. Bank*, 9

4. **RECEIVER.**—The employment of counsel, by a receiver appointed by a state court, to argue a pending case in the supreme court of the United States, brought there to review a judgment rendered in a circuit court of the United States, does not operate to make him a party; nor did he make himself a party to the record from the fact that he sent the remittitur from the supreme court of the United States to the circuit court and had it filed there.³⁹

5. **ACCEPTANCE OF SERVICE.**—Acceptance of service of a summons or subpoena does not necessarily amount to a voluntary appearance.⁴⁰

6. **FILING PETITION FOR REMOVAL.**—See the title **REMOVAL OF CAUSES.**

7. **CONTINUANCE.**—It seems that applying for or assenting to a continuance amount to a general appearance.⁴²

8. **DEMURRER.**—Filing a demurrer to the plaintiff's pleadings, unless it is limited to the question of want of jurisdiction of the person, constitutes a general appearance.⁴³

Wheat, 738, 830, 6 L. Ed. 204; *Commercial Bank v. Slocomb*, 14 Pet. 60, 64, 10 L. Ed. 354. See ante, "Authority to Appear," II, J, 2; post, "Corporation," IV, A, 1, b, (2), (c), bb.

39. **Receiver.**—*Pendleton v. Russell*, 144 U. S. 640, 36 L. Ed. 574.

40. **Acceptance of service.**—*Butterworth v. Hill*, 114 U. S. 128, 29 L. Ed. 119.

The fact that an official of the United States government at Washington accepts, of service of a subpoena in the District of Columbia issued by a circuit court of the United States for another circuit on a bill in equity filed in that court, admits the service with the same effect the regular service by a proper officer would have had, but waives no objection to jurisdiction, and gives no consent to be sued away from his residence or from the seat of government. *Butterworth v. Hill*, 114 U. S. 128, 29 L. Ed. 119.

A subpoena issued by the circuit court of the United States for the District of Vermont, on a bill in equity filed in that court, was delivered to the commissioner of Patents at Washington, in the District of Columbia, and his written acceptance of service to have the same effect as if duly served on me by a proper officer, there indorsed on the writ. It was held that the acceptance of service as indorsed on the writ is not to be treated as a voluntary appearance by the commissioner in the court in Vermont, without objection to the jurisdiction. The case stands as it would if the process had been actually served on him in the District of Columbia by some competent officer. The court said: "The fair meaning of the indorsement on the writ is that the commissioner admits the service with the same effect it would have if made by an officer in the District of Columbia. No appearance is thereby entered in the cause. Service of subpoena in the District is acknowledged, but nothing more. In the letter which followed the indorsement of service, both counsel and the court were informed that the commissioner declined to appear. *Butterworth v. Hill*, 114 U. S. 128, 132, 29 L. Ed. 119.

42. **Continuance.**—*Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741; *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 9.

43. **Demurrer.**—*St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 603, 36 L. Ed. 829; *New Jersey v. New York*, 6 Pet. 323, 8 L. Ed. 414; *Fitzgerald, etc., v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; See *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935; *Citizens' Sav., etc., Co. v. Illinois, etc., R. Co.*, 205 U. S. 46, 51 L. Ed. 703; *Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685. See post, "Special Appearance," III, B.

A defendant's demurrer was based on three grounds, two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. This was held to amount to a general appearance to the merits. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659.

Appearing by counsel and moving to dismiss the bill for want of jurisdiction and also for want of equity, amounts to a voluntary appearance and is a waiver of a nonresident's privilege. *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935. See post, "Venue or District in Which Suit Brought," IV, A, 7.

Where the defendant not only demurred but answered, and the second ground of the demurrer was that the petition did not set out a cause of action, the defendant was held to have entered a general appearance. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829.

A demurrer, signed by a solicitor of the court, is an appearance in the cause in which it is filed. *New Jersey v. New York*, 6 Pet. 323, 8 L. Ed. 414.

At January term, 1831, an order was made by the supreme court of the United States, giving the state of New York leave to appear in a suit, brought by the state of New Jersey, on the second day of a designated term, and answer the complainant's bill; and if there should be no appearance, that the court would proceed to hear the cause on the part of the complainants, and to decree on the matter of

9. INTERVENTION AND INTERPLEADER.—Filing a plea of intervention amounts to a general appearance.⁴⁴

10. PLEADING TO THE MERITS—*a. In General.*—Pleading to issue or to the merits of the action in the first instance amounts to a general appearance.⁴⁵

b. After Objection to Jurisdiction Overruled.—See post, "Effect of Special Appearance with Respect to Jurisdiction," IV, B.

11. ASSUMING POSITION OF AN ACTOR—*a. In General.*—There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but there is none as to the proposition that when he does become an actor in a proper sense he submits, and that his submission

the bill. On the first day of the term, a demurrer to the complainants' bills was filed, which was signed, "Greene C. Bronson, attorney general of New York;" no other appearance was entered on the part of the defendants. It was held that the demurrer filed in the case by the attorney general of New York, he being a practitioner in the supreme court, is considered as an appearance for the state; if the attorney general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court. *New Jersey v. New York*, 6 Pet. 323, 8 L. Ed. 414. See the title STATE.

Objection to jurisdiction of subject matter.—See post, "Special Appearance," III, B.

Objection to jurisdiction over person.—See post, "Special Appearance," III, B.

44. **Intervention and interpleader.**—*Clark v. Barnard*, 108 U. S. 436, 447, 27 L. Ed. 780.

A state in intervening as a claimant of a fund in court thereby makes a general appearance. *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. Ed. 780.

"In the present case the state of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title. The case differs from that of *Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216, where the state expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court." *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. Ed. 780.

45. **In general.**—*Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Logan v. Patrick*, 5

Cranch 288, 3 L. Ed. 103; *Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685; *Voorhees v. United States Bank*, 10 Pet. 449, 473, 9 L. Ed. 490; *Scott v. Sanford*, 19 How. 393, 474, 15 L. Ed. 691. See *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 611, 37 L. Ed. 292; *The Merino*, 9 Wheat. 391, 400, 6 L. Ed. 118; *New Jersey v. New York*, 6 Pet. 323, 8 L. Ed. 414.

Often the first and only evidence of the appearance of a party is the filing of his plea, answer, or demurrer. *Eldred v. Bank*, 17 Wall. 545, 551, 21 L. Ed. 685. See ante, "Demurrer," III, A, 8.

Answer.—An answer to a bill to be relieved against a judgment, in ejectment to compel a conveyance of the land, and to obtain an injunction to stay proceedings on the judgment is a general appearance. *Logan v. Patrick*, 5 *Cranch* 288, 3 L. Ed. 103.

A defendant by filing his answer, subscribed and sworn to by himself, and signed by his counsel, enters his appearance to the action. *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799.

"Suit was against Walker, Puckett and Lang. The latter employed David Shelton as his attorney to defend the suit. Lang told Shelton to put in pleas for all the defendants who had been served with process. Upon examination, Shelton found that process had been served on Walker, Lang, and Puckett, and he put in a joint plea for them. Afterwards, Shelton, the attorney, met both Walker and Lang in Jackson, where the court sat, and spoke to them in each other's presence, about the defense of the case; and a conversation was held with them, in which they promised Mr. Shelton that another attorney, William Seiger, should be associated with him in defending the suit. The questions likely to arise in the case were stated by Lang and Walker, and they were especially anxious to know from Shelton whether Mr. Shields, the principal to the note sued on, would be competent as a witness on their behalf. The cause was tried at a subsequent term, on the issue made by the plea put in by Shelton, and a verdict and judgment rendered." It was held that the defendant, Walker, by pleading to the action, entered a general appearance. *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552.

amounts to a general appearance.⁴⁷

b. *Filing Set-Off, Counterclaim or Recoupment*.—Setting up a counterclaim, after objection to the jurisdiction of the person has been overruled, even though it be one arising wholly out of the transaction sued upon by the plaintiff and in the nature of recoupment rather than set-off, constitutes a general appearance. By an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit, and thereby enters a voluntary appearance to the suit.⁴⁸

12. *MOTION TO VACATE JUDGMENT*.—A motion to vacate a judgment, challenging the judgment not merely on jurisdictional but also on nonjurisdictional grounds, constitutes a general appearance.⁴⁹

B. Special Appearance.—If the defendant wishes to object to the jurisdiction of the court over his person, he must limit his appearance to the question of jurisdiction alone.⁵⁰

47. *In general*.—*Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488.

48. *Filing set-off, counterclaim or recoupment*.—*Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 290, 51 L. Ed. 488.

After the suit was begun, a motion to quash the return of service was made and overruled, and thereupon the defendant (a nonresident corporation), after excepting, appeared, as ordered, and pleaded the general issue and also a counterclaim of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff. It was held, that by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 289, 290, 51 L. Ed. 488.

The court said: "It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. *Davis v. Hedges*, L. R. 6 Q. B. 687; *Mondel v. Steel*, 8 M. & W. 858, 872; *O'Connor v. Varney*, 10 Gray, 231. This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense." *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488.

"If, as would seem and as was assumed

by the form of pleading, the counterclaim was within the Illinois statute. *Charnley v. Sibley*, 73 Fed. Rep. 980, 982, the case is still stronger. For by that statute the defendant may get a verdict and a judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other; and after the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. *Illinois Rev. Stats.*, c. 110, §§ 30, 31; *East St. Louis v. Thomas*, 102 Illinois 453, 458; *Butler v. Cornell*, 148 Illinois 276, 279." *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 290, 51 L. Ed. 488.

49. *Motion to vacate judgment*.—*Sugg v. Thornton*, 132 U. S. 524, 33 L. Ed. 447.

The rule on motion to vacate a judgment is thus expressed by Judge Brewer in *Burdette v. Corgan*, 26 Kansas 102, 104: "The motion challenged the judgment not merely on jurisdictional but also on nonjurisdictional grounds, and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion. *Cohen v. Trowbridge*, 6 Kansas 385; *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563; *Grattier v. Rosecrance*, 27 Wisconsin 489, 491; *Alderson v. White*, 32 Wisconsin 308, 309. Such a general appearance to contest a judgment on account of irregularities will, if the grounds therefor are not sustained, conclude the parties as to any further questioning of the judgment. A party cannot come into court, challenge its proceedings on account of irregularities, and after being overruled be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground." *Sugg v. Thornton*, 132 U. S. 524, 529, 33 L. Ed. 447.

50. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Texas, etc.,*

IV. Effect of Appearance.

A. General Appearance—1. RESPECTING JURISDICTION—*a. Jurisdiction of Subject Matter.*—A voluntary or general appearance does not confer jurisdiction of the subject matter of the suit.⁵¹

R. Co. v. Cox, 145 U. S. 593, 603, 36 L. Ed. 829.

If defendant enters his appearance through counsel, which though special in terms is not limited to any particular purpose, he enters a general appearance. *Renand v. Abbott*, 116 U. S. 277, 29 L. Ed. 629, citing *United States v. Yates*, 6 How. 605, 608, 12 L. Ed. 575, and *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 9.

"In the case of *Wynn v. Wyatt*, 11 Leigh (Va.) 534, * * * the court say, 'That the appearance of the defendant, in term, and his motion to quash the attachment irregularly issued, and to set aside the proceedings at the rules, founded upon it, was not an appearance to the action, dispensing with farther and proper process.'" *Harris v. Hardeman*, 14 How. 334, 343, 14 L. Ed. 444.

In *Beknap v. Schild*, 161 U. S. 10, 40 L. Ed. 599, the attorney general of the United States, appearing for this purpose only, filed a suggestion (called in the record a "plea to the jurisdiction") to the effect that the court had no jurisdiction of an action against officers and employees of the United States for infringement of a patent by use of the patented improvement in a navy yard. The suggestion of the attorney general was overruled.

In *The Exchange v. McFaddon*, 7 Cranch 116, 3 L. Ed. 287, the attorney of the United States for the district of Pennsylvania appeared (at the instance of the executive department of the government of the United States, as it was understood) and filed a suggestion that jurisdiction was sought to be exercised in contravention of international law.

Effect of arguing merits of case disclosed by bill.—Defendants do not waive the benefit of a qualified appearance at the time of the filing pleas to the jurisdiction, and enter a general appearance by arguing the merits of the case as disclosed by the bill, at the hearing as to the sufficiency of their pleas; where there was no motion for the dismissal of the bill for want of equity, and the discussion of the merits was permitted or invited by the court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. *Citizens' Sav., etc., Co. v. Illinois, etc.*, R. Co., 205 U. S. 46, 58, 51 L. Ed. 703.

Objecting to jurisdiction of subject matter.—A defendant, a foreign corporation, insisted that the court had no juris-

diction to proceed, declined to stand upon an objection to the service of process, and submitted itself to the decision of the court in respect to jurisdiction over the subject matter, which jurisdiction, it is entirely clear, the court possessed. These proceedings were taken by defendant after discovering the alleged ground of objection to the service and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. It was held: That such jurisdiction resulted under the circumstances admits of no doubt; and the court added: "The rule to that effect seems well settled in *Nebraska, Kansas and Ohio*, * * *. *Elliott v. Lawhead*, 43 O. St. 171; *Porter v. Chicago, & N. W. P.*, 1 Neb. 14; *Aultman v. Steinan*, 8 Neb. 112; *Meixell v. Kirkpatrick*, 29 Kan. 679." *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608.

51. Of subject matter.—*Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Atkins v. Fiber, etc., Co.*, 18 Wall. 272, 21 L. Ed. 841; *Andrews v. Andrews*, 188 U. S. 14, 41, 47 L. Ed. 366; reaffirmed in *Winston v. Winston*, 189 U. S. 506, 47 L. Ed. 922; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Continental Life Ins. Co. v. Rhodes*, 119 U. S. 237, 29 L. Ed. 380; *New England, etc., Co. v. The Detroit, etc., Co.*, 18 Wall. 307, 21 L. Ed. 846; *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Empire, etc., Trans. Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037.

Where an inferior court can have no jurisdiction of a case of law or equity, appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing. *Scott v. Sanford*, 19 How. 393, 474, 15 L. Ed. 691; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

"Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when, perhaps, he has a good defense to it." *Hall v. Lanning*, 91 U. S. 160, 170, 23 L. Ed. 271.

Allegation of jurisdictional facts.—If the jurisdiction of the court is limited, a general appearance does not waive the necessity to set forth upon the record the facts or circumstances which are essential to give jurisdiction. *Turner v. Bank*,

b. *Jurisdiction over the Person*—(1) *In General*.—If the court has jurisdiction of the subject matter, a general or voluntary appearance confers jurisdiction of the person; such an appearance waives the objection of want of jurisdiction over the person.⁵² Where jurisdiction is so acquired, a court of general juris-

4 Dall. 8, 1 L. Ed. 718. See post, "With Respect to Pleadings," IV, A, 6.

Divorce proceedings.—The appearance of one or both of the parties to a divorce proceeding cannot suffice to confer jurisdiction over the subject matter where it is wanting because of the absence of domicile within the state. *Andrews v. Andrews*, 188 U. S. 14, 41, 47 L. Ed. 366; reaffirmed in *Winston v. Winston*, 189 U. S. 509, 47 L. Ed. 922; *German Sav., etc., Society v. Dormitzer*, 192 U. S. 125, 128, 48 L. Ed. 373. See the titles CONFLICT OF LAWS; DIVORCE.

52. In general.—*Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Knox v. Sumners*, 3 Cranch 496, 2 L. Ed. 510; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Goldey v. Morning News*, 156 U. S. 518, 521, 39 L. Ed. 516; *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540; *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604; *Clark v. Wells*, 203 U. S. 164, 171, 51 L. Ed. 138; *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70; *Hatfield v. King*, 194 U. S. 162, 166, 46 L. Ed. 481; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Voorhees v. United States Bank*, 10 Pet. 449, 9 L. Ed. 490; *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Clark v. Barnard*, 108 U. S. 436, 27 L. Ed. 780; *Boswell v. Otis*, 9 How. 336, 348, 13 L. Ed. 164; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. Ed. 931; *Atkins v. Fiber, etc., Co.*, 18 Wall. 272, 298, 21 L. Ed. 841; *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799; *Wabash, etc., R. Co. v. Brow*, 164 U. S. 271, 278, 41 L. Ed. 431; *Hilton v. Guyot*, 159 U. S. 113, 40 L. Ed. 95; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 699; *Herrndon v. Ridgeway*, 17 How. 424, 15 L. Ed. 100. See post, "Summons and Process," IV, A, b, 3.

An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by a general appearance. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691; *Rhode Island v. Massachusetts*, 12 Pet. 657, 718, 9 L. Ed. 1233; *Toland v. Sprague*, 12 Pet. 300, 9

L. Ed. 1093; *Voorhees v. United States Bank*, 10 Pet. 449, 473, 9 L. Ed. 490. See post, "Summons and Process," IV, A, b, 3.

"It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary, by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable, till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject matter of controversy." *Voorhees v. United States Bank*, 10 Pet. 449, 473, 9 L. Ed. 490.

Effect of default at time for hearing.—A defendant having once submitted himself to the jurisdiction of the court, and at the time appointed for the hearing having failed to appear and made default, no hearing or evidence is necessary to entitle the court to proceed to judgment. *Ritchie v. McMullen*, 159 U. S. 235, 241, 40 L. Ed. 133.

Divestiture by unnecessary service by publication.—The fact that, after amendment of the petition, service by publication was made on a party, who had appeared unconditionally in the action and resisted the application to amend the petition so as to charge him personally, did not deprive the court of the jurisdiction which it had acquired before. The service by publication after the amendment was unnecessary. *Ward v. Todd*, 103 U. S. 327, 26 L. Ed. 339.

Appearance of assignee in bankruptcy in state court.—See the title BANKRUPTCY.

Appearance of state.—An act of the legislature of Rhode Island authorized the B. H. & E. Co., a Connecticut railroad company, to purchase the franchises of another railroad company created under the laws of Rhode Island and Connecticut, and to extend within the limits of the state the road thus acquired. The act provided, viz: "This act shall not go into effect unless the said B. H. & E. R. company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treas-

diction will settle the matter in controversy between the parties.⁵³

(2) *Appearance by Attorney*—(a) *In General*.—Appearance by an attorney, if authorized, is as effective for the purposes of jurisdiction as an actual service of summons.⁵⁴

(b) *Where There Are Several Defendants*.—Where there are several defendants, a general appearance by an attorney may be limited to any one or more of them; but such an appearance, purporting to be on behalf of all, will be *prima facie*, presumed to be an appearance for all.⁵⁵

urer its bond, with securities satisfactory to the governor of this state, in the sum of \$100,000, that they will complete their said road before the first day of January, A. D. 1872." The bond was filed as required, conditioned as follows: "Now, therefore, if said B. H. & E. R. company shall complete their said railroad before the first day of January, A. D. 1872, then the aforewritten obligation shall be void; otherwise be and remain in full force and effect;" security for payment of the bond, a loan certificate of the city of Boston for \$100,000 was deposited with the treasurer of the state. Afterwards, the B. H. & E. company became bankrupt; and its assignees in bankruptcy filed a bill to enjoin the treasurer of the state from collecting the loan certificate. The treasurer demurred, on the ground that the real party in interest was the state. The money was paid into court on an interlocutory decree. The state then entered its appearance and asserted its claim to it. It was held that the voluntary appearance of the state disposed of the demurrer and conferred jurisdiction to adjudicate its rights. *Clark v. Barnard*, 108 U. S. 436, 27 L. Ed. 780, distinguishing *Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216.

The demurrer of the treasurer does not affect the result. For that demurrer could not reach beyond the question of the right to sue him by reason of his official character, which became insignificant when the state made itself a party; and in point of fact, the bill was framed to avoid the objection, by charging the treasurer as a wrongdoer in his individual capacity. *Clark v. Barnard*, 108 U. S. 436, 447, 448, 27 L. Ed. 780.

53. *Boswell v. Otis*, 9 How. 336, 348, 13 L. Ed. 164.

54. *In general*.—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Habich v. Folger*, 20 Wall. 1, 7, 22 L. Ed. 307; *Knox v. Summers*, 3 Cranch 496, 2 L. Ed. 510; *Washington, etc., R. Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675; *Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564; *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552; *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666; *Toland v. Sprague*, 12 Pet. 300, 331, 9 L. Ed. 1093; *Atkins v. Fiber, etc., Co.*, 18 Wall. 272, 298, 21 L. Ed. 841; *Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309; *St. Louis, etc.,*

R. Co. v. McBride, 141 U. S. 127, 132, 35 L. Ed. 659; *Wabash, etc., R. Co. v. Brown*, 164 U. S. 271, 280, 41 L. Ed. 431; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935.

The appearance of parties by authorized attorneys is equivalent to a personal service of process upon those parties. *Habich v. Folger*, 20 Wall. 1, 7, 22 L. Ed. 307; *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

Corporation, receivers, trustees.—A corporation of New York was declared to be "dissolved" by one of its courts, acting in professed conformity to a statute of the state; and receivers of its assets were appointed. A creditor of the corporation residing in another state sued it there, in "trustee process" (foreign attachment), by which he attached debts due by certain persons (known in the language of the process as "trustees") to the corporation. The corporation, the receivers, and the trustees all appeared by attorney; the trustees answered, and after the corporation and the receivers had contested the claim of the plaintiff so long as they could, the receivers withdrew their opposition, and a formal judgment was entered, which recited that the trustees were charged on their answer. "If the corporation was in existence, so that it could appear in a suit, it was concluded by the appearance of its attorney. If it was not in existence, the receivers, representing the corporation and its creditors, were bound by the appearance of their attorneys. In either event the result is the same." *Habich v. Folger*, 20 Wall. 1, 7, 22 L. Ed. 307.

After the expiration of its charter and the transfer of its property to trustees, a bank, by its attorney, appeared and defended an attachment suit, and the trustees also appeared to the suit and moved to dissolve the attachment. It was held, that neither the bank nor the trustees can afterwards deny the jurisdiction of the court, on the ground that the bank, against which the suit was instituted by name, had passed out of existence, but both must be bound by the proceedings to which they voluntarily submitted. *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

55. **Where there are several defendants.**—*Hills v. Ross*, 3 Dall. 331, 1 L. Ed. 623.

Partnership.—A plea by one partner, on behalf of himself and his copartners, the rejoinder being signed by a proctor for

(c) *To Plead in Abatement*—aa. *Natural Persons*.—In courts of general jurisdiction, where a plea in abatement is interposed by individual defendants, an appearance and pleading by attorney waives all objections to the jurisdiction.⁵⁶

bb. *Corporation*.—Where a plea in abatement is interposed by a corporation, no waiver of objection to jurisdiction can result from its appearing and pleading by attorney.⁵⁷

(3) *Suit Commenced by Attachment*.—A court will acquire jurisdiction of the person in a suit originally commenced by an attachment in rem, if the party against whom the claim is set up voluntarily appears and submits himself to the jurisdiction of the court.⁵⁸ If in an attachment suit, the defendant appears, the

all the defendants, amounts to a legal appearance for them all. This was an admiralty suit against three partners. The plea was headed as a plea by one partner in behalf of himself and copartners. The replication regarded the plea as the plea of all the company and the rejoinder was signed by a proctor for all the defendants. One of the partners was absent from the country and no authority to appear for him was produced. *Hills v. Ross*, 3 Dall. 331, 1 L. Ed. 623. See ante, "Partners," II, E.

56. Natural persons.—*Commercial Bank v. Slocomb*, 14 Pet. 60, 64, 10 L. Ed. 354.

An appearance of the defendant, by attorney, cures all antecedent irregularity of process. *Knox v. Summers*, 3 Cranch 496, 2 L. Ed. 510. See ante, "Appearance by Attorney," IV, A, 1, b, (2).

The defendant, perhaps, might appear in propria persona, and directly plead in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity. *Knox v. Summers*, 3 Cranch 496, 2 L. Ed. 510. See ante, "Jurisdiction over the Person," IV, A, 1, b.

In *Commercial Bank v. Slocomb*, 14 Pet. 60, 64, 10 L. Ed. 354, it was contended that whatever might have been the original ground of objection to the jurisdiction, the defendants had appeared by attorney; and that such an appearance waived all objection to the jurisdiction of the court over the person of the defendants. The court said: "This is admitted stood to be a well-established rule in pleas of this sort, in courts of general jurisdiction, where the plea is interposed by individual defendants. We deem it unnecessary, for the purposes of this case, to inquire what would be the effect of an appearance by attorney, of an individual defendant, in pleading such a plea in the circuit courts of the United States, which are of limited jurisdiction."

57. Corporation.—*Commercial Bank v. Slocomb*, 14 Pet. 60, 64, 10 L. Ed. 354.

In the case of a corporation aggregate, no waiver of an objection to jurisdiction could be produced, by their appearing and pleading by attorney, because, as such a corporation cannot appear but by attorney, to say that such an appearance would amount to a waiver of the objection, would be to say, that the party must

from necessity forfeit an acknowledged right, by using the only means which the law affords of asserting that right. *Commercial Bank v. Slocomb*, 14 Pet. 60, 64, 10 L. Ed. 354. See, also, *Wabash, etc., R. Co. v. Brow*, 164 U. S. 271, 278, 41 L. Ed. 431; *Osborn v. Bank*, 9 Wheat. 738, 830, 6 L. Ed. 204.

An action was brought in the circuit court of Mississippi, against the Commercial and Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the state of Louisiana; the defendants pleaded in abatement, by attorney, that they were an aggregate corporation, and that two of the stockholders resided in the state of Mississippi; the affidavit to the plea was sworn to by the cashier of the bank, before the "deputy clerk;" it was not entitled as of any term of the court; the plaintiffs demurred to the plea. Held, that the appearance of the defendants in the circuit court, by attorney, was proper. *Commercial Bank v. Slocomb*, 14 Pet. 60, 10 L. Ed. 354.

58. Suit commenced by attachment.—*Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 725, 24 L. Ed. 565; *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538; *Mayhew v. Thatcher*, 6 Wheat. 129, 130, 5 L. Ed. 223.

Foreign attachment.—The appearance of the defendants to a foreign attachment, in a circuit court of the United States, waives all objection to the nonservice of process. *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666. See, to the same effect, *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Irvine v. Lowrey*, 14 Pet. 293, 299, 10 L. Ed. 463; *Atkins v. Fiber, etc., Co.*, 18 Wall. 272, 298, 21 L. Ed. 841.

A party against whose property a foreign attachment has issued in a circuit court of the United States, although the circuit court had no right to issue such an attachment, having appeared, to the suit, and pleaded to issue, cannot afterwards deny the jurisdiction of the court; the party has, as a personal privilege, a right to refuse to appear; but it is also competent to him to waive the objection. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Irvine v. Lowrey*, 14 Pet. 293, 10 L. Ed. 463; *Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307; *McGoon v. Scales*, 9 Wall. 23,

cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court.⁵⁹ Even supposing there was any objection to the proceeding by

31, 19 L. Ed. 545; *Gruner v. United States*, 11 How. 163, 13 L. Ed. 647; *United States v. Yates*, 6 How. 605, 12 L. Ed. 575; *Chaffee v. Hayward*, 20 How. 208, 15 L. Ed. 804; *Commercial Bank v. Slocomb*, 14 Pet. 60, 10 L. Ed. 354; *Eldred v. Bank*, 17 Wall. 545, 557, 21 L. Ed. 685.

"The cases of *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666, and *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157, are decisive to show, that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves, that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived; and that appearing and pleading will produce that waiver." *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659.

An action was brought by foreign attachment, in the court of common pleas of Warren county, Pennsylvania, in the name of a citizen of Pennsylvania, for the use of The Lumberman's Bank, at Warren, Pennsylvania, against a citizen of New York; the suit was on a note given by the defendant to the plaintiff, to be paid "in the office notes of the Lumberman's Bank at Warren;" some of the stockholders of the Lumberman's Bank at Warren were citizens of the state of New York. The defendant appeared to the action, by counsel, and having given bond with surety to the court of common pleas, removed the cause to the circuit court of the United States for the western district of Pennsylvania; a motion was made in the circuit court, to remand the cause to the court of common pleas of Warren county, the circuit court having no jurisdiction of the cause, on the ground that the real party in the suit was the Lumberman's Bank, at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the state of New York. It was held, that the circuit court had jurisdiction of the case. *Irvine v. Lowery*, 14 Pet. 293, 10 L. Ed. 463.

"By thus appearing and submitting to the process of attachment, the defendant waived any privilege to which he was entitled by the section (12) of the judiciary act, as held by this court in *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, so that on his appearance and entry of bail, the attachment was dissolved, and the cause will thenceforth proceed, as if it had commenced by the ordinary process of the court, served on the defendant within the district. The commencement

of the action in the common pleas, by attachment, being expressly provided for in the 12th section of the judiciary act, it must be considered, when removed into the circuit court, as an original one." *Irvine v. Lowery*, 14 Pet. 293, 298, 10 L. Ed. 463.

⁵⁹. *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 725, 24 L. Ed. 565; *Cole v. Cunningham*, 133 U. S. 107, 116, 33 L. Ed. 538.

If there is personal appearance by the defendant in proceedings to enforce a debt or demand by attachment of his property, the cause becomes mainly a suit in personam. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Lien of attachment not discharged.—Certain lands in Arkansas, liable to confiscation under the act of July 17, 1862 (12 Stat. 589), and belonging to A., a non-resident of the state, were seized February 16, 1865, by the marshal, pursuant to instructions from the district attorney, who, on the 17th of that month, filed a libel of information against them in the proper district court of the United States. On the following day, a warrant of arrest and monition was issued and duly served. The libel was amended April 5, so as to embrace other lands of A. On that day a decree of condemnation, forfeiture, and sale of all the lands was entered by that court, and they were sold on the 28th of that month by the marshal, under a venditioni exponas. The purchasers subsequently conveyed them to B. The decree of condemnation was affirmed by the circuit court. A writ of attachment, sued out of one of the courts of Arkansas, March 9, 1865, at the suit of sundry creditors of A., was on that day levied upon the same lands. A., by his attorney, entered his appearance to the suit, and judgment was rendered against him September 29. Held, that the appearance of A. did not discharge the lien of the attachment. *Pike v. Wassell*, 94 U. S. 711, 24 L. Ed. 307.

Appearance by attorney.—A personal appearance by the defendant, through his attorneys, converts into a personal suit that which was before a proceeding in rem. *Creighton v. Kerr*, 20 Wall. 8, 12, 22 L. Ed. 309; *Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564.

Where an action was commenced by attachment and service had by publication and then the defendant voluntarily appeared by attorney and went to trial, the court had jurisdiction of the person of the defendant. *Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564; *Creighton v. Kerr*.

attachment, it was cured by the appearance of the defendant, and his litigating the suit.⁶⁰ But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demands which the court may find to be due to the plaintiff.⁶¹

2. AS WAIVING PRIVILEGES IN RESPECT TO PARTICULAR COURTS.—A general appearance to the merits, if the case was one of which the court could take jurisdiction, waives all special privileges of the defendant in respect to the particular court in which the action is brought.⁶²

3. SUMMONS AND PROCESS—*a. Want of Process*—(1) *In General*.—Objections based on the want of process are waived by a voluntary appearance.⁶³

20 Wall. 8, 12, 22 L. Ed. 309. See ante, "Appearance by Attorney," IV, A, 1, b, (2).

The appearance of a nonresident defendant to an action, in which, under a state statute, an order of attachment had been made and garnishee process duly served, converts into a personal suit that which was before a proceeding in rem. *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 105, 34 L. Ed. 608.

The record of a judgment in one state is conclusive evidence in another, although it appears that the suit in which it was rendered was commenced by an attachment of property, the defendant having afterwards appeared and taken defense. *Mayhew v. Thatcher*, 6 Wheat. 129, 5 L. Ed. 223. See the title FOREIGN JUDGMENTS.

Presumption as to truth of record.—The record showed that the action was commenced by attachment and service had by publication; and that the defendant voluntarily appeared and submitted himself to the jurisdiction of the court. He at first filed a demurrer, then an answer, and finally went to trial upon the issues made by the pleadings. After judgment he moved for a new trial which was overruled. It was held, if these statements appearing in the record are true, the court had jurisdiction of the person of the defendant, and could bind him by a judgment. No evidence was introduced to contradict the record. Its truth is, therefore, presumed. *Maxwell v. Stewart*, 22 Wall. 77, 80, 22 L. Ed. 564. See, also, the title RECORDS.

60. *Mayhew v. Thatcher*, 6 Wheat. 129, 130, 5 L. Ed. 223.

Foreign attachment.—After appearing and pleading to the action, it is too late to question the regularity of a foreign attachment, as the case stands as if suit had been brought in the usual way. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157; *Toland v. Sprague*, 12 Pet. 300, 331, 9 L. Ed. 1093.

The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error; Robert Barry appeared, gave special bail, and discharged the attachment; the plaintiff below then

filed a declaration in *indebitatus assumpsit* "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue; the parties went to trial, and a verdict and judgment were rendered for the defendant in error. It was held, that the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail and the appearance of the defendant, is immaterial. The defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

Where there was error in the beginning of an action of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, the defect is thereby cured. *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309.

61. *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 725, 24 L. Ed. 565; *Cole v. Cunningham*, 133 U. S. 107, 116, 33 L. Ed. 538; *Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564. See the title ATTACHMENT AND GARNISHMENT.

62. **Privileges respecting particular courts.**—*St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 130, 35 L. Ed. 659.

63. **In general.**—*Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 699; *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. Ed. 931; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432; *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100; *Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Levy v. Fitzpatrick*, 15 Pet. 167, 171, 10 L. Ed. 699; *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309.

Where the defendant has appeared and pleaded to issue no question as to process can arise. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Scott v. Sandford*, 19 How. 393, 473, 15 L. Ed. 691.

(2) *Nonservice of Process*—(a) *In General*.—By appearing to an action, defendants place themselves precisely in the situation in which they would have stood had process been served upon them, and consequently waive all objections to the nonservice of process.⁶⁴

(b) *Nonresidents*.—Nonservice of process is waived by appearance by the defendant, and answering and participating in the trial, in an action in a state in which he does not reside, and in which he has not been served with process.⁶⁵

64. Nonservice of process.—Pollard v. Dwight, 4 Cranch 421, 428, 2 L. Ed. 666; Wabash, etc., R. Co. v. Brow, 164 U. S. 271, 280, 41 L. Ed. 431; Henderson v. Carbondale Coal, etc., Co., 140 U. S. 25, 40, 35 L. Ed. 332; Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935; Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Shields v. Thomas, 18 How. 253, 15 L. Ed. 368; Creighton v. Kerr, 20 Wall. 8, 22 L. Ed. 309; Knox v. Summers, 3 Cranch 496, 2 L. Ed. 510; Atkins v. Fiber, etc., Co., 18 Wall. 272, 298, 21 L. Ed. 841.

The appearance of the defendants without reservation makes their position just what it would have been if they had been brought in regularly by service of process. Atkins v. Fiber, etc., Co., 18 Wall. 272, 298, 21 L. Ed. 841, citing Pollard v. Dwight, 4 Cranch 421, 2 L. Ed. 666, and Knox v. Summers, 3 Cranch 496, 2 L. Ed. 510.

"A general appearance (through an attorney) waives all questions of the service of process. It is equivalent to a personal service." Creighton v. Kerr, 20 Wall. 8, 12, 22 L. Ed. 309. See ante, "Appearance by Attorney," IV, A, 1, b, (2).

A general appearance without insisting upon the objection that the process was not served upon defendant in the district is a waiver of such objection. Logan v. Patrick, 5 Cranch 288, 3 L. Ed. 103.

Notice.—A general appearance is a waiver of the want of notice. Buckingham v. McLean, 13 How. 150, 14 L. Ed. 9. As to waiver of notice of appeal or writ of error, see the title APPEAL AND ERROR, vol. 1, p. 333.

Persons ordered to be made party.—A person whom the court ordered to be made a party to the proceedings who voluntarily appears and files an answer, setting up his claims, cannot subsequently raise an objection for nonservice of process. Henderson v. Carbondale Coal, etc., Co., 140 U. S. 25, 35 L. Ed. 332.

Judgment creditor in foreclosure suit.—An objection that a judgment creditor, having lien and necessarily a party, had no notice of the pendency of a suit to foreclose the mortgage, is waived by such creditor's appearing by attorney, and consenting that a decree may be rendered pursuant to the prayer in the bill. Bronson v. La Crosse, etc., R. Co., 2 Black 528, 17 L. Ed. 359.

Mandamus proceedings.—After making a return to the alternative mandamus sued out against him by a judgment creditor

of a township, the township supervisor cannot set up the nonservice of any notice in the cause. Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314.

"The plea of nonservice of any other notice than the writ is inadmissible. The appearance of the defendant and the actual making of the return are a sufficient answer to it. Nonservice may be good ground for a motion to set aside proceedings based on supposed service, but is not a good return to the writ." Edwards v. United States, 103 U. S. 471, 479, 26 L. Ed. 314.

A perpetual injunction will not be granted against a judgment at law on the ground that one of the plaintiffs was not served with notice to appear and defend the suit at law where he actually appeared and pleaded to the action. Walker v. Robbins, 14 How. 584, 14 L. Ed. 552.

65. Nonresidents.—Fitzgerald, etc., Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Shields v. Thomas, 18 How. 253, 15 L. Ed. 368. See St. Louis, etc., R. Co. v. McBride, 141 U. S. 127, 132, 35 L. Ed. 659; Texas, etc., R. Co. v. Cox, 145 U. S. 593, 603, 36 L. Ed. 829; Sugg v. Thornton, 132 U. S. 524, 33 L. Ed. 447. See post, "Venue or District in Which Suit Brought," IV, A, 7.

That a party resides beyond the territorial jurisdiction of the court so that process cannot reach him is a personal privilege, which he waives by a general appearance. Kendall v. United States, 12 Pet. 524, 623, 9 L. Ed. 1181; Tolland v. Sorague, 12 Pet. 300, 330, 9 L. Ed. 1093; Herndon v. Ridgway, 17 How. 424, 15 L. Ed. 100.

State courts.—Where there was an administration upon the estate of an intestate in Kentucky, the surety in the administration bond and a portion of the distributees residing there, the court of that place had jurisdiction over the subject matter, and where the principal defendant, although residing out of the state, voluntarily appeared and answered a bill filed against him, the jurisdiction of the court was complete, and it had a right to pass a decree in the premises. Shields v. Thomas, 18 How. 253, 15 L. Ed. 368.

In the suit in the state court, the subject matter of the controversy, as well as a portion of the parties, both plaintiffs and defendants, being confessedly within its cognizance, no ground for exception

b. *Defective Process*.—All defects or irregularities in process are waived by a general appearance.⁶⁶

to the jurisdiction could exist as to these. The principal defendant, when he voluntarily entered his appearance, and answered the bill, placed himself in the same predicament with the other parties regularly before the court, and could not afterwards except to the jurisdiction upon the ground of his nonresidence. *Shields v. Thomas*, 18 How. 253, 258, 15 L. Ed. 368.

United States courts.—By the 11th section of the judiciary act of 1789, no civil suit shall be brought before the courts of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The construction given to these provisions, by the supreme court, is, that no judgment can be rendered by a circuit court against any defendant, who has not been served with process issued against his person, in the manner pointed out; unless the defendant waive the necessity of such process, by entering his appearance to the suit. *Lavy v. Fitzpatrick*, 15 Pet. 167, 10 L. Ed. 699; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100.

By the judiciary act of 1789, in a case where jurisdiction of the circuit court depended on citizenship, every defendant must have resided, or been served with process, in the district where the suit was brought; but by the act of 1839 this is not necessary; a nonresident defendant may either voluntarily appear, or, if not a necessary party, his appearance may be dispensed with. *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935. See, also, *Christmas v. Russell*, 14 Wall. 69, 82, 20 L. Ed. 762.

It is not necessary to aver, on the record, that the defendant in the circuit court is an inhabitant of the district or found therein at the time of serving the writ. It is sufficient if the court appear to have jurisdiction, by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant is not an inhabitant, or in which he is not found, at the time of serving the process, is the privilege of the defendant, which he may waive by a voluntary appearance. If process is returned by the marshal, as served upon him within the district, it is sufficient; and where the defendant voluntarily appears, without taking the exception, it is an admission of the regularity of the service, and a waiver of any further inquiry into the matter. *Gracie v. Palmer*, 8 Wheat. 699, 700, 5 L. Ed. 719.

Constitutional question.—A judgment having been obtained against a partnership, a nonresident partner filed a petition to vacate the judgment. The motion to

vacate challenged the judgment on the merits, and the decision was against him which was affirmed by the supreme court of the state. It was held that by such an appearance the nonresident partner is precluded from questioning the judgment on the ground that the state law providing for service of process upon a partnership and nonresident partners is repugnant to the constitution of the United States. *Sugg v. Thornton*, 132 U. S. 524, 33 L. Ed. 447.

Foreign attachment.—See ante, "Suit Commenced by Attachment," IV, A, 1, b, (3).

66. Defective process.—*Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741; *Carroll v. Dorsey*, 20 How. 204, 15 L. Ed. 803; *Chaffee v. Hayward*, 20 How. 208, 15 L. Ed. 804; *Buckingham v. McLean*, 13 How. 150, 14 L. Ed. 9; *McDonogh v. Millaudon*, 3 How. 693, 11 L. Ed. 787; *The Merino*, 9 Wheat. 391, 400, 6 L. Ed. 118; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432.

A voluntary appearance cures any defects in the form of process. *Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741; *The Merino*, 9 Wheat. 391, 400, 6 L. Ed. 118; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432.

"Upon the strictest rules which govern in courts of common law, objections to the regularity of the process to enforce an appearance, would be considered as removed, by the appearance of the party." *The Merino*, 9 Wheat. 391, 400, 6 L. Ed. 118.

A technical defect in a subpoena commanding a defendant to be summoned to appear and answer is cured when he enters his appearance without raising the objection, and it is certainly too late to raise it on appeal. *Johnson v. Waters*, 111 U. S. 640, 673, 28 L. Ed. 547.

A technical defect in the description of the representative capacity of a defendant, in the subpoena which summons him, where he is properly described in the bill, is cured when he entered his appearance, even by the defective title, without raising the objection. *Johnson v. Waters*, 111 U. S. 640, 28 L. Ed. 547.

Defective notice.—Error in the commencement of an action by reason of a defective notice is cured by a general appearance. *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309.

In admiralty cases.—In certain admiralty cases, a warrant issued to the marshal to seize the property libelled, and to cite and admonish all persons claiming an interest in the same, to appear before the court, and to show cause why the same should not be condemned, as forfeited to the United States under the slave trade acts. This process was returned executed, and claims were interposed for

c. Defective Service.—A general appearance to the merits, if the case was one of which the court could take jurisdiction, waives all defects in the service of process.⁶⁷

4. COMMENCEMENT AND CONDUCT OF CAUSE—*a. In General.*—A general appearance cures antecedent defects in procedure.⁶⁸

b. Commencement without Leave of Court.—A general appearance waives the objection that the action was commenced without leave of court where such leave is necessary.⁶⁹

c. Unauthorized Transfer of Cause.—A general appearance and defense to the action waives an objection based upon an unauthorized removal of the cause from the district to the circuit court.⁷⁰

the several vessels and their cargoes, by the asserted owners thereof. It was held that by the appearance of the parties interested in the property seized, and filing their claims to the same, all objections to the regularity of the proceedings were waived. *The Merino*, 9 Wheat. 391, 399, 6 L. Ed. 118.

Proceeding instituted by order of publication.—If the parties to be affected by an order of publication appear and go to trial without objection to the sufficiency of the notice or seek further time, they cannot thereafter claim to be prejudiced by any defect in the notice. *Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567.

In a proceeding to probate a will instituted by order of publication, the caveators appeared, and without seeking further time, for the purpose of securing additional testimony or preparing for the hearing, went to trial on the issues submitted to the jury. It was held that they at least cannot claim to be prejudiced by any defect in the notice. *Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567.

Appearance by attorney.—See ante, "Appearance by Attorney," IV, A, 1, b, (2).

67. Defective service.—*St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 130, 35 L. Ed. 659; *Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608; *Merchants Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488; *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719.

A judgment by default was entered for want of a plea, and the defendant appeared by attorney and moved the court to set it aside on the ground that there had been no sufficient service of process. This motion was denied, but the court ordered the default to be opened and the cause placed on the trial calendar, on the condition that the appearance of the defendant was entered by the receiver within a period of ten days. The defendant appeared and proceeded to trial. It was held that even if the service were defective the defendant had waived the objection. The court said: "This order was, doubtless, made in order to give the company an opportunity to defend, and at the same time to set at rest the point raised about the service in case the merits

of the action were tried. The condition thus imposed was complied with, and for aught that appears, the subsequent litigation has been conducted on the part of the company by its voluntary appearance in every stage of the case." *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675, reaffirmed in *Houston, etc., Central R. Co. v. Bowles*, 168 U. S. 706, 42 L. Ed. 1213; *Herman v. Texas*, 198 U. S. 579, 49 L. Ed. 1171.

Objections to the service of process are waived by defendant's pleading to merits after discovering the alleged ground of objection. *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608.

Service obtained by fraud.—Service of process upon the defendant was obtained by means of a fraudulent device or trick. The defendant appeared, demurred, answered, and petitioned to remove the cause to the federal court, and participated in the trial therein. It was held that he thereby waived all questions as to the service of process and that he cannot, by motion for a nonsuit, motion to dismiss, or request for an instruction, attack the jurisdiction of the court on that ground. *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608.

68. In general.—*Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.

69. Commencement without leave of court.—*Jerome v. McCarter*, 94 U. S. 731, 737, 24 L. Ed. 136.

An objection that leave was not given to file the bill of foreclosure—the mortgaged premises being at the time in the possession of a receiver appointed in a former suit in the same court—if, under any circumstances, available, will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the meantime appeared, answered it, and cross-examined the witnesses of the complainant. "It was then too late. They must be held to have acquiesced; and, if not, leave of the court to commence and prosecute the suit must be presumed after the orders made to facilitate its progress." *Jerome v. McCarter*, 94 U. S. 731, 737, 24 L. Ed. 136.

70. Unauthorized transfer of cause.—*Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224.

Unauthorized removal by certiorari.—Although a circuit court has no authority

5. WITH RESPECT TO PARTIES.—As to waiver of defect of parties by failure to plead in abatement for nonjoinder, etc., see the title PARTIES.

6. WITH RESPECT TO PLEADINGS.—A general appearance does not waive the necessity to allege jurisdictional facts or circumstances, in a complaint or declaration filed in a court of limited jurisdiction, nor cure the omission of such averments.⁷¹

7. VENUE OR DISTRICT IN WHICH SUIT BROUGHT—*a. In General.*—The defendant's right to object that an action, within the general jurisdiction of the court, if brought in the wrong district, is waived by entering a general appearance, without taking the objection.⁷²

to issue a certiorari or other compulsory process to a district court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced, if, instead of taking advantage of this irregularity at a proper time, and in a proper manner, the defendant enters his appearance to the suit in the circuit court, takes defense, and pleads to issue, it is too late, after verdict, to object to the irregularity in the proceedings. The supreme court will consider the suit as an original one in the circuit court, made so by the consent of parties. Had a new declaration been filed in the circuit court no doubt could be entertained as to the correctness of this conclusion. And it is not going too far, to consider the declaration sent from the district court in the same light, after appearance, issue and verdict. *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224.

71. With respect to pleadings.—*Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 29 L. Ed. 380. See ante, "Jurisdiction of Subject Matter," IV, A, 1, a. See the title PLEADING.

72. In general.—*Interior Const.*, etc., *Co. v. Gibney*, 160 U. S. 217, 219, 40 L. Ed. 401, citing *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 36 L. Ed. 942; *Texas, etc., R. Co. v. Sanders*, 151 U. S. 105, 38 L. Ed. 90; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98; and *Southern Express Co. v. Todd*, 12 U. S., appx. 351. See to the same effect, *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 453, 36 L. Ed. 768; *Texas, etc., R. Co. v. Horn*, 151 U. S. 110, 38 L. Ed. 91; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 688, 38 L. Ed. 311; *In re Keasby, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402; *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405;

Shields v. Thomas, 18 How. 253, 15 L. Ed. 368; *Logan v. Patrick*, 5 Cranch 288, 3 L. Ed. 103; *Irvine v. Lowrey*, 14 Pet. 293, 10 L. Ed. 463; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935.

A noncompliance with the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district is waived by a defendant who does not seasonably object that the suit is brought in the wrong district. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 688, 38 L. Ed. 311, citing *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, and *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98.

"The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented." *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853, a case which arose under the judiciary act of 1875. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659.

After pleading to merits.—"The party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608." *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 132, 35 L. Ed. 659; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98. *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853.

An objection that the suit was brought in the wrong district, made after the defendant had pleaded in bar, comes too late. *Texas, etc., R. Co. v. Saunders*, 151 U. S. 105, 109, 38 L. Ed. 90, citing *St.*

b. *Where Dependent upon Residence of Parties*—(1) *In General*.—A general appearance waives any objection to the jurisdiction founded on the defendant's residence in another district than that wherein he is sued.⁷³

Louis, etc., *R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829.

73. In general.—*Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Levy v. Fitzpatrick*, 15 Pet. 167, 171, 10 L. Ed. 699; *Irvine v. Lowrey*, 14 Pet. 293, 299, 10 L. Ed. 463.

The provisions that no civil suit shall be brought against any person, by any original process or proceedings, in any other district than that whereof he is an inhabitant, is a personal privilege which he may waive, and which is waived, by a general appearance and pleading to the merits. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Mexican, etc., R. Co. v. Davidson*, 157 U. S. 201, 208, 39 L. Ed. 672; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *Jones v. Anderson*, 10 Wall. 327, 19 L. Ed. 935; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Irvine v. Lowrey*, 14 Pet. 293, 299, 10 L. Ed. 463; *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100; *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L. Ed. 699; *In re Keasbey, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402; *Interior Const., etc., Co. v. Gibney*, 160 U. S. 217, 221, 229, 40 L. Ed. 401.

That the defendant who enters a general appearance is a nonresident, is immaterial. *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608. See *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488.

Jurisdiction founded upon diversity of citizenship.—The restriction that, where the jurisdiction is founded upon diversity of citizenship, suit is to be brought "only in the district of the residence of the plaintiff or the defendant," is a personal privilege of the defendant, which may be waived by him, and is waived by a general appearance and pleading to the merits. *Mexican, etc., R. Co. v. Davidson*, 157 U. S. 201, 208, 39 L. Ed. 672, citing *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659.

When the parties are citizens of different states, so that the case comes within the general grant of jurisdiction in the first part of the first section of the judiciary, 24 stat., 552, 25 stat. 433, the defendant, by entering a general appearance in a suit brought against him in a district of which he is not an inhabitant, waives the right to object that it is brought in the wrong district. *In re Keasbey, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402, citing *Interior Const., etc., Co. v. Gibney*, 160 U. S. 217, 40 L. Ed. 401.

After a general appearance the jurisdiction of the court cannot be challenged

on the ground that the action cannot be brought in a district where neither of defendants was an inhabitant. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, citing *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

Case removed from state court.—In *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809, the jurisdiction of the circuit court over a controversy between citizens of different states was sustained in a case removed from the state court, although it was conceded that the suit could not have been commenced in the first instance in the circuit court. See, also, *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 28 L. Ed. 76. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 131, 132, 35 L. Ed. 659.

Case of foreign attachment.—See ante, "Suit Commenced by Attachment," IV. A. 1, b. (3).

That codefendants, inhabitants of another district.—As defendants who have appeared generally in the action, cannot even object that they were themselves inhabitants of another district, they, of course, cannot object that others of the defendants were such. *Interior Const., etc., Co. v. Gibney*, 160 U. S. 217, 220, 40 L. Ed. 401. See *In re Keasbey, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402.

"When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object, at the proper stage of the proceedings, to being compelled to answer the suit. But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district." *Interior Const., etc., Co. v. Gibney*, 160 U. S. 217, 220, 40 L. Ed. 401.

Appearing by counsel and moving to dismiss the bill for want of jurisdiction and also for want of equity is a waiver of a nonresident's privilege. *Jones v. Au-*

(2) *Corporations.*—The exemption of a corporation from being sued in any other district than in the state and district in which it has been incorporated or in that of which the other party is a citizen, may be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction.⁷⁴

draws, 10 Wall. 327, 19 L. Ed. 935. See ante, "Demurrer," III. A, 8.

Specific performance of a contract by T., for the sale by him of a lot of ground in the city of Cincinnati, was asked, by a bill filed in the circuit court for the district of Ohio, by L. The complainant in the bill had purchased the lot, and had paid, according to the contract, the proportion of the purchase money payable to T.; by the contract, a deed, with a general warranty, was to have been given by the vendor, within three months, on which a mortgage for the balance of the purchase money was to have been executed by the purchaser; this deed was never given nor offered; the purchaser went into possession of the lot, improved it, by building valuable stores upon it, and sold a part of it. A subsequent agreement was made with the vendor, as to the rate of interest to be paid on the balance of the purchase money, the purchase was made in 1814, and the interest, as agreed upon, was regularly paid until 1822, when it was withheld. In 1822, the vendor instituted an action of ejectment for the recovery of the property, and he obtained possession of the same in 1824. In 1819, the purchaser was informed that one Chambers and wife had a claim on the lot, which was deemed valid by counsel; and in 1823, a suit for the recovery of the lot was instituted by Chambers and wife against T. L. and others, which was depending until after 1829. In 1825, this bill was filed, claiming from T. a conveyance of the property under the contract of 1814, on the payment of the balance of the purchase money and interest. The circuit court decreed a conveyance; and the decree was affirmed by the supreme court. After the filing of the original bill, amended bill, and answers, the circuit court considered that C., who held a part of the lot purchased by L., should be made a party complainant; and he came in and submitted to such decree as might be made between the original parties. Held, that this was regular. "By this general appearance to the suit, in the prior proceedings, Taylor necessarily waived any objection to the suit, founded on his residence in another district; and he became, like every other party properly before a court of equity, subject to all the orders of the court." *Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405.

74. Corporations.—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942, citing *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; and *Texas*,

etc., R. v. Cox, 145 U. S. 593, 36 L. Ed. 829; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98. See *Empire, etc., Trans. Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488.

If a defendant corporation, which is sued in another district than that in which it has its domicile, has, by a proper plea or motion, sought to avail itself of the statutory exemption, the court should dismiss the suit for want of jurisdiction. But if the defendant corporation does not choose to plead that provision of the statute, but enters a general appearance, and joins with the complainant in its prayer for the appointment of a receiver, it is brought within the rule that the exemption from being sued out of the district of its domicile is a personal privilege which may be waived, and which is waived by pleading to the merits. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 132, 38 L. Ed. 98.

"The court below suggested that the present case is distinguishable from the others in which it was held that the right of exemption might be waived, in that neither the plaintiff nor the defendant resided in the district in which the suit was brought, that is, the Mercantile Trust Company, the plaintiff, had its residence in New York, and the Virginia, Tennessee, and Carolina Company, the defendant, was a corporation of New Jersey. But a similar state of facts existed in the case of *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768, inasmuch as Shaw, the plaintiff, was a citizen of Massachusetts, and the mining company was a corporation of the state of Michigan, and the suit was brought in the circuit court for the southern district of New York. Nor do we see any reason for a different conclusion, as to the subject of waiver, when the question arises where neither of the parties are residents of the district, from that reached where the defendant only is not such resident." *Central Trust Co. v. McGeorge*, 151 U. S. 129, 134, 38 L. Ed. 98.

"By the constitution and laws of the United States, the jurisdiction of the circuit courts, on the ground of the citizenship of the parties, extends only to suits between citizens of different states and within the meaning of those laws, as construed by this court, a corporation is a citizen of that state only, by which it is created. By the act of March 3, 1875, ch. 137, § 1 (in force when the original bill and the first amended bill were filed).

B. Effect of Special Appearance with Respect to Jurisdiction—1.

WHERE GENERAL RULE OBTAINS.—Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity.⁷⁵ The established rule is that an appearance which is solely to challenge the jurisdiction, is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court.⁷⁶ Nor is the

permitting in 'a controversy between citizens of different states,' a person to be sued in any district in which he either was an inhabitant or was found, a corporation might indeed be sued in any state in which it did business and had an agent, provided, always, it was not a citizen of the same state with the plaintiff. Under the act of March 3, 1887, ch. 373, § 1 (in force when the second amended bill was filed), providing that 'where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant,' a corporation, incorporated in one state only, cannot be compelled to answer in another state in which it has a usual place of business, and of which the plaintiff is not a citizen. But, under either statute, if the parties are not citizens of different states, there is an entire want of jurisdiction which cannot be waived by the parties, but will be noticed by the court of its own motion. 18 Stat. at L. 470; 24 Stat. at L. 552; *Ex parte Shaw* (*Shaw v. Quincy Min. Co.*), 145 U. S. 444, 36 L. Ed. 768, and cases there collected; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942, 943; *Wolfe v. Hartford Life, etc., Ins. Co.*, 148 U. S. 389, 37 L. Ed. 493." *Empire, etc., Trans. Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 164, 37 L. Ed. 1037.

"*St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 131, 35 L. Ed. 659, was a case wherein it was contended in this court that the court below, the circuit court of the United States for the western district of Arkansas, had no jurisdiction, because the suit was brought against a railway company whose domicile was in another state, and therefore within the operation of the judiciary act of 1887, as amended in 1888, providing that no suit shall be brought against any person in any other district than that whereof he is an inhabitant; but it was held, citing *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853, and *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, that 'without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court, on the ground that the suit had been brought in the wrong district.'" *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98. See ante, "In General," IV, A, 7, a, (1).

Appearance cannot be overruled by intervening stockholders and creditors.—

"As the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition." *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98.

Suit against national bank.—The exemption of national banks under the act of February 18, 1875, 18 Stat. 316, 320, ch. 80, from suit in state courts in counties other than the county or city in which the bank is located is a personal privilege which is waived by appearing to such a suit brought in another county or city, and making defense without claiming the immunity granted by congress. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98. See the title BANKS AND BANKING.

Effect of special appearance.—See post, "Where General Rule Obtains," IV, B, 1.

75. Where general rule obtains.—*Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Goldrey v. Morning News*, 156 U. S. 518, 526, 39 L. Ed. 516; reaffirmed in *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266.

76. York v. Texas, 137 U. S. 15, 19, 34 L. Ed. 604; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 206, 36 L. Ed. 942.

Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 208, 209, 37 L. Ed. 699.

"In *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699, it was held * * * that the special appearance of the company for the purpose of objecting that the service of process was not good did not, in the federal courts, confer jurisdiction as in case of a general appearance." *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 617, 43 L. Ed. 569, reaffirmed in *Mutual, etc., Life Ins. Co. v. Birch*, 200 U. S. 612, 50 L. Ed. 620.

Where a bill was filed in the district

objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation.⁷⁷ It is only

court of the United States for the northern district of Mississippi, against four defendants, who all reside in Alabama, two of whom appeared for the purpose of moving to dismiss the bill, and the other two declined to appear altogether, nor was process served upon them, the court had no alternative but to dismiss the bill. The two absentees were essential parties. *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100.

Corporation objecting that suit had been brought in wrong district.—A corporation having appeared specially for the purpose of taking objection to the jurisdiction on the ground that the suit had been brought in the wrong district, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in a wrong district. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942. See *Empire, etc., Trans. Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037.

In *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768, the court, speaking through Mr. Justice Gray, said: "The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern district of New York by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in a wrong district. * * * All that is now decided is that, under the existing act of congress, a corporation, incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state." *Central Trust Co. v. McGeorge*, 151 U. S. 129, 134, 38 L. Ed. 98. See *In re Hohorst*, 150 U. S. 653, 661, 37 L. Ed. 1211.

In *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 453, 36 L. Ed. 768; and *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942, the right of a corporation to avail itself of the exempting clause of the act of 1887 was maintained, but, in both cases, the defendants specially appeared and set up such right, in the one case by a motion to set aside the service of the process, and in the other by a special demurrer. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. Ed. 98.

"The opinion in *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768, contains

a full history of the legislation on this subject, and refers to the several questions that have arisen and been determined by this court under such legislation." *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98.

Petition for removal.—See the title REMOVAL OF CAUSES.

Adjudication affecting only property within district.—The condition prescribed by § 8, of the act of March 3, 1875, 13 Stat. 472, that any adjudication, affecting absent defendants without appearance, should affect only such property, within the district, as may be the subject of the suit and under the jurisdiction of the court, is not waived by nonresident defendants appearing in the circuit court for the sole purpose of objecting to the jurisdiction of the court. *Citizens' Sav., etc., Co. v. Illinois, etc., R. Co.*, 205 U. S. 46, 51 L. Ed. 703.

⁷⁷ *Harkness v. Hyde*, 98 U. S. 476, 479, 25 L. Ed. 237; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 206, 36 L. Ed. 942; *Goldey v. Morning News*, 156 U. S. 518, 526, 39 L. Ed. 516, reaffirmed in *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 603. See ante, "After Objection to Jurisdiction Overruled," III, A, 10, b.

A defendant loses no rights by pleading to the merits, as required, after saving his rights by objecting to the jurisdiction. *Merchants' Heat., etc., Co. v. Clow*, 204 U. S. 286, 289, 51 L. Ed. 488; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942.

Where the defendant filed a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed. Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection. *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 206, 36 L. Ed. 942; following *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237.

An objection to the jurisdiction of a circuit court presented by filing a demurrer, for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled. *In re Atlantic City R. Co.*, 164 U. S. 633, 635, 41 L. Ed. 579; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942.

Illegality in service of process.—The de-

where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.⁷⁸

2. STATE STATUTE MAKING SPECIAL EQUIVALENT TO GENERAL APPEARANCE—*a. In General.*—The Texas statutes give to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction of the defendant.⁷⁹

b. Constitutionality.—The statutes of Texas on this subject have been held not to violate the fourteenth amendment of the constitution of the United States, forbidding any state to deprive any person of life, liberty or property without due process of law.⁸⁰

defendant having specially appeared to move that the service be set aside, illegality in the service of process by which jurisdiction is to be obtained is not waived after such motion is denied by his answering to the merits. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 208, 37 L. Ed. 699.

A nonresident defendant corporation does not lose its right of objecting to the jurisdiction of the court on the ground of insufficient service of process by pleading to the merits pursuant to order of the court after objections overruled. *Merchants' Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 488.

78. *Goldrey v. Morning News*, 156 U. S. 518, 526, 39 L. Ed. 516, reaffirmed in *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699. See *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608.

Illegality in the service of process by which jurisdiction is to be obtained is considered as waived only when the defendant, without having insisted upon it, pleads in the first instance to the merits. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 208, 37 L. Ed. 699.

79. *In general.*—*Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699.

"The difference between the present rule in Texas and elsewhere, is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid." *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604.

Under the Texas statute, a defendant who appears only to obtain the judgment

of the court upon the sufficiency of the service of process upon him, is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose. *Kauffman v. Wooters*, 138 U. S. 285, 34 L. Ed. 962; *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604.

Nonresidence.—The statutes of Texas makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of nonresidence. *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942.

General rule formerly obtained.—At an earlier day the general rule obtained in Texas. *York v. Texas*, 137 U. S. 15, 19, 34 L. Ed. 604.

80. *Constitutionality.*—*Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 204, 37 L. Ed. 699; *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604; *Kauffman v. Wooters*, 138 U. S. 285, 34 L. Ed. 962.

State legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, is not forbidden by the fourteenth amendment. *Kauffman v. Wooters*, 138 U. S. 285, 287, 34 L. Ed. 962, reaffirming and applying *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604.

Under the constitution of the United States, the defendant has not an inviolable right to have the question of the sufficiency of the service decided in the first instance and alone. *York v. Texas*, 137 U. S. 15, 20, 34 L. Ed. 604.

"It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right." *York v. Texas*, 137 U. S. 15, 21, 34 L. Ed. 604.

The cases of *York v. Texas*, 137 U. S.

c. *Not Binding on Federal Courts.*—The provision of the Texas statutes giving to a special appearance the force and effect of a general appearance does not bind the federal courts.⁸¹

V. Withdrawal, Striking Out, and Alteration of Appearance.

A. *Withdrawal and Alteration*—1. *WHAT CONSTITUTES A WITHDRAWAL*—a. *Withdrawal of Plea.*—When a defendant has filed a plea to the merits, and afterwards, by leave of the court, withdraws his plea, that does not withdraw his appearance, but he is still in court so as to be bound personally by a judgment rendered against him in the action.⁸²

b. *Withdrawal of Attorney.*—The appearance of the defendant may remain, although the attorneys, by whom it was entered, have withdrawn. Its effects cannot be annulled by such withdrawal.⁸³

2. *NOTICE, TIME AND LEAVE OF COURT*—a. *Withdrawal.*—The appearance of a defendant, once regularly entered, cannot be withdrawn without leave of the court.⁸⁴

15, 34 L. Ed. 604, and the subsequent case of *Kauffman v. Wooters*, 138 U. S. 285, 34 L. Ed. 962, reaffirming the ruling in *York v. Texas*, were cases arising in the state courts, and were brought to the supreme court of the United States on writs of error to the supreme court of the state, and it was, therefore, properly said in the opinion in *York v. Texas*, 137 U. S. 15, 20, 34 L. Ed. 604, that "the state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Citing *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468." *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 204, 37 L. Ed. 699.

81. *Not binding on federal courts.*—*Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248. For complete treatment, see the title COURTS.

82. *Withdrawal of plea.*—*Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685; *Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309; *Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307; *United States v. Armejo*, 131 U. S., appx. lxxxii, 18 L. Ed. 247.

In *Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685, the defendant withdrew his plea, claiming that the withdrawal left the case as though it had never been filed, and that, never having been served with process, he was not liable to a personal judgment. The court said: "We do not agree to this proposition. The filing of the plea was both an appearance and a defense. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring him again within the jurisdiction of the court. * * * He was not by the withdrawal of the plea out of court." *Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309.

Where a defendant withdraws after pleading to the merits and agreeing to a judgment, his withdrawal is without effect, and merely means that he does not wish

to incur more costs. *Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307.

83. *Withdrawal of attorney.*—*Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309. See *United States v. Curry*, 6 How. 106, 111, 12 L. Ed. 363; *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351. See post, "Withdrawal," V. A, 2, a.

84. *Notice and leave of court.*—*United States v. Curry*, 6 How. 106, 111, 12 L. Ed. 363; *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 606, 43 L. Ed. 1103, reaffirmed in *Cooper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351.

"It has been held that the appearance of a defendant, once regularly entered, cannot be withdrawn without leave of the court. *United States v. Curry*, 6 How. 106, 111, 12 L. Ed. 363; *Dana v. Adams*, 13 Illinois 691. But an examination of those cases discloses that this is a rule designed for the benefit and protection of the plaintiff. Usually the question has arisen where there had been no service of process on the defendant, and where, therefore, a withdrawal of appearance by the attorney would leave the plaintiff without ability to proceed by defaulting the defendant for want of an appearance. It was said by this court in *Creighton v. Kerr*, 20 Wall. 8, 13, 22 L. Ed. 309: 'The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other parties.'" *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 606, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351. See the title ATTORNEY AND CLIENT.

No withdrawal of appearance can be allowed in any case, without proper notice, and leave of the court first obtained. *United States v. Armejo*, 131 U. S., appx. lxxxii, 18 L. Ed. 247.

Suit between states.—See the title STATES.

b. *Alteration*.—It is too late after the lapse of a term to alter a general to a special appearance, so as to affect the rights of parties; and no such alteration of appearance can be allowed in any case, without proper notice, and leave of the court first obtained.⁸⁵

3. *EFFECT*—a. *Withdrawal by Defendant*.—A withdrawal, “without prejudice to the plaintiff,” of a general appearance entered by an attorney, for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood.⁸⁶

b. *Withdrawal by Attorney*.—The withdrawal of his appearance by the attorney, without leave of the court, leaves the record in a condition in which a judgment by default for want of an appearance can be validly entered.⁸⁷

85. *Alteration*.—United States v. Armejo, 131 U. S., appx. lxxxii, 18 L. Ed. 247. See, also, United States v. Curry, 6 How. 106, 111, 12 L. Ed. 363. See, also, the titles APPEAL AND ERROR, vol. 1, p. 333; ATTORNEY AND CLIENT.

Where the reasons are conclusive in favor of issuing a writ of mandamus to a circuit court to set aside an order of dismissal, and to take jurisdiction of a bill as against a defendant corporation, even if the appearance in its behalf in that court had been only a special appearance for the purpose of moving to dismiss the bill for want of jurisdiction; it is unnecessary to consider whether, under the circumstances of the case, the corporation was rightly allowed to amend its general appearance into a special appearance, or whether the action of the circuit court in that respect could be controlled by writ of mandamus. In re Hohorst, 150 U. S. 653, 664, 37 L. Ed. 1211, affirmed in Smith v. Iverson, 203 U. S. 586, 51 L. Ed. 329.

86. *Withdrawal without prejudice to the plaintiff*.—Creighton v. Kerr, 20 Wall. 8, 22 L. Ed. 309.

Where there has been error in the beginning of an action, as ex. gr., one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be “without prejudice” to him. Creighton v. Kerr, 20 Wall. 8, 22 L. Ed. 309. See ante, “Suit Commenced by Attachment,” IV, A, 1, b, (3).

“A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding in rem. This result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. Any judgment that he could then obtain against the defendant was binding upon the defendant, indisputable and valid against him and his property wherever he or it could be found. To reconstruct this judgment, and, by means of a withdrawal of the appearance, make it a judgment to be enforced upon

certain shares of bank stock only, and liable to be re-examined as to that upon the personal application of the defendant, would produce an extremely unfavorable effect upon the plaintiff's position. It would be a ‘prejudice’ to him, and hence it cannot be permitted. A rule to plead had been served upon the attorneys. This remained in force. At the expiration of the time to plead, the action was undefended, and a right to an interlocutory judgment at once arose. To take away this right would be an injury to the plaintiff. Hence under the condition of no prejudice it remained good to him.” Creighton v. Kerr, 20 Wall. 8, 12, 22 L. Ed. 309.

Appearance withdrawn unconditionally.—The court said: “We do not intend * * * to intimate that the result would have been different had the appearance been withdrawn unconditionally, as was the case in Eldred v. Bank, 17 Wall. 545, 551, 21 L. Ed. 685.” Creighton v. Kerr, 20 Wall. 8, 13, 22 L. Ed. 309.

87. *Withdrawal by attorney*.—Rio Grande, etc., Co. v. Gildersleeve, 174 U. S. 603, 605, 43 L. Ed. 1103, reaffirmed in Copper King v. Johnson, 195 U. S. 627, 49 L. Ed. 351.

“Where, therefore, a withdrawal of appearance by the attorney would leave the plaintiff without ability to proceed by defaulting the defendant for want of an appearance. It was said by this court in Creighton v. Kerr, 20 Wall. 8, 13, 22 L. Ed. 309: ‘The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other parties.’” Rio Grande, etc., Co. v. Gildersleeve, 174 U. S. 603, 606, 43 L. Ed. 1103, reaffirmed in Cooper King v. Johnson, 195 U. S. 627, 49 L. Ed. 351. See the title ATTORNEY AND CLIENT.

Indiana.—Sloan v. Wittbank, 12 Indiana 444, was a suit on a promissory note, and to which the defendant appeared. He then withdrew his appearance and the case went to trial, and resulted in a judgment in favor of the plaintiff. On error, the supreme court of Indiana held that the withdrawal of appearance carried with it the answer, and the court should

B. Striking Out Appearance.—The legal effect of striking out the appearance of a party to whom a monition or notice had issued is to recall the monition or notice as to him.⁸⁸

APPEARANCE BAIL.—See the title BAIL AND RECOGNIZANCE.

APPEARED.—See note 1.

APPELLATE JURISDICTION.—See, generally, the title APPEAL AND ERROR, vol. 1, p. 406.

APPENDANT.—See APPURTENANT.

APPLICATION OF PAYMENTS.—See the title PAYMENT.

APPLY.—See note 2.

then have entered judgment as by default, instead of going to trial, but that this was a mere irregularity which could not injure the defendant, and could not be taken advantage of on appeal." *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 607, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351.

Massachusetts.—"It was held by the Supreme Judicial Court of Massachusetts, that it was no ground for reversing a judgment rendered on the default of the defendant, after he had appeared and then withdrawn his appearance, that the date of the writ was a year earlier than the fact. *Fay v. Hayden*, 7 Gray 41." *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 607, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351.

Collusion between plaintiff and attorney for defendant.—"A case, indeed, might arise of collusion between the plaintiff and the attorney of the defendant, but in such case the court, on due and prompt application to it, would no doubt defeat any attempt on the part of the plaintiff to take advantage of a corrupt dereliction of duty on the part of the defendant's attorney. But it is not pretended, in the present case, that there was any collusion practiced between the plaintiff and the defendant's attorney, nor that the latter, either in entering or withdrawing defendant's appearance, acted without authority or by mistake." *Rio Grande, etc., Co. v. Gildersleeve*, 174 U. S. 603, 607, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 4 L. Ed. 351.

88. Striking out appearance.—*Windsor v. McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914.

In proceedings before the district court, in a confiscation case, monition and notice were issued and published; but the appearance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the court. Held, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as

to him. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

1. Appeared.—In *Bouldin v. Massie*, 7 Wheat. 122, 153, 5 L. Ed. 414, it is said: "To the question, whether the assignment purported to be made by Joutite himself, or by an agent, he answers that it 'purported, and appeared to him, to be made by Joutite himself, to the best of his recollection.'" The word **appeared** which is introduced by the witness in his answer to this interrogatory, and which is not in the question, seems intended to indicate that he had formed an opinion on the handwriting."

2. Apply.—In *Wayman v. Southard*, 10 Wheat. 1, 25, 6 L. Ed. 253, it is said: "But by the words of the section, the laws of the state furnish a rule of decision for those cases only 'where they apply;' and the question arises, do they **apply** to such a case? In the solution of this question, it will be necessary to inquire, whether they regulate the conduct of the officer, serving the execution; for it would be contrary to all principle to admit, that, in the trial of a suit, depending on the legality of an official act, any other law would **apply** than that which had been previously prescribed for the government of the officer. If the execution is governed by a different rule, then these laws do not **apply** to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A., to satisfy an execution against B., and a suit be brought by A., the question of property must depend entirely on the law of the state. But if an execution issue against A., as he supposes, irregularly, of if the officer should be supposed to act irregularly in the performance of his duty, and A. should, in either case, proceed against the officer, the state laws will give no rule of decision in the trial, because they do not **apply** to the case, unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume that the state law **applies** to such a case, we must show that it governs the officer in serving the execution; and, consequently, its supposed application to such

APPOINT—APPOINTMENT.—See, also, the titles POWERS; PRINCIPAL AND AGENT; PUBLIC OFFICERS. See note 1.

APPORTIONMENT.—As to apportionment of costs, see the title APPEAL AND ERROR, ante, p. 422. As to apportionment of rent, see the title LANDLORD AND TENANT. As to rule for apportioning accretions, see the title ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 56.

APPRAISAL AND APPRAISERS.—See the titles EXECUTORS AND ADMINISTRATORS; INSURANCE; REVENUE LAWS.

APPREHENDED.—See note 2.

APPRENTICES.—See the titles CONTRACTS; GUARDIAN AND WARD; PARENT AND CHILD; MASTER AND SERVANT; SLAVES.

APPROPRIATE.—See note 3.

a case is no admissible argument in support of the proposition, that it does govern the execution." See, generally, the titles COURTS; EXECUTIONS.

1. **Appoint—Popular election.**—In *Mcpherson v. Blacker*, 146 U. S. 1, 27, 36 L. Ed. 869, it is said: "It has been said that the word **appoint** is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination. It was used in Article V of the Articles of Confederation, which provided that 'delegates shall be annually **appointed** in such manner as the legislature of each state shall direct.'"

Appointment—When complete.—In *United States v. Le Baron*, 19 How. 73, 78, 15 L. Ed. 525, it is said: "When a person has been nominated to an office by the president, confirmed by the senate, and his commission has been signed by the president, and the seal of the United States affixed thereto, his **appointment** to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the **appointee** before he shall enter on the possession of the office under his **appointment**. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the **appointee**, not by the executive; all that the executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

An **appointment** is complete when made by the president and confirmed by the senate. The giving of a bond is not necessary to the completion of the **appointment**. *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

The words, "after date of appointment" and "from such date," which occur in § 1556 of the Revised Statutes, fixing the annual pay of passed assistant surgeons of the navy, refer not to the original entry of the officer into the service as an

assistant surgeon, but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered as a passed assistant surgeon. A passed assistant surgeon is an officer, and the notification of the secretary of the navy is a valid **appointment** to it. *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588.

2. **Apprehended.**—An act of congress provided that the trial of crimes committed on the high seas should be in the district where the offender was **apprehended**. It was held that the word **apprehended** did not imply a legal arrest to the exclusion of a military arrest or seizure. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554. See, generally, the titles CRIMINAL LAW; VENUE.

3. **Appropriate.**—In *United States v. Philadelphia and New Orleans*, 11 How. 610, 659, 13 L. Ed. 834, it is said: "In this grant words are used of strong and decisive import; words which, it is believed, show the intent of the grantor as fully as any that could have been adopted. 'Exercising the authority which the king has granted to us, we destine and **appropriate**, in his royal name, the aforesaid twelve leagues.' To destine is 'to set, ordain, or appoint to a use, purpose, estate, or place.' We are all 'destined to a future state.' 'To fix unalterably by a divine decree, to appoint unalterably.' The word **appropriate**, in the sense used, signifies, 'to set apart for or assign to a particular use, in exclusion of all other uses; 'to claim or use by an exclusive right.' No words of a more determinate character, to convey a complete title, could have been found in any language. The words '*destinamos y apropiamos*,' as used in the original grant, mean 'to grant and deliver as property.'"

Appropriate in the sense of adapted to the end, see *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579.

Appropriate legislation.—By the 15th amendment congress is empowered to enforce the provisions of that amendment by **appropriate** legislation. It was held that where a statute was in general language broad enough to cover wrongful

APPROPRIATION.—See the titles CONSTITUTIONAL LAW; EMINENT DOMAIN. See note 1.

APPROVE.—See note 2.

APPROVAL OF APPEAL BONDS.—See the title APPEAL AND ERROR, ante, p. 181.

APPROVEMENT.—See, generally, the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63; PARDON.

The ancient and obsolete practice called approvement may be explained as follows: "When a person indicted of treason or felony was arraigned, he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such approvement was only allowed in capital offenses, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the approver, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the approver should be condemned."³

APPURTENANT—APPURTENANCE.—See, generally, the title EASEMENTS.

"This term, both in common parlance and in legal acceptance, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (*Co. Litt.* 121b), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, land cannot be appurtenant to land."⁴

acts without as well as within the constitutional jurisdiction, that this was not appropriate legislation. *United States v. Reese*, 92 U. S. 214, 218, 23 L. Ed. 563.

That legislation is appropriate which is adapted to carry out the objects of the amendments. *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676.

1. Appropriation.—13 Stat. at Large 381 provided that the jurisdiction of the court of claims should not extend to claims growing out of the destruction or appropriation of property by the army or navy engaged in the suppression of the rebellion. The term appropriation is of the broadest import including all taking and use of property by the army and navy in the cause of the war not authorized by contract with the government. *Filor v. United States*, 9 Wall. 45, 49, 19 L. Ed. 549; *Pugh v. United States*, 13 Wall. 633, 20 L. Ed. 711; *In United States v. Russell*, 13 Wall. 623, 631, 20 L. Ed. 474, it was held that the temporary taking into the services of the United States of steamers with intent to return them to the owner as soon as the emergency was over, was not an appropriation of property within this act. See, generally, the titles COURTS; UNITED STATES.

Abatement of nuisance.—In *Sweet v. Rechel*, 159 U. S. 380, 397, 40 L. Ed. 188, it is said: "The abatement of a nuisance—nothing more being required or done—is not of itself, and within the meaning of the constitution, an appropriation of property to public uses."

2. Approve.—*United States Bank v.*

Dandridge, 12 Wheat. 64, 83, 6 L. Ed. 552, it is said: "A board may accept a contract, or approve a surety, by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof, by parol evidence, than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative."

3. 4 Bla. Com. 330; Whiskey Cases, 99 U. S. 594, 599, 25 L. Ed. 399.

4. Land appurtenant to land.—*Harris v. Ellicott*, 10 Pet. 25, 54, 9 L. Ed. 333. And in that case it was held where a description was as follows, "one other lot of land with the appurtenances" that the soil and freehold of the street upon which the land bounded did not pass.

In *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473, it was held: that a railroad company joining in the construction of an elevator upon land not belonging to it, and situated at some distance from its road, did not by its ownership of stock in the elevator company acquire such an interest in it as would pass as an appurtenance under the mortgage of the road, as constructed or to be constructed, and the 'appurtenances thereunto belonging.' The court went further, and held that the elevator itself, if owned by the company, would not be appurtenant to its road. See also, *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 55, 36 L. Ed. 66.

In *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 55, 36 L. Ed. 66, it is said: "The word appurtenant, as ordinarily de-

fined, is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident, such as an easement, or servitude to land; the tackle, apparel, rigging and furniture to a ship; a right of common to a pasture; or a barn,* garden or orchard to a house or messuage. In a strict legal sense it is said that land can never be **appurtenant** to land, *Jackson v. Hathaway*, 15 Johns. 447, 454; *Leonard v. White*, 7 Mass. 6; *Woodhull v. Rosenthal*, 61 N. Y. 382; but it was evidently contemplated by this mortgage that real as well as personal property subsequently acquired, such as land for stations, machine shops or other purposes immediately connected with the road, should pass under the lien of the mortgage. Property, however, not connected with what is ordinarily termed the plant, or not forming a part of the organic structure of the road, is never treated as **appurtenant** to it."

A conveyance was of a division or branch of a canal, "including its banks, margins, tow paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the **appurtenances** thereunto belonging." It was held that certain adjoining parcels of land belonging to the grantor which were necessary to the use of the canal passed by this grant. *Sheets v. Seldon*, 2 Wall. 177, 17 L. Ed. 822.

Indispensable or convenient.—*Humphreys v. McKissock*, 140 U. S. 304, 314, 35

L. Ed. 473, it is said: "Under the term **appurtenances**, as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway and what would be only convenient. *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810."

In *Humphreys v. McKissock*, 140 U. S. 304, 313, 35 L. Ed. 473, it is said: "A thing is **appurtenant** to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris v. Elliott*, 10 Pet. 25, 54, 9 L. Ed. 333; *Jackson v. Hathaway*, 15 Johns. 447, 455; *Linthicum v. Ray*, 9 Wall. 241, 9 L. Ed. 657."

In *Linthicum v. Ray*, 9 Wall. 241, 19 L. Ed. 657, it was held that the right to use a wharf would not pass as **appurtenant** to a lot. The court said: "Nor was the right to use the wharf made **appurtenant** to the twenty foot lot, situated on the north side of Water street, by being conveyed to the Johns in the same instrument. It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land so as to become **appurtenant** to it."

ARBITRATION AND AWARD.

BY S. B. FISHER.

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CROSS REFERENCES.

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As to the right of particular persons or classes of persons to submit to arbitration, see the appropriate titles, as, for instance, ATTORNEY AND CLIENT; EXECUTORS AND ADMINISTRATORS; ETC. As to adjustment of claims against government see the title UNITED STATES. As to agreements by contractor to submit all matters in dispute to an appointed engineer, see the titles CONTRACTS; UNITED STATES; WORKING CONTRACTS.

I. Scope of Title.

The title ARBITRATION AND AWARD will be confined to the treatment of the voluntary submission of controversies to arbitrators selected by the parties, and, if necessary, an umpire selected by such arbitrators. References in pending actions under a rule of court to arbitrators, appointed by the court with the consent of the parties, and references in the course of suits in chancery, will be treated under the title REFERENCE.

II. Definition, Nature and Classification of Arbitration Proceedings.

A. Definition, Nature and Essentials—1. DEFINITION.—Arbitration may be defined as the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called "arbitrators," or "referees."¹

1. **Arbitration defined.**—Black Law Dict. title, Arbitration, citing 3 B. Com. 16.

"It is always in the power of parties to compromise their difference. One way

of doing this is by arbitrators mutually chosen." United States v. Justice, 14 Wall. 535, 19 L. Ed. 753.

In a wide sense, this term may embrace the whole method of thus settling contro-

2. **JUDICIAL ACTION AS ESSENTIAL.**—It would seem that in order to constitute a submission of disputed matters to a third person or persons for settlement a submission to arbitration, and their decision thereon an award, in the true sense of the term, such person or persons must be required to act in a judicial and not a merely ministerial capacity.² Thus, for instance, acts of congress providing for the examination and adjustment by a certain officer, or a commission, of claims against the United States, does not constitute a submission to arbitration, nor does the report of such officer or commission constitute an award.³ Nor is a report of

versies, and thus include all the various steps. But in more strict use, the decision is separately spoken of, and called an "award," and the "arbitration" denotes only the submission and hearing. Black Law Dict., title, Arbitration.

2. **Necessity for judicial action by arbitrator.**—*Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35; *Kelly v. Crawford*, 5 Wall. 785, 18 L. Ed. 562. See, also, *Nutt v. United States*, 125 U. S. 650, 31 L. Ed. 821; *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126.

3. **Reference of claims against government and report thereon.**—*Nutt v. United States*, 125 U. S. 650, 31 L. Ed. 821; *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126.

An act of congress referring a claim against the government to an officer of one of the executive departments, to examine and adjust, does not, even though the claimant and the government act under the statute, and the account is examined and adjusted, make the case one of arbitration and award in the technical sense of these words, so as to bind either party as by submission to award. Hence a subsequent act repealing the one making the reference (the claim not being yet paid), impairs no right and is valid. *Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35, affirming *De Groot v. United States*, 5 Wall. 419, 432, 18 L. Ed. 700.

"The secretary of war acted ministerially. The resolution conferred no judicial power upon him. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy. The resolution under which the secretary assumed to act did not authorize him to make a final adjustment of the matter embraced in it. It did not bind the appellant to an acceptance of the amount reported by the secretary, or that he would cease to clamor for more, after being a fifth time paid the amount of damages awarded to and accepted by him." *Gordon v. United States*, 7 Wall. 188, 194, 19 L. Ed. 35.

"The various acts and resolutions of congress in this case emanated from a desire to do justice, and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the

officer by which to adjust the accounts, congress reserving to itself the power to approve, reject, or rescind or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial capacity." *Gordon v. United States*, 7 Wall. 188, 194, 19 L. Ed. 35.

The voluntary submission of a claim against the government to the special commission appointed to investigate such claims is not a submission to arbitrators. *United States v. Child*, 12 Wall. 232, 20 L. Ed. 360.

Account rendered under agreement between United States and the Cherokee Nation, ratified by congress, neither an award nor an account stated. *United States v. Cherokee Nation*, 202 U. S. 101, 50 L. Ed. 949.

Award of senate as prima facie evidence in court of claims.—The act of March 3, 1881, 21 Stat. 504, giving the court of claims jurisdiction of questions arising out of the treaty with the Choctaw Indians of 1855, and power to review all grievances de novo, and providing that the court shall not be estopped by any award made by the senate under the treaty of 1855, does not abrogate it, and does not require, as a condition of the exercise of the jurisdiction conferred by the act, that the court should entirely disregard it, giving it no effect whatever. It merely says that the court shall not be estopped by any action had or award made by the senate in pursuance of that treaty. The plain and literal meaning of this language is fully satisfied by holding that the award, considered as such, shall not, upon its face, be taken to be final and conclusive. There is nothing in the language to prevent the court from giving to that award effect as prima facie establishing the validity of the claim so far as adjudged in favor of the Choctaw Nation, leaving to the representatives of the government in this litigation the right not only to question the validity of the award, as such, upon any such grounds as might or should invalidate awards ordinarily, either at law or in equity, but also to attack it upon the merits, as a finding unsupported by proof, or unjust and unfair in view of all the circumstances, and on that account not to be enforced. In that view, so much effect only would be given to it as to cast the burden of dis-

auditors, appointed by consent of parties in a suit in equity, in the nature of an award by arbitrators. Such auditors are agents or officers of the court who examine and adjust accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made.⁴ Where a party who has been, and still is, carrying on an agency in the sale of anything for another, becomes thus indebted to this other, and agrees that an accountant shall examine the books of account and ascertain from them the exact amount due, "the amount so found to be due and owing to be final"—the agreement is not "a submission to arbitration," nor is the amount found by the accountant an "award" in any such sense as will make them subject to the strict rules governing arbitrators and awards.⁵

B. Classification—Voluntary or Compulsory.—Arbitration may be either voluntary or compulsory. Voluntary arbitration is that which takes place by mutual and free consent of the parties, while compulsory arbitration is that which takes place when the consent of one of the parties is enforced by statutory provisions.⁶

General Common Law Arbitration and Reference under Rule of Court.—An arbitration may be a general one, as at common law, of all matters in dispute between the parties,⁷ or a specific reference of the matters in dispute, in a cause pending in court, under a rule of court.⁸

III. Resort to Arbitration Favored by Courts.

Arbitration as a method of settling disputes should, and in fact does, receive every encouragement from the courts.⁹ Every reasonable intendment is indulged in favor of the award, in construing the same,¹⁰ and in proceedings to enforce,¹¹ impeach or set aside the award.¹²

proving its justice and fairness upon the United States in this suit. *Choctaw Nation v. United States*, 119 U. S. 1, 31, 30 L. Ed. 306.

Generally, as to the adjustment of claims against the government, see the title UNITED STATES.

4. Report of auditors not an award.—*Field v. Holland*, 6 Cranch 8, 3 L. Ed. 136.

A report of auditors, appointed, by consent of parties, in a suit in equity, not being in the nature of an award by arbitrators, may be set aside by the court, although neither fraud, corruption, partiality nor gross misconduct on the part of the authors, be proved. *Field v. Holland*, 6 Cranch 8, 3 L. Ed. 136. See the title REFERENCE.

5. Examination of books by accountant.—*Kelly v. Crawford*, 5 Wall. 785, 18 L. Ed. 562. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 70.

"There was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited." *Kelly v. Crawford*, 5 Wall. 785, 790, 18 L. Ed. 562.

6. Voluntary or compulsory arbitration.—Black Law Dict., title Arbitration.

7. General arbitration at common law of all matters in dispute.—*Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904. See, also, *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

8. Specific reference under rule of court.—*Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904; *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

The practice of referring pending actions under a rule of court to arbitrators appointed by the court with the consent of both parties, is a mode of prosecuting a suit to judgment, as well established and as fully warranted as a trial by jury. *Hecker v. Fowler*, 2 Wall. 123, 17 L. Ed. 759; *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60.

There is nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, which would prevent parties in that court, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration. *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

For a full treatment of the subject of references under rule of court in pending actions, see the title REFERENCE.

9. Arbitration favored by courts.—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

10. Construction to support award.—See post, "Construction of and Presumptions as to Awards," VIII, D.

11. Enforcement of award.—See post, "Enforcement of Award," VIII, F, and post, "Remedy for Breach of Award," VIII, G.

12. Impeachment of award. See post, "Impeaching and Setting Aside Award," VIII, E, 2.

IV. The Submission.

A. Definition and Nature.—A submission to arbitration has been defined as a contract between two parties, whereby they agree to refer the subject in dispute to others, and to be bound by their award.¹³

B. Who May Make—1. **IN GENERAL.**—**Capacity to Contract as Criterion.**—With regard to who may make a valid submission to arbitration, it may be stated as the general rule that the validity of such agreements depends upon the existence of the right to contract,¹⁴ and that every one who is capable of making a disposition of his property, or a release of his rights, may make a submission to an award;¹⁵ but no one can make such submission who is under either a natural or civil incapacity to contract.¹⁶ The above rule would seem to apply to all classes of persons whether natural or artificial, and whether acting in an individual or representative capacity.¹⁷

13. Submission defined.—*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118, quoting *Whitcher v. Whitcher*, 49 N. H. 76.

Submission a contract.—"Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: 'A submission is a contract.' And again, on p. 50: 'The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts.'" *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118. See the title **CONTRACTS**.

"In determining whether an agreement to arbitrate involves the power to contract, we eliminate at once from consideration consents to arbitrate made under a rule of court, by consent, in a pending suit, and shall consider only whether an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose is or is not a contract. We do this, because there is no pretense in the case at bar that the submission to arbitration was under a rule of court or equivalent thereto. Indeed, the courts below held that the submission of the claim in question to arbitration was a purely common-law one and not made under a statute or rule of court; and in consequence of these views the courts held it to be their duty to make the award executory by rendering a judgment thereon, on the assumption that the parties having agreed to a common-law submission were bound by reason thereof to abide by the award of the arbitrator." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

"It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be the act of the corporate body, *Russell on Arbitrators*, 5th Ed. p. 20; which act was of necessity required to be evidenced in a particular manner." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118. See the title **CORPORATIONS**.

As to agreement to abide by decision as

implied from submission, see post, "Mutual Agreement to Abide by Award," IV, D, 2.

14. Validity as dependent on right to contract.—"The proposition that an independent agreement to submit to an award must depend for its validity upon the existence of the right to contract is elementary." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

As to capacity to contract, see, generally, the title **CONTRACTS**, and cross references there found.

15. Persons capable of making submission.—*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

A power to agree with a proprietor for the purchase or use of land, includes a power to agree to pay a specified sum or such sum as arbitrators may fix upon. *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60.

16. Persons under incapacity to contract incapable of making submission.—*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118, citing *Kyd*, p. 35; *Russell on Arbitrators*, p. 14.

17. Corporations.—Although the charter of a company does not, in terms, give the power to refer, yet the power to sue and be sued includes the power of reference, that being one of the modes of prosecuting a suit to judgment. *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60. See, also, *Hecker v. Fowler*, 2 Wall. 123, 128, 17 L. Ed. 759.

It is immaterial whether the power of reference is lodged in the president and directors or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party. *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60. See the title **CORPORATIONS**.

Compensation paid to officers of a corporation for procuring an agreement of submission of matters in dispute to arbitrators, does not constitute a part of the actual expense of the construction of a

Ratification of Submission by Agent.—Where an agreement, providing for the settlement of certain claims, and the submission of other claims to arbitration, is signed by an agent for his principal in the name of the latter, and the latter

railroad." *Columbia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

Municipal corporations.—"The power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (*Mun. Corp.*, 4th Ed., § 478); 'As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities.'" *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118. See the title MUNICIPAL CORPORATIONS.

The commissioners for the District of Columbia do not possess the power to bind the district to a common-law submission to arbitration. *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

It is not in reason sound to say that because the district commissioners have the power to sue and be sued, they have therefore the authority to enter into a contract to submit a claim preferred against the district to arbitration, and thus to oust the courts of jurisdiction, when no authority is conferred upon the commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation had been made by congress for the payment of any such claim. It cannot be said that because congress had appropriated for the improvement of streets, and therefore authorized a contract for such improvement to the extent of the appropriation, that it had also authorized and appropriated for a claim in damages asserted to have arisen from the fact that work had been stopped because the appropriation made by congress had been exhausted. The appropriation of money to improve streets was in no sense the appropriation of money to pay a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from the refusal to permit the performance of work and labor and the furnishing of materials. *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

"There is no authority for holding that a mere administrative officer of a munic-

ipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common law submission. And this being true, with how much less reason can it be contended that the administrative officers of the district have such power without the consent of congress when the acts defining the powers of the commissioners, by clear and necessary implication, contain an express prohibition to the contrary." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

An executor, at common law, had the power to submit to an award. *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

"This power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. *Wheatley v. Martin*, 6 Leigh 62; *Wamsley v. Wamsley*, 23 W. Va. 45; *Wood v. Tunnicliff*, 74 N. Y. 38. Whilst, however, the agreement of the executor to a common law submission was binding upon him, such a consent on his part did not protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was the voluntary act of the executor and was not the equivalent of a judicial finding. 3 *Williams on Executors*, p. 326, and authorities cited." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118. See the title EXECUTORS AND ADMINISTRATORS.

One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both to arbitration; but he may bind himself, so as to submit his own interests to such decision. *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121. See, generally, the title PARTNERSHIP.

An attorney at law, as such, has authority to submit the cause to arbitration. *Holker v. Parker*, 7 Cranch 336, 3 L. Ed. 396. And see *Somers v. Balabrega*, 1 Dall. 164, 1 L. Ed. 83, and cases cited in the notes to that case. See, generally, the title ATTORNEY AND CLIENT.

Assignees or trustees in bankruptcy.—Generally, as to the powers of assignees or trustees in bankruptcy to submit to arbitration, compromise, etc., see the title BANKRUPTCY.

Where an assignment of the debt was made more than two months before the commencement of the bankrupt proceed-

accepts the settlement and brings an action upon the covenant contained in the submission, thereby adopts and ratifies the acts of the agent.¹⁸

2. **INTERNATIONAL ARBITRATION.**—International arbitration as a mode for the settlement of disputes between sovereign states is now more than ever before approved by civilized nations, and the usual rules as to the conclusiveness and effect of submission and award apply to such arbitration.¹⁹

ings, it is not necessary that the assignees should be parties to the submission to arbitration to ascertain the amount due. *Crawford v. Halsey*, 124 U. S. 648, 31 L. Ed. 572.

Trustees.—Where a trustee has power to make partition of lands, he may submit the partition to arbitration. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855.

It is not a valid objection to the partition that the trustee authorized to make it did not give his personal attention to it, but by agreement with one of the heirs demanding it, submitted it to disinterested persons, whose arbitrament he confirmed by executing the necessary indenture. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855. See the title **TRUSTS AND TRUSTEES**.

For other instances of submission by particular persons or classes of persons, see the appropriate titles, as, for instance, **GUARDIAN AND WARD; INFANTS; INSANITY; PARENT AND CHILD**; etc.

18. **Ratification of submission by agent.**—*Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See the title **PRINCIPAL AND AGENT**.

19. **International arbitration.**—*La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. Ed. 223. See the titles **INTERNATIONAL LAW; STATES; TREATIES; UNITED STATES**.

"Vattel, in his treaties, p. 277, says: 'When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators, chosen by common agreement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators; they have engaged to do this; and the faith of treaties should be religiously observed.' And again, 'In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators; and it is upon these points alone, that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say, that it is

manifestly unjust; since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality.' And again, in page 178, he says, 'Arbitration is a very reasonable mode, and one that is perfectly conformable to the law of nations, for the decision of every dispute which does not directly interest the safety of the nation. Though the claim of justice may be mistaken by the arbitrators it is still more to be feared that it will be overpowered in an appeal to the sword.' The author well observes, that the Helvetic republic, by a wise adherence to this mode of adjusting controversies among themselves, and with foreign countries, has secured its liberty, and made itself respectable throughout Europe. These principles have been established by the common consent of the civilized world. And where they are invoked in the settlement of disputes between states, and the proceeding is characterized by fairness and good faith, it ought not to be set aside, and indeed cannot be; without, in the language of Vattel, proving by the clearest evidence, that the award was the offspring of corruption or flagrant partiality. And if the determination of the arbitrators has the sanction of time as well as of principle, it is believed, that history affords no instance where it has not been considered as absolutely binding on the parties. The peace of nations, and the prosperity of mankind, require that compacts thus formed should be held sacred." *Rhode Island v. Massachusetts*, 14 Pet. 210, 275, 10 L. Ed. 423.

"International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the

C. Basis and Scope of Submission.—1. **NECESSITY FOR DISPUTE OR CONTROVERSY BETWEEN PARTIES.**—It would seem that there cannot be submission to arbitration, in the strict sense of the term, in the absence of an existing controversy or at least an actual difference of opinion between the parties, to be submitted to the judgment or discretion of the arbitrator.²⁰

2. **SUBJECT MATTER OF SUBMISSION.**—In a civil case one may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge.²¹ Criminal proceedings cannot, however, generally speaking, be the subject of submission.²²

3. **SCOPE OF SUBMISSION.**—A general arbitration at common law usually involves a submission of all the matters in dispute between the parties.²³

Where Action Referred.—The law is well settled, that by the reference of an action to the determination of an arbitrator, nothing is included in the submission but the subject matter involved in it.²⁴

redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity." *Frelinghuysen v. United States*, 110 U. S. 63, 28 L. Ed. 71.

"It was also said in argument that the act of congress in some way—not clearly defined by counsel—was inconsistent with the principles underlying international arbitration, a mode for the settlement of disputes between sovereign states that is now more than ever before approved by civilized nations. We might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration. So far from the act of congress having any result of that character, the effect of such legislation is to strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the government concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself. The act of 1892 is a recognition of the principle that 'international arbitration must always proceed on the highest principles of national honor and integrity.' *Frelinghuysen v. United States*, 110 U. S. 63, 28 L. Ed. 71, above cited. By that act the United States declares that its citizens shall not through its agency reap the fruits of a fraudulent demand which they had induced it to assert against another country. Such legislation is an assurance in the most solemn and binding form that the government of this country will exert all the power it possesses to enforce good faith upon the part of citizens who, alleging that they have been wronged by the authorities of another country, seek the intervention of their government to obtain redress." *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 462, 44 L. Ed. 223.

20. **Actual controversy as essential to submission.**—*Kelly v. Crawford*, 5 Wall.

785, 18 L. Ed. 562. See ante, "Judicial Action as Essential," II, A, 2.

As to the validity of stipulations for submission of future controversies, see post, "Validity of Stipulations as to Submission of Future Controversies," IV, E, 2.

21. **Civil matters proper subjects for submission.**—*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365.

22. **Criminal matters not proper subject of submission.**—See *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365. And see, generally, the titles CONSTITUTIONAL LAW; CRIMINAL LAW.

23. **Submission of all disputed matters.**—*Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904.

24. **Where action referred.**—*New York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380, citing *Tidd's Prac.* 822; 2 T. R. 645. See, also, *Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904.

In *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879, it was held that notwithstanding the expression in the agreement of submission, that all questions of law in the case were concluded by the award, in this respect it was no more than a submission of all matters involved in the suit.

In *Hemingway v. Stansell*, 106 U. S. 399, 27 L. Ed. 245, it was held that the stipulation that three engineers should "constitute a board of arbitrament for the adjustment of all questions of difference" was necessarily limited to questions of difference in relation to the subject to be referred to them.

In *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516, it was held that the power of the arbitrators extends to all matters in controversy, as exhibited in the pleadings, unless it be restrained by other parts of the submission.

Letters as evidence showing matters submitted.—The letters of the parties are competent evidence to show matters submitted. *Lyle v. Rodgers*, 5 Wheat. 391, 5 L. Ed. 117.

Withdrawal of Matters Submitted.—Matters submitted in the first part of a submission may, it seems, be withdrawn in a subsequent part.²⁵

D. Form and Requisites of Submission.—1. **NECESSITY FOR SUBMISSION BY DEED**—Where the title to land is in question, it would seem that the submission as well as the award must be by deed;²⁶ but when the price of land, and not the question of title is submitted, the submission need not be by deed.²⁷

2. **MUTUAL AGREEMENT TO ABIDE BY AWARD.**—In order to clothe a person with the authority of an arbitrator the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy.²⁸ It is held, however, that the submission itself implies an agreement to abide the result, even if no such agreement were expressed.²⁹

E. Conclusiveness and Effect of Submission.—1. **SUBMISSION OF MATTERS IN DISPUTE**—a. *Effect upon Pending Suits Generally.*—The question of the effect of submission to arbitration in pending suits, as working a discontinuance or suspension of the case, waiving objections to form of remedy, etc., will be treated in another title in this work.³⁰

b. *Effect upon Right to Remove Cause.*—It has been held that a cause could not be removed by certiorari into the supreme court after the arbitrators had entered on the business submitted to them.³¹

c. *Effect upon Original Agreement between Parties Where Arbitration Fails.*—After a settlement of matters in dispute between a board of levee commissioners and contractors for building levees, which was binding as an accord and satisfaction, three engineers were appointed as arbitrators to settle a dispute in regard to the amount of work done. The arbitration failed because of the persistent efforts of contractors to introduce evidence before the arbitrators, not limited to the question of measurement, which was the only matter submitted. Held, the original agreement was not affected by the submission to arbitration, and remains in force.³²

d. *Right to Withdraw after Award Made or Benefits Received.*—After the award has been made or benefits received under the arbitration, neither party is at liberty to withdraw from the submission.³³

2. **VALIDITY OF STIPULATIONS AS TO SUBMISSION OF FUTURE CONTROVERSIES.**—It being a well settled rule that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void,³⁴ and that a person cannot bind

25. **Withdrawal in subsequent part of submission.**—*Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516.

26. **Submission by deed where title to land in dispute.**—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

27. **Deed unnecessary where price of land only is in question.**—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

28. **Mutual agreement to abide by award.**—*Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35.

29. **Agreement implied from submission.**—*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118, quoting *Whitcher v. Witcher*, 49 N. H. 176; *Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085.

"So the agreement to submit the matter to arbitrators, and to an umpire, if needful, carried with it the further agreement to abide the award which they might render, or, in case of their disagreement, which he might render. The law implies an agreement to abide the result of an arbitration from the fact of sub-

mission." *Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597.

30. **Effect of submission on pending suits.**—See the title **REFERENCE**.

31. **Effect upon right to remove cause.**—*Grubbs v. Grubbs*, 2 Dall. 192, 1 L. Ed. 344. See the title **REMOVAL OF CAUSES**.

32. **Effect on original agreement where arbitration fails.**—*Hemingway v. Stansell*, 106 U. S. 399, 27 L. Ed. 245.

33. **May not withdraw after award or benefits received.**—*United States v. Justice*, 14 Wall. 535, 19 L. Ed. 753.

Neither party to an arbitration between a sovereign state and a railroad company affecting public concern, after receiving benefits thereunder, can defeat the operation of the submission by withdrawal of its nominated arbitrators, after the discussion have been closed. *Columbia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

34. **Stipulations ousting jurisdiction illegal and void.**—*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365. See the title **ILLEGAL CONTRACTS**.

himself in advance by an agreement, which may be specifically enforced to forfeit his rights at all times and on all occasions, whenever the case may be presented,³⁵ a stipulation that the parties to a contract will in all cases of disputes arising under such contract submit their rights to arbitration, will not be specifically enforced, and the parties will not thereby be barred from resorting to the ordinary legal tribunals.³⁶ Parties may, however, by contract, stipulate that certain questions shall be determined in a certain manner when they arise,³⁷ and stipulations not ousting the jurisdiction of the courts, but leaving the general question of liability to be determined by the courts, and merely providing that certain matters therein mentioned shall be determined by submission to arbitration, are unquestionably valid.³⁸ In such case a party to such contract cannot, it would seem, resort to an action until such submission has been made if possible.³⁹

35. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365.

36. **Stipulations as to submissions of all future controversies.**—*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *The Excelsior*, 123 U. S. 40, 31 L. Ed. 75.

Mr. Justice Story, in his commentaries on Equity Jurisprudence, says: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced." *Home Ins. Co. v. Morse*, 20 Wall. 445, 452, 22 L. Ed. 365.

"In *Stephenson v. P. F. and M. C. Ins. Co.*, the court says: 'While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdiction; as conditions precedent to an appeal to the courts, they are void.'" *Home Ins. Co. v. Morse*, 20 Wall. 445, 452, 22 L. Ed. 365.

"In the case of *The Raisby*, 10 P. D. 114, there was an agreement to tow a ship in distress, 'the matter of compensation to be left to arbitrators at home, to be appointed by the respective owners.' As to this, Sir James Hannen said: 'This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the admiralty division, and if effect could have been given to it at all, it would only have

been by bringing an action upon it for not submitting to arbitration.'" *The Excelsior*, 123 U. S. 40, 51, 31 L. Ed. 75.

37. **Stipulation as to determination of certain questions.**—*United States v. Robeson*, 9 Pet. 319, 9 L. Ed. 142. See the title CONTRACTS.

38. **Stipulation for submission of certain matters to arbitration.**—*Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 34 L. Ed. 419; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385, 34 L. Ed. 708; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284.

39. **Submission as condition precedent to action.**—*Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385, 34 L. Ed. 708; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 34 L. Ed. 419. See, generally, the title CONDITIONS.

A provision, in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 255, 34 L. Ed. 419, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 384 L. Ed. 708. See *Cooley v. O'Connor*, 12 Wall. 391, 19 L. Ed. 446.

"The rule of law upon the subject was well stated in *Dawson v. Fitzgerald*, by Sir George Jessel, Master of the Rolls, who said: 'There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that

F. Construction.—Obvious Intention of Parties as Controlling.—In construing an agreement for submission, the court must look at what was the obvious intention of the parties.⁴⁰

In construing a submission written in a foreign language, fairness demands that the language be taken in its natural sense.⁴¹

no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant 'to bring an action for not referring,' or (under a modern English statute) 'to stay the action till there has been an arbitration.' 1 Ex. D. £30." *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 34 L. Ed. 708.

Where a person, on a given contract, covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, such person, if he prevent any arbitration may be sued at law on a quantum valebat, and the sum due may be ascertained by a jury under instructions from the court. If the jury, under such instructions, find that only so much is due, the plaintiff can recover nothing more. *Humaston v. American Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

"It might turn out on the trial that the price already paid was excessive, or, on the contrary, that it was not sufficiently remunerative. This point of value the triers were to determine, and if determined favorably to the plaintiff, he would have a cause of action against the defendant. Until this determination, if there had been no interruption to the arbitration, no cause of action could arise. It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if *Humaston*, instead of the company, had refused to proceed with the arbitration, he could not resort to an action, for the defendant would not have been in default, and, therefore, not liable to suit." *Humaston v. American Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

"This action cannot be supported as an action seeking damages for breach of contract to deliver stock, for there was no engagement to deliver any, except on a condition which has not happened and there is no proof that the arbitrators would have found that *Humaston* was entitled to receive more stock than he had already obtained. The action can be supported for the value of the property and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong and deprive the plaintiff

of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators, the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract, the thing on which the submission was based, and the revocation of the submission leaves the jury to settle it." *Humaston v. American Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

As to provisions in policies of insurance as to submission to arbitration in case of loss, see the title INSURANCE.

40. Court must consider obvious intention of parties.—*Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930.

As to construction of award, see post, "Construction of and Presumptions as to Awards," VIII, D.

It was agreed between *McA.* and *H.*, that *McA.* should withdraw entries of 10,000 acres, part of 11,666 acres, which had been located for the use of *H.*, and should relocate the same elsewhere; and that the 10,000 acres, the entries of which had been withdrawn, and the 10,000 acres relocated elsewhere by *McA.*, should be valued by two disinterested persons, one to be chosen by each party, and if the two could not agree on the value of the land, or any part thereof, they should choose a third person, who should agree on the value of the land, and that *H.* should have so much of the land relocated, as should amount to the value of the land for which the locations had been renewed; and also to the value of \$2,000, in addition to the value of the 10,000 acres. The two persons appointed could not agree as to the value of part of the land, and they nominated a third person; of the three persons thus appointed, two only agreed as to the value of part of the land. It is an unreasonable construction of this agreement, that it was so framed as that it not only might fail to accomplish the very object intended; but that, in all probability, it must fail, and become entirely nugatory, as the third man was not to be called in until the two had disagreed; it is a more reasonable construction, to consider the third man as an umpire, to decide between the two that should disagree; this would insure the accomplishment of the object the parties had in view. The valuation by the two appraisers was within the submission. *Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930.

41. Construction of submission written in foreign language.—*Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

For the general rules as to interpretation and construction, see the title IN-

V. Bond.

A. Definition and Nature.—The arbitration bond binds the parties to submit to the award order and arbitrament of the arbitrators or a majority of them respecting the controversy between the parties.⁴²

B. Action on Bond.—The right of action on arbitration bonds, the pleading thereon, etc., will be treated elsewhere in this title.⁴³

VI. Arbitrators and Umpires.

A. Definitions.—An arbitrator has been defined as "a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same."⁴⁴

The umpire is a third person appointed to decide between the two other arbitrators or referees who differ in opinion.⁴⁵

B. How Chosen.—Arbitrators, as seen from the definitions above given, are chosen by the parties.⁴⁶

Umpires.—Where the agreement in a submission to arbitration provides that certain claims shall be referred to the final decision and arbitration of parties designated, and an umpire, if needful, the arbitrators are authorized in case of their disagreement to appoint an umpire. It will be presumed that the parties intend that the usual mode shall be followed in the appointment, in the absence of any different designation; and the usual mode is by the act of the arbitrators themselves.⁴⁷

C. Duties and Powers.—1. DUTY TO ACT IMPARTIALLY AND PROCEED IN REGULAR MANNER.—Arbitrators, being judges chosen by the parties themselves, ought, as well as those who are constituted by law, to be exempt from all imputation of partiality or corruption; their conduct ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard, and themselves the means of understanding the subjects they are to decide.⁴⁸ Corrupt motives are not, however, lightly to be ascribed to the arbitrator, nor is partiality to

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42. Arbitration bond defined.—See *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

The bond by which the parties agree to submit their matters to arbitration, and by which they bind themselves to abide by the award of the arbitrator, is commonly called a "submission bond." *Black Law Dict.*, tit., Submission Bond.

43. Actions on bond.—See post, "Remedy for Breach of Award," VIII, G.

44. Arbitrator defined.—*Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35.

"Arbitrators are judges of the parties own choosing, for the furtherance of justice and quieting of controversies." *Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87.

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal." *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

45. Umpire defined.—2 *Bouv. Law Dict.*, title, Umpire. *Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930. And see post, "How Chosen," VI, B.

46. Arbitrators chosen by the parties.—See ante, "Definitions," VI, A. And see *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305; *United States v. Justice*, 14 Wall. 535, 19 L. Ed. 753; *Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417.

As to appointment of referees by the court, with the consent of the parties, see the title REFERENCE.

47. Umpires usually appointed by arbitrators.—*Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See, also, *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813; *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830; *Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417.

As to appointment of umpire under order of reference, see the title REFERENCE.

48. Duty to act impartially and regularly.—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305. See, generally, the title JUDGES.

Where one of the arbitrators of a controversy between a railroad company and its contractors for the construction of a tunnel, was, at the time of the making of the contract, a chief engineer in the employment of the contractors, left such employment before the contract was performed, but had received a share of the profits under an agreement with the contractors, though not otherwise interested, these facts do not constitute grounds for setting aside a judgment on the award. *Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417.

be attributed to him, on account of difference of opinion with respect to the decision he has made.⁴⁹

2. **DUTY TO DETERMINE ALL MATTERS SUBMITTED AND REPORT THEREON.**—It is the duty of the arbitrator or referee to determine all the matters submitted to him, and to report the result of his findings.⁵⁰

3. **SCOPE OF AUTHORITY.**—The arbitrator derives his authority from the submission,⁵¹ and may not deviate therefrom in his award,⁵² and his acts in excess of the powers conferred by the submission are not binding.⁵³ Every presumption is, however, indulged in favor of the validity of the award,⁵⁴ and any excess of power must be clearly shown.⁵⁵

4. **DELEGATION OF AUTHORITY.**—An agreement of submission, while making the arbitrators exclusive judges of the subject submitted to their decision, gives them no power to delegate their trust and authority to others.⁵⁶

5. **TERMINATION OF AUTHORITY.**—The power of arbitrators is exhausted when

49. Improper motives or partiality not to be imputed.—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

The statement by an arbitrator that one of the parties to the submission ought to buy his winter's meat for him, without charge, on account of the services he had rendered in the arbitration, if made seriously and confidentially, would have furnished objections to the award not easily to be removed. *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

For evidence held insufficient to show misconduct or partiality on the part of an arbitrator, see *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

50. Duty to determine and report on all matters submitted.—*Hecker v. Fowler*, 2 Wall. 123, 17 L. Ed. 759; *Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417. See post, "Conformity to and Limitation by Terms of Submission," VIII, C, 2, a. And see, generally, the title **REFERENCE**.

51. Authority derived from submission.—See ante, "The Submission," IV.

52. May not deviate from submission.—See post, "Conformity to and Limitation by Terms of Submission," VIII, C, 2, a.

Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other dispositions of the property. The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners, is insufficient. *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.

Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee. *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.

53. Acts in excess of authority ineffective.—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305; *De Groot v. United States*, 5

Wall. 419, 18 L. Ed. 700. See post, "Grounds," VIII, E, 2, b, (2).

Congress may disaffirm the act of an arbitrator appointed by it if made in excess of the submission. *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

Defense available in court of law.—The injured party may avail himself of the defense of excess of power in arbitrators, in a court at law, where the excess of power is apparent on the face of the award. *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305, in which case the question was raised but not decided, whether, when excess of power is not shown by the award itself, the injured party is at liberty in a court of law to avail himself of evidence dehors the record.

54. Every presumption in favor of award.—See post, "Construction of and Presumptions as to Awards," VIII, D.

55. Excess of power must be clearly shown.—Under an arbitration bond binding the parties to submission and award respecting a controversy of several accounts and contracts existing between them, the arbitrators debited the plaintiff with the purchase money of a lot of ground which had been conveyed to him by the defendant. It is contended that this is not a contract subsisting between the parties, and consequently, is not included within the terms of the submission. The court held that the plaintiff in the court below has failed to show that the arbitrators exceeded their power. *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

56. May not delegate authority.—*Levey v. Gorgas*, 4 Dall. 71, 1 L. Ed. 746. See, generally, the title **POWERS**.

A reference to the secretary of the inferior for the mere purpose of an account cannot be considered as a delegation of authority by the senate to adjudicate any of the questions which had been submitted to it by the agreement of the parties. The stating of the account was merely in execution of the judgment; the principle on which it should proceed was fully, clearly, and finally adjudged. *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. Ed. 306.

they have once finally determined matters before them. Any second award is void.⁵⁷

VII. Hearing before Arbitrators.

A. Necessity for Hearing in Presence of Parties.—Arbitrators being, as has been seen, judges chosen by the parties,⁵⁸ and being required to act judicially,⁵⁹ in order that their award may be binding, the usual rule as to judicial proceedings applies, namely, that in order to be concluded by a judgment or decree, the parties thereto must have an opportunity to be present and be heard in their own behalf.⁶⁰ In order that the award in an arbitration, or a reference under rule of court, may be binding, there must be a hearing before the arbitrators or referees, at which the parties are entitled to be present, and be heard.⁶¹ This right to be present may, however, it seems, be waived.⁶²

B. Testimony.—1. **RIGHT TO PRODUCE WITNESSES.**—**In General.**—On hearings before arbitrators or referees, no surprise is permitted, such as refusing the parties a reasonable time to bring forward their witnesses,⁶³ or refusing to hear them when they are brought.⁶⁴

Admission of Incompetent or Illegal Testimony as Affecting Award.—See post, "Grounds," VIII, E, 2, b, (2).

2. **EXAMINATION OF WITNESSES.**—The witnesses on both sides are required to give their evidence in the presence of the parties,⁶⁵ that they may have the oppor-

57. **Termination of authority.**—*Bayne v. Morris*, 1 Wall. 97, 17 L. Ed. 495.

The authority conferred upon an arbitrator by act of congress may be taken away by a repeal of the resolution. *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

58. **Arbitrators as judges.**—See ante, "Definitions," VI, A.

59. **Judicial functions of arbitrators.**—See ante, "Judicial Action as Essential," II, A, 2.

60. **Application of general rule as to judicial proceedings.**—*Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813. See the titles JUDGMENTS AND DECREES; JURISDICTION.

61. **Right to hearing in presence of parties.**—*Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82; *Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 396; *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305. See the title REFERENCE.

"Both parties should have an opportunity of being heard, and that in the presence of each other, that they may be enabled to apply their testimony to the allegations." *Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82.

Where a party has been detained by legal process from attending the hearing before arbitrators, the mere fact of his having failed to answer certain letters from his client is no such negligence as will estop him from objecting to an award rendered at a hearing in his absence, and an award so rendered will be set aside. *Holker v. Parker*, 7 Cranch 436, 453, 3 L. Ed. 396.

Insufficient evidence of absence of parties.—Statements of arbitrators after rendering an objection, not made in a serious or confidential manner are insufficient evidence to prove the fact that the parties

were not present at the hearing. *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

62. **Waiver of right to be present.**—*Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 396.

63. **Allowance of reasonable time to bring forward witnesses.**—*Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82.

"It is essential to the fair and satisfactory investigation of facts, that an opportunity should be afforded to obtain and produce the necessary evidence, however distant the scene of the transaction may be. A court of justice will always allow time for the execution and return of a commission, when witnesses reside abroad. In the present case, the question turned upon the seaworthiness of a ship; and time was asked by the defendants to produce testimony from Halifax, where she had undergone a survey and repairs. This was refused, without any reason to suppose that the object in asking it was mere delay and vexation. The refusal has deprived the party of the means of defense before the referees; and we cannot think it just, to place him out of the reach of all remedy, by confirming the report." *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830.

64. **Right to have witnesses heard.**—*Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82.

For the general rules as to evidence, its admissibility, weight and sufficiency, see the title EVIDENCE. Generally, as to witnesses, right to produce, competency, examination and cross-examination, etc., see the title WITNESSES.

65. **Witnesses to be examined in presence of parties.**—*Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82; *Hagner v. Musgrove*, 1 Dall. 83, 1 L. Ed. 46; *Chaplin v. Kirwan*, 1 Dall. 187, 1 L. Ed. 93; *Pass-*

tunity of cross-examining such witnesses.⁶⁶ Where an umpire has been appointed by the referees, in accordance with the power given them in case of disagreement, such umpire must examine the witness and the documents for himself, in the presence of the parties, without relying solely upon the information or facts reported by the referees.⁶⁷

VIII. The Award.

A. Definition.—The award is the judgment or decision of arbitrators, or referees, on a matter submitted to them.⁶⁸

B. Validity of Award by Majority of Arbitrators.—While, when there has been an original delegation of power to three persons for a private purpose, it would seem that all must agree, or the authority has not been pursued,⁶⁹ yet it may be stated as a general rule that, where a controversy is submitted to arbitration, an award by a majority of the arbitrators is sufficient and effective.⁷⁰ Where a

more *v. Pettit*, 4 Dall. 271, 1 L. Ed. 830. "All the testimony should be heard, all the documents should be seen by both the parties, in the presence of the referees." *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830. See, generally, the title WITNESSES.

66. Right to cross-examine.—*Hollingsworth v. Leiper*, 1 Dall. 161, 1 L. Ed. 82.

67. Re-examination of case by umpire.—*Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830; *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813.

"When an umpire is chosen by referees, he stands in the same situation, precisely, as the referees themselves, both with respect to powers to be exercised, and duties to be performed. He may examine, and he ought to examine, the witnesses, and the documents, for himself, in the presence of the parties, without relying solely upon the information or facts reported by the referees. This rule was settled in the case of *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813; and it is highly important to the administration of justice, that it should be observed. It has not been observed upon the present occasion; and, therefore, the report cannot be confirmed." *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830.

"For the plaintiff, it was observed, that however widely the parties differed on facts and principles, the referees knew no diversity of sentiment, but upon the single question, how far the rule of reference extended. Their general statements, therefore, to the umpire, were in unison; and he examined for himself, all the accounts, which the parties had exhibited. It has been decided, in *Hall v. Lawrence*, 4 T. R. 589, that the award of an umpire will not be set aside, because he received the evidence from the arbitrators, without examining the witnesses himself, unless such a re-examination was expressly requested." *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813.

"The case of *Hall v. Lawrence* was decided in 1792. It is not, therefore binding upon us, as an authority; and upon principle, we cannot accede to the decision. The plainest dictates of natural

justice must prescribe to every tribunal, the law, that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right; but it is the result of long experience, and of a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning, by the party himself, will sometimes have a wonderful effect upon a sound and generous mind; an effect which the cold and minute details of a reporter can neither produce nor supplant. Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction; there is scarcely an argument that may not be elucidated, so as to insure success; or controverted, so as to prevent it. To exclude the party, therefore, from the opportunity of interposing, in any of these modes (which the most candid and the most intelligent, but a disinterested person, may easily overlook), is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition." *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813.

68. Award defined.—1 Bouv. Law Dict., tit., Award. And see *Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 396.

Award and compromise distinguished.—See the title COMPROMISE AND SETTLEMENT.

69. Where authority originally delegated to three.—*Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930.

70. Majority award sufficient.—*Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930; *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305; *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

Where a commission, appointed to settle a controversy, and given the power to determine the procedure to be followed in the exercise of the powers conferred upon it, resolves that all decisions shall be by majority vote, an award by such majority vote is binding. *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

case is submitted to two arbitrators, with the power to choose a third person as umpire in case of disagreement,⁷¹ and these original arbitrators do disagree and appoint an umpire, his duty is to decide between them, and the decision of such umpire and one of the arbitrators is a majority award and effective.⁷²

C. Form and Requisites of Valid Award.—1. **FORM.**—**Necessity for Deed.**—Where the dispute is concerning land, and the title to such land is in question, it has been held that the award, as well as the submission, should be by deed.⁷³ Where, however, the dispute is only as to the price, the award need not be by deed.⁷⁴

Signature.—Where the fact that an award was signed by only two of three referees was not called to the attention of the court when their report was confirmed and judgment rendered thereon, it has been held that this will furnish no ground for reversing the judgment.⁷⁵

2. **REQUISITES.**—a. *Conformity to and Limitation by Terms of Submission.*—**In General.**—The submission to arbitration, being the contract by which the parties agree to refer the dispute, and to abide by the award, is the source of the arbitrators' authority,⁷⁶ and such arbitrators, in making their award, must conform to the terms of the submission.⁷⁷

Decision of All Matters Submitted.—The award must decide all the matters submitted,⁷⁸ and a party is not bound to accept an award which clearly does not dispose of part of the matters submitted.⁷⁹

Presumption as to Determination of All Issues.—In the absence of evidence to the contrary, it will be presumed that all the issues were determined by the arbitrator or referee.⁸⁰ There is a class of cases upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod*; but the rule is to be understood, with this qualification—that in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must dis-

71. Selection of umpire in case of disagreement.—See ante, "Definitions," VI, A.

72. Decision of one arbitrator and umpire a valid award.—Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 930.

73. Necessity for award by deed where title to land in question.—Davy v. Faw, 7 Cranch 171, 3 L. Ed. 305.

74. Deed unnecessary where price of land alone in question.—Davy v. Faw, 7 Cranch 171, 3 L. Ed. 305.

75. Signature by only two of three referees.—Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085. See the title REFERENCE.

"The omission was amendable and non constat but * * * the amendment could and would have been made if the objection had been suggested." Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085.

76. Submission source of arbitrators' authority.—See ante, "The Submission," IV.

77. Conformity to submission.—McCormick v. Gray, 13 How. 26, 14 L. Ed. 36; Karthaus v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; De Groot v. United States, 5 Wall. 419, 18 L. Ed. 700; Burchell v. Marsh, 17 How. 344, 15 L. Ed. 96.

78. Decision of all matters submitted.—McCormick v. Gray, 13 How. 26, 14 L. Ed.

36; Carnochan v. Christie, 11 Wheat. 446, 6 L. Ed. 516; De Groot v. United States, 5 Wall. 419, 18 L. Ed. 700.

79. Award not disposing of all matters submitted need not be accepted.—De Groot v. United States, 5 Wall. 419, 18 L. Ed. 700.

Omission as ground for setting aside award.—See post, "Grounds," VIII, E, 2, b, (2).

80. Presumption that all issues were determined.—Hecker v. Fowler, 2 Wall. 123, 17 L. Ed. 759. See the title REFERENCE.

Implied rejection of credits not enumerated.—"The arbitrators have allowed to the plaintiffs several credits claimed by them, but have not expressed their rejection of any item which may have been made and disallowed. Instead of introducing into the award the several items which may have been claimed and disallowed, they award a specific sum to the defendant, with a declaration that the several items enumerated in the preceding part of the award as credits to which the plaintiffs are entitled, are to be deducted therefrom. This is, we think, a rejection of all credits not enumerated." Carnochan v. Christie, 11 Wheat. 446, 462, 6 L. Ed. 516.

tinently show, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them.⁸¹

Limitation to Matters Submitted.—The award must not extend to any matters not within the submission.⁸² And if it does extend to such matters it

81. Necessity for notice to arbitrators of omitted points.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

Duty of party to show that matters were brought before arbitrators or referees.—If a submission be of all actions, real and personal, and the awards be only of actions personal, the award is good; for, it shall be presumed, no actions real was depending between the parties. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof aliunde, they were brought before the referees. *Karthauss v. Ferrer*, 1 Pet. 222, 229, 7 L. Ed. 121.

"That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall v. Randall* is a leading case of that class. Lord Ellenborough, C. J., in delivering the opinion of the court, says: 'The arbitrators had three things submitted to them; one was, to determine all actions, etc., between the parties; another was, to settle what was to be paid by the defendant for hops, poles and potatoes in certain lands; the third was, to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for.' This case was adjudged, according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. *Kyd* 177. But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground of only part of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. *Caldwell* 105; *Kyd* 177; *Cro. Car.* 216; *Baspole's Case*, 8 Co. 98; *Ingraham v. Milnes*, 8 East 445. That Lord Ellenborough understood and intended to apply the rule, as thus qualified, in *Randall v. Randall*, is manifest. For Mr. Espin-

asse, in commenting upon *Baspole's Case*, having observed, that it is said in that case, that though there be many matters in controversy, yet if only one be signified to the arbitrators, he may make an award for that, for he is to determine according to the *allegata et probata*; and it is in every day's practice, that an award may be good in part, and bad in part. Lord Ellenborough, in an answer to that argument, replies, 'That is, where it does not appear there is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him, than those that are mentioned to him at the time of the reference; but here it does expressly appear, that there was another matter referred, on which there is no arbitrament.'" *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

82. Must not extend to matters not within submission.—*McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36; *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

Where the agreement for reference contained a clause, providing that upon payment of damages to the owner of the land he should convey it to the other party, it was proper for the umpire to omit all notice of this. It was not put in issue by the pleadings, nor referred to the arbitrators, whose authority was limited to the finding of damages. *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60. See the title REFERENCE.

Where a resolution of congress authorized one of the executive departments to settle, on principles of justice and equity, all damages, losses, and liabilities incurred or sustained by certain parties who had contracted to manufacture brick for the government, provided "that the said parties first surrender to the United States all the bricks made, together with all the machines and appliances, and other personal property prepared for executing the said contract, and that said contract be canceled," an award is not within the resolution, which, taking a surrender of real estate—the brick yard—where the brick, machinery, and appliances were, makes allowance for it. Nor will another award be brought within the submission, because the party, being dissatisfied with the first award, congress has referred the matter to another executive department, directing it to settle the claim, but prescribing for the mode or settlement essentially the same principle by which the settlement was to be made by the department first authorized. *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

need not be accepted by the party.⁸³ It cannot, however, be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject matter of it.⁸⁴

b. *Certainty, Finality and Conclusiveness*.—(1) *Necessity*.—**In General**.—The award must be certain,⁸⁵ final,⁸⁶ and conclusive of the whole matter referred.⁸⁷

Sufficient if the Award May Be Rendered Certain.—It would seem to be a sufficient compliance with the above requirement as to certainty if the award can be reduced to a certainty.⁸⁸ Thus, an award which provides the means of de-

83. Award exceeding submission need not be accepted.—*De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700, holding that an award allowing large sums for matters not submitted need not be accepted.

Exceeding submission as ground for setting aside award.—See post, "Grounds," VIII. E, 2, b, (2).

84. Admission of illegal evidence as raising inference of exceeding submission.—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

One of the claims made by the party who was sued was for damages for the violence of the agent of the creditors; and the referees heard evidence upon this subject. Even if this had been beyond the submission, there was nothing in the record to show that the arbitrators made any allowance for this violence and for slanderous language. *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

85. Award must be certain.—*Young v. Reuben*, 1 Dall. 119, 1 L. Ed. 63; *Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87; *Thornton v. Carson*, 7 Cranch 596, 597, 3 L. Ed. 451; *Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117; *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904; *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700; *Choctaw Nation v. United States*, 119 U. S. 1, 1 L. Ed. 306.

For similar requirements in case of judgments or decrees, see the title JUDGMENTS AND DECREES.

Failure to distinguish personal from representative liability.—Where claims against a party, both in his own right, and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award that it does not precisely distinguish between moneys which are to be paid by him in his representative character, and those for which he is personally bound. *Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117.

Award for sum of money due at a prior date void for uncertainty.—"Under a rule of this court, referees reported, 'that the sum of £75 was due the 3d of March last, with interest on the same.' The time mentioned was several months before the meeting of the referees; and, on motion, the court set aside the report for the uncertainty; as there might have been a sum due on the 3d of March, and nothing due

at the time of making the report." *Young v. Reuben*, 1 Dall. 119, 1 L. Ed. 63.

The effect of uncertainty is to render the award void in whole or in part. *Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117. See post, "Effect of Partial Invalidity," VIII. C. 3.

86. Award must be final.—*Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87; *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 12; *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700; *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879; *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.

An award is regarded as final, when it is an absolute conclusive adjudication of the matters in dispute. *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

87. Must be conclusive of all matters referred.—*McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36; *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700; *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

Where the arbitrators determined that the plaintiffs should be entitled to a credit of a certain sum, on account of sales of lands to the defendant, provided "they shall grant, or cause to be granted, to the said W. C. (the defendant), a clear, unincumbered, and satisfactory title" to the lands, without limiting any time within which the title should be made; held, that the award was void, as not being final and conclusive. *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516.

"It is contrary to the principle of a general reference, that the court should take the award so far as it goes, and supply all omission by its decree. The award ought to be in itself a complete adjustment of the controversies submitted to the arbitrators." *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516.

88. Sufficient if award may be rendered certain.—*Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87; *Lynn v. Risberg*, 2 Dall. 180, 1 L. Ed. 339. See, generally, the title INTERPRETATION AND CONSTRUCTION.

Extrinsic evidence to supply an omission of a person's name.—An award was made that "an order for £550, should be given on — (not mentioning the name), in whose hands, it is said, that sum was deposited by certain defendants in a former action, for the use of the

termining with certainty the amount for which it was rendered is valid.⁸⁹

(2) *Validity of Alternative and Contingent Award.*—**General Rule.**—It has been held that an award is not void because in the alternative, and contingent;⁹⁰ nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control.⁹¹

plaintiff." Held, the award may be supplied, where it can be rendered certain. So was the case of *Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87. Here are words of reference; and we think it may, in this case also, be supplied by parol proof. *Lynn v. Risberg*, 2 Dall. 180, 1 L. Ed. 339.

"Two of the essentials in awards are that they should be certain and final. By the condition of the bond, in this case, it appears, that a particular controversy between the parties was 'about the exchange of a number of loanoffice certificates,' and, by the award, the defendant is ordered to pay to the executors of John Grier, deceased, 175 L., in consideration of the loss sustained by the exchange of certificates between the said John Grier and him. From these, it may be collected, that the meaning of the arbitrators seems to be, that a loss had been sustained by the exchange of certain loan office certificates between a certain John Grier, deceased, and the defendants, that this loss affected the plaintiffs in some way or other, because it was made an express article in the submission, and that the payment of the money to the executors of John Grier, should determine the controversy on this account. John Grier, deceased, has executors; who they are, may be easily ascertained; as easily as the costs of an action, or the charges of a voyage, which have been adjudged to be good awards, because they can be reduced to a certainty. *Beale v. Beale*, Cro. Car. 383; and 1 Roll. Abr. 251. So that this award appears to be certain enough. Besides, if the executors are considered as strangers, yet, by the better authorities, an award to pay money to them shall be intended for the benefit of the plaintiffs, and that they, being the submittants, were either the executors, or authorized by them, unless the contrary appear. 1 Salk. 74, 3 Leon. 62." *Grier v. Grier*, 1 Dall. 173, 174, 1 L. Ed. 87.

89. Sufficient if award provides means for determining amount.—*Choctaw Nation v. United States*, 119 U. S. 1, 30 L. Ed. 306.

"It is insisted that the award is invalid because it is uncertain, inasmuch as while it determines that the Choctaws shall be allowed the proceeds of the sale of the lands ceded by the treaty of 1830, and at the rate of 12½ cents an acre for the residue, it does not ascertain what those proceeds and the value of the residue amount to in the aggregate. But the award itself provided the means of reducing this uncertainty by a reference to the secretary of the interior, who was directed to cause the account to be stated with the Choctaws,

showing what amount was due them according to the principle of settlement embraced in the award." *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. Ed. 306.

90. Award valid though in alternative and contingent.—*Thornton v. Carson*, 7 Cranch 596, 597, 3 L. Ed. 451.

"It is objected that the award did not agree with the submission, and under that head it is argued that the first question submitted for adjudication to the senate was whether the Choctaws were entitled to the proceeds of the sale of the lands ceded by them to the United States by the treaty of September 27, 1830, and that there was no authority to allow to them, such proceeds, unless the senate should first find that they were entitled to them. * * * The language of the question is in the alternative; it is whether the Choctaws are entitled to or shall be allowed; and it was sufficient, in our judgment, to satisfy the terms of the submission, for the senate to declare, as it did, that the Choctaws should be allowed the proceeds of the sale of the lands sold by the United States which had been ceded by the Choctaws under the treaty of 1830; and we are, therefore, of opinion that the award cannot be avoided on this ground." *Choctaw Nation v. United States*, 119 U. S. 1, 32, 30 L. Ed. 306.

91. Requirement of acts in conjunction with others.—*Thornton v. Carson*, 7 Cranch 596, 597, 3 L. Ed. 451.

"The plaintiff is required, in conjunction with certain other persons, to convey to the defendants, for the benefit of himself and the heirs of Thomas Carson, on or before a fixed day, certain property specified in the award, or to pay the amount of the two bonds in suit. If he made the conveyance, then the referees have awarded certain property to the defendant; and if he failed to do this, judgment was to be entered against him, for the amount of those bonds. The defendant had his election to do either. * * * There is no uncertainty in all this; or, at least, none which might not be rendered certain by the act of the plaintiff, in conformity with the award, and which must not necessarily be certain, at the time the court was to render judgment on the award." *Thornton v. Carson*, 7 Cranch 596, 599, 3 L. Ed. 451.

"The award is said to be unreasonable, because it requires the plaintiff to get other persons to join in the conveyance to the defendant, which he may not be able to do. But surely, if the plaintiff was bound to pay the bonds in suit, or to

Where an award is in the alternative, and one of the alternatives is adopted, neither party is bound as to the others.⁹²

(3) *Objections for Uncertainty*.—It has been held that the defendant in an action on an arbitration bond can have no reason to complain, that the plaintiff or plaintiffs, may not, on account of the uncertainty, be able to obtain all the benefits intended by an award,⁹³ nor can it furnish any reason for withholding from them, that to which they are certainly entitled.⁹⁴

c. *Mutuality*.—Great stress was laid, in the early cases, upon the mutuality of an award; but at present, it is by no means considered necessary that each party should be directed to do, or not to do, any particular thing.⁹⁵

3. *EFFECT OF PARTIAL INVALIDITY*.—An award may be void in part and good for the residue,⁹⁶ but if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.⁹⁷ It is indispensable to such cases that the part allowed to stand should appear to be in no way affected by the departure from the submission.⁹⁸ If an arbitrator embraces

convey a good title to certain property, which title would not be valid, in the opinion of the referees, unless other persons joined in the conveyance, he cannot surely complain, that he is ordered to pay the money, unless he executes such a deed as will pass a good title. It is his misfortune if he cannot make the title, but it is no reason why, in that event, he should not pay the money." *Thornton v. Carson*, 7 Cranch 596, 597, 3 L. Ed. 451.

92. *Effect of adoption of one alternative*.—*Great Falls Mfg. Co. v. Garland*, 124 U. S. 581, 31 L. Ed. 527.

93. *Uncertainty as defense to action on arbitration bond*.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

94. *Not ground for withholding benefit to which party entitled*.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

95. *Necessity for mutuality—Former and present rule*.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

"Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The court held it a good award. *Harris v. Knipe*, 1 Lev. 58. In *Palmer's Case* (12 Mod. 234), one party was directed to pay money to the other, without any directions being given to the latter in any way; and again, it was awarded that A. should pay B. 40 shillings for a trespass. *Freem. 204*. The respective awards were considered unimpeachable. These cases fully establish the principle above laid down." *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

96. *Award good in part and void as to residue*.—*Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117; *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36; *New York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

An award for a single sum consisting of several items may be invalid as to some of its items, and sustained as to the balance. *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159; *Ex parte Republic of Colombia*, 195 U. S. 604, 49 L. Ed. 338.

97. *Entire award void where void portion inseparable from residue*.—*Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117. And see cases cited in notes to preceding text.

In his note upon *Pope v. Brett*, 2 Saund. 292, Sergeant Williams says: "If, by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration, for that which he is to do to the other, the award is void in the whole." Quoted in *Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117.

"There is great good sense in this distinction. If A. be directed to pay B. \$100, and also to do some other act, not well enough defined to be obligatory, there is no reason why B. should not have his \$100, because he cannot also get that other thing which was intended for him. But if A. be directed to pay B. \$100, and B. to do something for the benefit of A, which is not so defined as to enable A. to obtain it, there is much reason why A. should not pay the \$100; since he cannot obtain that which the arbitrators as much intended he should receive, as that he should pay the sum awarded against him." *Lyle v. Rodgers*, 5 Wheat. 394, 409, 5 L. Ed. 117.

98. *Residue must be unaffected by departure from submission*.—*McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.

"There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission, to stand; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission. In the present case this does not appear. On the contrary, the basis of this whole award is erroneous, resting on the assumption that the disposal of the entire assets of the partnership was the subject of the award, and it is certain the arbitrator could properly have made no part of this award, as it stands, if he had assumed that the trusts declared

in his award matter not submitted, and includes the result in a single conclusion, so as to render it impossible to separate the matters referred from those which have not been, the award is bad.⁹⁹

D. Construction of and Presumptions as to Awards.—Awards will be construed liberally and favorably by the courts.¹

Every Intendment in Favor of Award.—It is a settled rule in the construction of awards that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it.² The supreme court will presume, until the contrary is shown, that an award made is correctly made.³ Thus, in

in the assignment were to be executed." *McCormick v. Gray*, 13 How. 26, 38, 14 L. Ed. 36.

Although, as a general rule, where an award exceeds the submission, it is not invalid if the party which is in excess can be separated from the residue; yet where, on a submission of a claim for compensation for breach of contract, an award is made of one gross sum—this embracing an allowance for matters that are not within the submission, as well as for matters that are, and where it is impossible for the court to apportion the parts—the case is not within the rule. Such an award is not obligatory on the party disadvantageously affected by it. *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

"It is, however, not always that an award is invalid because in some respects it exceeds the submission, for it is said that if the part which is in excess can be clearly separated from the remainder which is within the submission, the latter may stand. This, as a general rule, is true, but it is subject to some qualifications, one of which is expressed by Chief Justice Marshall, speaking for this court in the case of *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516, to the effect that the award to be valid ought to be in itself a complete adjustment of the controversies submitted to the arbitrators. There is no means by which the sum allowed by the secretary for this land can be separated from the other allowances made for the personal property, machines, and appliances transferred by claimant to the United States. They are all summed up in one grand item of \$29,323.22. What proportion of this item is for the land, it is impossible to tell. If we reject the whole of this item, then the claimant has no allowance for the machines, appliances, and personal property transferred to the government, and for the real loss in the purchase of land, and improvements placed on it for this specific purpose, the value of which must be much diminished by diverting it from that use." *De Groot v. United States*, 5 Wall. 419, 430, 18 L. Ed. 700.

99. Where result included in single conclusion.—*New York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380.

1. Awards liberally and favorably construed.—*Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87. See, generally, the title INTER-

PRETATION AND CONSTRUCTION.

As to construction of submission, see ante, "Construction," IV, F.

"It may not be amiss to observe that the rules established in England, before the revolution, respecting the construction of awards, have been more liberal and favorable than formerly; that many of the nice distinctions to be met with in our law books are by no means to be admitted as precedents in expounding awards, at this day; and that, as arbitrators are judges of the parties' own choosing, for the furtherance of justice, and quieting of controversies, the courts have of late construed their awards with great latitude, and according to their intention, appearing from the words of the whole. (a) 1 Burr. 277; 1 Bacon Abr. 139." *Grier v. Grier*, 1 Dall. 173, 175, 1 L. Ed. 87.

Construction of appeal from court of admiralty.—There is nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty which varies the effect to be given to such award from that to be given to it in any other court, either in the court below or on appeal. An award is to be construed in such court and its effect determined by the same general principles which would govern it in a court of common law or of equity. *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

2. Every intendment in favor of award.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

Facts stated in an award are presumed to so exist.—*Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159.

In patent cases.—If the arbitrators' finding as to the character of the machine manufactured by the respondent is correct, it is settled law that this decision is correct. *Reedy v. Scott*, 23 Wall. 352, 366, 23 L. Ed. 109; See *Gill v. Wells*, 22 Wall. 1, 22 L. Ed. 699; *Gould v. Rees*, 15 L. Wall. 187, 194, 21 L. Ed. 39; *Vance v. Campbell*, 1 Black 427, 428, 17 L. Ed. 168; *Prouty v. Ruggles*, 16 Pet. 336, 341, 10 L. Ed. 985; *Carver v. Hyde*, 16 Pet. 514, 10 L. Ed. 1053; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 329, 13 L. Ed. 441. See the title PATENTS.

3. Presumption on appeal.—*Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109. See the

favor of the award and decree below it will be presumed that the arbitrators had evidence of that fact on which their award is based.⁴

Construed According to Intention Apparent from Language.—Awards will be construed according to their intention, appearing from the words of the whole.⁵

E. Conclusiveness and Effect.—1. *IN GENERAL.*—As has already been seen, the parties to a submission to arbitration, agree by such contract of submission to refer the subject in dispute to others, and to be bound by their award;⁶ and an award honestly made in conformity with a valid submission, and after a full and fair hearing, is conclusive upon the parties.⁷ Under such an agreement, neither of them can hope again successfully to agitate the same points.⁸

2. *IMPEACHING AND SETTING ASIDE AWARD.*—a. *Jurisdiction.*—An award may be set aside in courts of admiralty for all the reasons on which awards are set aside in courts of law or chancery.⁹

b. *When Proper.*—(1) *In General.*—The general principles, upon which courts of equity interfere to set aside awards, are too well settled by numerous decisions to admit of doubt.¹⁰ If relief is granted in equity in the case of an award, it must be on a plain error in law or fact, specifically set forth.¹¹

(2) *Grounds.*—**Excess of Power.**—An award may be set aside for exceeding the power conferred by the submission.¹²

Fraud or Corruption.—So also fraud,¹³ or corruption in the arbitrator, will be ground for setting aside the award.¹⁴

title APPEAL AND ERROR, vol. 1, p. 333.

"Arbitrators as well as courts are presumed to decide correctly until the contrary appears, and if the party desires that the decision of such a tribunal shall be re-examined by an appellate court, he must see that the means for such a review is embodied in the record." *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109.

4. **Presumed that there was evidence of fact on which award based.**—*United States v. Farragut*, 22 Wall. 406, 424, 22 L. Ed. 879.

5. **Construed according to intention as shown by the words.**—*Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87.

Extrinsic evidence to aid interpretation.—"With respect to the observation that an award is to be interpreted by its own words, and not by any matter out of it, it is law; but when the words of an award have relation to things certain, out of the award, these things may be averred. *Grier v. Grier*, 1 Dall. 173, 175, 1 L. Ed. 87.

"And therefore, as the executors of John Grier, deceased, are persons certain, we think that it may be averred who they are by name, as has been done by the replication in the present case, were such averment necessary; for it is only explaining more particularly what was contained in the award itself." *Grier v. Grier*, 1 Dall. 173, 174, 175, 1 L. Ed. 87. See *Lynn v. Risberg*, 2 Dall. 180, 1 L. Ed. 339. See the title PAROL EVIDENCE.

6. **Parties bound by contract of submission.**—*Calhoun v. Dunning*, 4 Dall. 120, 1 L. Ed. 767; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085. See ante, "The Submission," IV.

7. **Award conclusive.**—*Calhoun v. Dunning*, 4 Dall. 120, 1 L. Ed. 767; *Burchell v. Marsh*, 17 Wall. 344, 15 L. Ed. 96; *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879; *New York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417. And see post, "Impeaching and Setting Aside Award," VIII, E, 2.

An arbitrament and award which concludes one party only is certainly an anomaly in the law. *Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35.

8. **May not again agitate the same points.**—*Calhoun v. Dunning*, 4 Dall. 120, 1 L. Ed. 767.

9. **Jurisdiction to set aside.**—*United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

10. **Principles controlling courts of equity well settled.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

"There are, it is true, some anomalous cases which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents." *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

11. **Must be for plain error specifically set forth.**—*Williams v. Paschall*, 4 Dall. 284, 1 L. Ed. 835.

12. **Exceeding power conferred by submission.**—*United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879. See ante, "Conformity to and Limitation by Terms of Submission," VIII, C, 2, a.

13. **Fraud.**—*United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879. See generally, the title FRAUD AND DECEIT.

14. **Corruption in arbitrator.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

Mistake.—An award may be impeached for gross mistake,¹⁵ either apparent on the face of the award, or to be made out by evidence.¹⁶

Mere Error of Judgment Insufficient.—In order to authorize the setting aside of an award there must be something more than a mere error of judgment;¹⁷ and in case of mistake, it should be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award.¹⁸ If an award is within the submission, and contains the honest decision of the arbitrators after a full and fair hearing of the parties, it has been held that a court of equity will not set it aside for error, either in law or fact.¹⁹ A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end of litigation.²⁰ A court of chancery has no right to annul an award honestly and incorruptly made merely because it thinks it could have made a better.²¹

An award cannot be set aside on the ground that the arbitrator had been misled by one of the parties, unless such arbitrator had been deceived by the nondisclosure of a material fact which the party was bound to disclose.²²

Omission of Arbitrators to Act upon a Part of Matter Submitted.—An award will not be set aside, in equity, on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission have injured the complainant.²³

The admission of illegal evidence, or taking the opinion of third persons, cannot be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject matter submitted to them, after a full and fair hearing of the parties, they are bound by

15. **Mistake.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96. See, generally, the title MISTAKE AND ACCIDENT.

For manifest mistake of law, an award may be set aside in a court of admiralty. *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

An award of arbitrators appointed under a mutual mistake of both parties, in supposing themselves bound by law to submit the matter in dispute to arbitration, is not obligatory. *Peisch v. Ware*, 4 Cranch 347, 2 L. Ed. 643.

16. **Apparent of record or shown by evidence.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

17. **Mere error of judgment insufficient.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96; *Bispham v. Price*, 15 How. 162, 14 L. Ed. 644.

18. **Requisite showing in case of mistake.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

19. **Not set aside for error in law or fact.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96; *New York, etc., R. Co. v. Myers*, 18 How. 246, 253, 15 L. Ed. 380.

"Where the award finds facts it is conclusive." *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

"Where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here." *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

"Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the

award." *United States v. Farragut*, 22 Wall. 406, 22 L. Ed. 879.

Mistake and mere error of judgment not synonymous.—"Courts should be careful to avoid a wrong use of the word 'mistake,' and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the courts should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell v. Marsh*, 17 Wall. 344, 15 L. Ed. 96.

20. **Reason for rule.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

21. **Disagreement of court with award insufficient ground to annul.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96.

"It may be admitted, that, on the facts appearing on the face of the record, this court would not have assessed damages to so large an amount, nor have divided them so arbitrarily between the parties; but we cannot say that the estimate of the arbitrators is so outrageous as of itself to constitute conclusive evidence of fraud or corruption." *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96. See, also, *The Excelsior*, 123 U. S. 40, 31 L. Ed. 75.

22. **Arbitrator misled by act of one party.**—*Teal v. Bilby*, 123 U. S. 572, 31 L. Ed. 263.

23. **Omission to act on all matters submitted.**—*Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305.

it; and a court of chancery has no right to annul their award because it thinks it could have made a better.²⁴ In arbitration proceedings in a controversy between a railroad company and its contractors, the fact that a material witness was an employee of the contractors at the time of making the contract, does not constitute sufficient ground for setting aside the award, when it does not appear that he testified falsely and the weight of the evidence corroborated his testimony.²⁵

c. *Pleading.*—**Specification of Error.**—In order that equity may grant relief against an award, the error in law or fact on the ground of which relief is claimed, must be specifically set forth.²⁶

Effect of Answer Denying the Allegations of Bill.—Where a case is submitted on a bill asking relief against an award as fraudulent and void, on the ground that it was made either from improper and corrupt motives, or in ignorance of the rights of the parties to the submission, and an answer denying that the arbitrators acted unjustly or with partiality or ignorance, and averring that they acted justly, fairly, and with a due consideration of the rights of the parties, such allegations of the answer must be taken to be true, unless it appears from other facts admitted by it, that this conclusion or averment founded on them is incorrect.²⁷

F. Enforcement of Award.—In General.—A court of equity either enforces an award as it is made, or sets it aside, if in any respect defective;²⁸ but it is contrary to its practice to confirm the award so far as it extends, and to supply omissions by decree of the court.²⁹

If any part of an award be impossible to be performed, the court will refuse an attachment for that part.³⁰

G. Remedy for Breach of Award—1. **FORM OF ACTION.**—In case of a refusal by one party to a submission to perform the award, the other party may bring an action of debt,³¹ or an action upon the covenant of submission.³²

2. **PARTIES.**—Where an instrument provides for the settlement of certain claims between certain parties, and the submission of other claims between other parties, the latter parties should only be named in actions upon the covenant of submission, although the instrument be signed by all the parties named therein.³³

3. **PLEADING.**—**Assignment of Breach.**—Where, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money; in an action on the bond to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, etc.; this is

24. **Admission of illegal evidence.**—*Burchell v. Marsh*, 17 How. 344, 351, 15 L. Ed. 96.

25. **Fact that witness was employee of one of the parties.**—*Union R. Co. v. Dull*, 124 U. S. 173, 31 L. Ed. 417.

26. **Error must be specifically set forth.**—*Williams v. Paschall*, 4 Dall. 284, 1 L. Ed. 835.

27. **Effect of denial in answer of allegations of bill.**—*Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96. See the titles EQUITY; PLEADING.

28. **Practice of courts of equity as to enforcement.**—*Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516.

29. **Supplying omissions.**—*Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516.

30. **Where any part of award impossible to be performed.**—*Kneekle v. Kneekle*, 1 Dall. 364, 366, 1 L. Ed. 178.

31. **Action of debt.**—*Williams v. Paschall*, 4 Dall. 284, 1 L. Ed. 835; *Kartheis v. Ferrer*, 1 Pet. 222, 7 L. Ed. 191. See the title DEBT, THE ACTION OF.

Where an award made under submission by parties plaintiff and defendant to that effect, awards that one party shall pay to the other a certain sum on one day specified, another sum on another day specified, and that to secure the payments he shall give a bond in a penal sum, and the party against whom the award is made refuses to do any of the things awarded, an action of debt will lie against him even although the time when both sums of money were awarded to be paid has not yet arrived. The right of action is perfect on the party's refusal to give the bond. *Bayne v. Morris*, 1 Wall. 97, 17 L. Ed. 495.

32. **Action on covenant of submission.**—*Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See the titles COVENANT, ACTION OF; COVENANTS.

33. **Parties to action on covenant of submission.**—*Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See the titles COVENANT, ACTION OF; PARTIES.

a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay.³⁴

Variance between Covenant Stated in Declaration and That Contained in Submission.—Where the covenant in a submission to arbitration, after referring certain claims to the decision of arbitrators, and an umpire, if necessary, adds the words, "as provided in articles of submission this day executed," and no such articles, in fact, ever had any existence, the declaration in an action for breach of the covenant need not refer to any such articles. Proof that no such articles ever had any existence will answer any objection of a variance between the covenant stated in the declaration and the covenant contained in the submission.³⁵

Plea.—A plea setting up mistake of the arbitrators, to an action of debt on an arbitration bond, which fails to set out particulars, is bad on demurrer.³⁶

Uncertainty of Award as Defense.—See ante, "Certainty, Finality and Conclusiveness," VIII, C, 2, b.

ARCHITECTS.—See the title WORKING CONTRACTS.

ARDENT SPIRITS.—See note 1.

ARE.—See note 2.

ARGOLS.—See note 3.

ARGUMENTATIVENESS.—See the titles INSTRUCTIONS; PLEADING.

34. Assignment of breach in action on bond.—*Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121.

35. Variance between covenant stated in declaration and that contained in submission.—*Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See the title VARIANCE.

36. Plea of mistake bad for failure to set out particulars.—*Williams v. Paschall*, 4 Dall. 284, 1 L. Ed. 835.

1. **Ardent spirits.**—Ardent spirits is a term applied to liquors obtained by distillation, such as rum, whiskey, brandy and gin. *Sarlls v. United States*, 152 U. S. 570, 572, 38 L. Ed. 556.

2. **Are.**—In *Tubbs v. Wilhoit*, 138 U.

S. 134, 136, 34 L. Ed. 887, it was held that the swamp land grant of September 28, 1850, was in præsentia. The court said: "The words 'are hereby granted' in the act imported a present grant, and not a promise of one in the future; and that the title to the lands, therefore, passed to the state at once, their identification to be made by the action of the secretary of the interior, but when identified, the title to relate back to the date of the act." See, also, *Wright v. Roseberry*, 121 U. S. 488, 30 L. Ed. 1039. And see, generally, the title PUBLIC LANDS.

3. **Argols.**—*Recknagel v. Murphy*, 102 U. S. 197, 198, 26 L. Ed. 130.

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CROSS REFERENCES.

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As to reargument in appellate court, see the title APPEAL AND ERROR, vol. 1, p. 333.

I. Control of Argument by Court.

A. **Compelling Argument.**—A party against his will cannot be compelled to argue his case with another.¹

B. **Requiring Two Cases Argued as One.**—When a case is advanced to be heard with another which has precedence on the docket, the rule is to require the two to be argued as one.²

II. Latitude of Argument.

A. **Language Used Must Be Respectful.**—Language used in oral argument must be respectful.³

B. **As Limited by the Evidence.—Comment upon Facts Not in Evidence.**—Any comments by counsel in argument upon facts not in evidence, which prejudices the defendant, is ground for reversal.⁴

1. *Louisiana v. New Orleans*, 103 U. S. 521, 26 L. Ed. 306.

2. *Louisiana v. New Orleans*, 103 U. S. 521, 26 L. Ed. 306.

3. *Kneeland v. American Loan, etc., Co.*, 138 U. S. 509, 34 L. Ed. 1052; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102.

We regret to notice in the brief of appellees' counsel in No. 1540 as persons on the conduct of opposing counsel. It is not pleasant to be compelled to remind counsel that language used in briefs, as well as that employed in oral argument,

must be respectful. *Kneeland v. American Loan, etc., Co.*, 138 U. S. 509, 34 L. Ed. 1052.

4. *Wilson v. United States*, 140 U. S. 60, 37 L. Ed. 650; *Hall v. United States*, 150 U. S. 76, 37 L. Ed. 1003; *Graves v. United States*, 150 U. S. 118, 37 L. Ed. 1021; *Waldron v. Waldron*, 156 U. S. 361, 39 L. Ed. 453.

Duty of court where objection is made.—When objection is made to comments by the district attorney upon the facts not in evidence, it is the court's duty to interfere and put a stop to them if they

Limitation to Rule.—Every remark made by counsel outside of the testimony is not ground for reversal. If such was true comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.⁵

Evidence Not Properly before the Jury.—It is well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, ground for reversal.⁶

C. Comments on Failure of Accused to Testify.—Under a statute allowing one charged with a crime to testify on his own behalf, but that his failure to testify shall not create any presumption against him, all comments in argument by counsel on such failure must be excluded from the jury.⁷

D. Comments on the Absence of Accused's Wife.—In a case where the wife is not a competent witness either in behalf of, or against her husband accused of crime, if he had brought her into court, neither he nor the government could have put her upon the stand, and it is a reversible error for the court to allow after objection, a comment to the jury upon her absence by the district attorney.⁸

E. Comments on Facts Having No Connection with Case.—Statements made having no connection with the case, if injurious to the defendant is ground for a new trial.⁹

are likely to be prejudicial to the accused. *Wilson v. United States*, 149 U. S. 60, 37 L. Ed. 650; *Hall v. United States*, 30 U. S. 76, 37 L. Ed. 1003; *Graves v. United States*, 150 U. S. 118, 120, 37 L. Ed. 1021.

5. *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799. See, also, *Crompton v. United States*, 138 U. S. 361, 34 L. Ed. 958.

6. *Waldron v. Waldron*, 156 U. S. 361, 380, 39 L. Ed. 453.

7. *Wilson v. United States*, 149 U. S. 60, 37 L. Ed. 650.

8. *Graves v. United States*, 150 U. S. 118, 121, 37 L. Ed. 1021.

9. *Graves v. United States*, 150 U. S. 118, 120, 37 L. Ed. 1021; *Hall v. United States*, 150 U. S. 76, 37 L. Ed. 1003; *Williams v. United States*, 168 U. S. 382, 398, 42 L. Ed. 509; *Wilson v. United States*, 149 U. S. 60, 37 L. Ed. 650; *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708.

Upon an indictment of a Chinese inspector for extortion of money, from a Chinese coming to United States from a foreign port, the representative of the governor remarked: "No doubt, every Chinese woman who did not pay Williams (the defendant) was sent back." The attorney for the accused objected to the prosecutor making any such statement before the jury. The court overruled the objection, and the defendant excepted. The objection should have been sustained. The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged. *Williams v. United States*, 168 U. S. 382, 398, 42 L. Ed. 509.

Comments upon another murder by defendant.—Upon a trial in Arkansas, it appeared upon cross-examination that the defendant had killed a negro in Mississippi. "The district attorney, in his closing argument to the jury, insisted that, from reading the newspapers and magazines, we know trials in the state of Mississippi of a white man for killing a negro to be farces; that the defendant came to the Indian country from Mississippi 'with his hands stained with the blood of a negro;' and that 'the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder.' The defendant instantly objected to all these declarations, expressions, and arguments of the district attorney; and excepted to the action of the court in overruling his objections." Held, that defendant was entitled to a new trial. *Hall v. United States*, 150 U. S. 76, 80, 37 L. Ed. 1003.

That case has been many times before courts.—The counsel for the prosecution alluded to the case as the most remarkable one ever tried in the territory, and to "the many times it had been brought before the tribunals." This allusion was not in contravention of that section of the act of the territory of Utah regulating proceedings in criminal cases, which declares that "the former verdict cannot be used or referred to either in evidence or in argument." (*Laws of Utah of 1878*, p. 126, § 317.) The object of this law was to prevent the accused from being prejudiced by reference to any former conviction on the same indictment. There was, in fact, no reference to any verdict on a previous trial, but merely a mention of the times the case had been before the courts, so as to magnify its importance. If allusions to previous trials, such as were

F. Reference to Historical Facts.—It has been said that it is a sound rule that historical facts, of which courts take judicial notice, may be alluded to in argument for the purpose of illustration.¹⁰

G. Explanations by Counsel.—If in the argument of the counsel the massage treatment is fairly explained to the jury, what it is ordinarily understood to be, and an explanation is given which was not radically wrong, it will not be error.¹¹

H. Statements in Answer to Issue Tendered in Argument by Opposing Counsel.—When in argument the defendant's counsel tenders an issue to the jury, the district attorney may accept the challenge, and any argument in reference thereto may be allowed.¹²

I. In Appellate Court.—The treatment of argument of counsel in the appellate court is treated elsewhere.¹³

III. Objections to Improper Argument.

It is the duty of the defendant's counsel at once to call the attention of the

here made, were to vitiate a subsequent trial, a new element of uncertainty would be introduced into the administration of justice in criminal cases. *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708.

10. *Hall v. United States*, 150 U. S. 76, 81, 37 L. Ed. 1003. See the title JUDICIAL NOTICE.

What are historical facts.—"The ground on which the presiding judge, in the opinion delivered on overruling a motion for a new trial (contained in the record, and cited by the attorney for the United States in this court), justified his own action and that of the district attorney in this regard, was that 'it is unquestionably a sound rule that historical facts, of which courts take judicial notice, may be alluded to in argument for the purpose of illustration,' and that he considered it 'a historical fact in this country' that in Mississippi the trial and acquittal of a white man for the killing of a negro is a farce. Whether or not such is the condition of things in that state is a matter of personal belief and opinion rather than of unquestioned historical fact. It is hard to see how the fact, if admitted, that in a certain locality all persons indicted for crimes or offenses of a certain class are acquitted, has any tendency to prove that every person, or any particular person, there indicted for such a crime or offense, is guilty." *Hall v. United States*, 150 U. S. 76, 81, 37 L. Ed. 1003.

11. **Massage treatment.**—Complaint was made of the remark of the district attorney to the following effect: "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is; how a man is stripped naked, from the sole of his feet to the crown of his head, and is rubbed with the hands." If the counsel gave a wholly erroneous definition of the word "massage," or misled the jury by giving them a false impression of the operation, the remark might have been prejudicial, and possible ground for error. But as the word is defined as "a rubbing or kneading of the body," an

operation which could hardly be carried on unless the person were divested of his clothing, there was no error in the remark of the district attorney in this case. *Dunlop v. United States*, 165 U. S. 486, 498, 41 L. Ed. 799.

As the massage treatment is comparatively a recent device, it is quite possible that it may not have been understood by all the members of the jury, but if the district attorney fairly explained to them what it is ordinarily understood to be, and gave an explanation which was not radically wrong, there was no impropriety in his doing so. *Dunlop v. United States*, 165 U. S. 486, 499, 41 L. Ed. 799.

12. The defendant's counsel said to the jury: "Either the defendant or Burt (a government witness) is guilty of this crime. I will show you that Burt is guilty, and, therefore, that defendant is not." In reply to this, the district attorney, in his closing argument, said: "The issue is squarely made by Mr. Neal, that either the defendant or William Burt is guilty of this crime. I have shown you that Burt is not guilty; therefore, by his logic, the defendant is guilty." The court said: "There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial." "It is by no means clear that the district attorney transcended the proper limits of an argument. Counsel for the defendant had tendered the issue to the jury, that either his client or Burt was guilty of the crime, and we perceive no impropriety in the district attorney accepting the challenge and attempting to demonstrate that Burt was not guilty, and arguing that the jury, upon the issue thus presented, had a right to infer that the defendant was guilty." *Crumpton v. United States*, 138 U. S. 361, 34 L. Ed. 958.

13. **In appellate court.**—See the title APPEAL AND ERROR, ante, p. 357.

court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception.¹⁴

IV. Curing Improper Argument.

Withdrawal by Counsel of Improper Argument.—There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured.¹⁵

ARID LAND.—See the title PUBLIC LANDS.

ARISE.—See note 1.

14. *Waldron v. Waldron*, 156 U. S. 361, 39 L. Ed. 453; *Crumpton v. United States*, 138 U. S. 361, 34 L. Ed. 958.

15. **Curing error.**—In the course of district attorney's remarks, and in speaking of the fact that during the time these murders were being perpetrated, one of the plaintiffs in error had testified that he drank some coffee, the district attorney said, "A man under such circumstances who would drink coffee ought to be hung on general principles." This remark the counsel for the plaintiffs in error objected to, and, after hearing counsel on the objection, the court directed the district attorney to confine himself to a proper argument, and thereupon the district attorney expressed his regret if he had made an improper argument, and withdrew the remark. When the objection was first made by counsel for the plaintiffs in error the court asked if he wanted to cut the district attorney off from making any argument, but thereupon the court immediately directed the district attorney to confine himself to a proper argument, as above stated. Counsel for the plaintiffs in error objected to both the remarks of the district attorney and the comments of the court as made, and counsel asked to be allowed to file an exception. Upon this request the court replied, "I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous." The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been done than was done by the court as soon as the objection was made by the counsel for the plaintiffs in error. *Sawyer v. United States*, 202 U. S. 150, 167, 50 L. Ed. 972.

Upon an indictment for causing to be deposited, for mailing and delivery, a newspaper containing obscene, lewd and indecent matters, the district attorney in his argument to the jury made the remark: "I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the state of Illinois, except where they

were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness and wrong of these publications." To this language counsel for the defendant excepted. The court held that it was improper, and the district attorney immediately withdrew it. "The action of the court was commendable in this particular, and we think this ruling, and the immediate withdrawal of the remark by the district attorney, condoned his error in making it, if his remark could be deemed a prejudicial error." *Dunlop v. United States*, 165 U. S. 486, 498, 41 L. Ed. 799.

1. **Arising.**—In *United States v. Heth*, 3 Cranch 399, 413, 2 L. Ed. 479, it is said: "The word arising refers to the present time, or time to come, but cannot, with any propriety, relate to time past, and embrace former transactions. As to the word 'imported,' it may comprehend the past or future, or both, according to the subject matter, and the words with which it is associated. Thus the word arising, coupled with the words 'on goods imported,' shows, that the whole clause has a future bearing and aspect, and will not justly admit of a retroactive construction."

Arising out of treaty.—In *United States v. Weld*, 127 U. S. 51, 57, 32 L. Ed. 62, it is said: "In order to make the claim one arising out of a treaty within the meaning of § 1066, Rev. Stat., the right itself, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation."

Whenever a right grows out of or is protected by a treaty, the case involving such right is a case arising under a treaty. *Owings v. Norwood*, 5 Cranch 344, 348, 3 L. Ed. 120.

Revenue law.—Where a statute did not mention the revenue or the revenue laws but in terms included every form of conspiracy against the United States and every form of conspiracy to defraud them, it was held that the claims defined by it could not be said to arise under the reve-

ARMED VESSEL.—See note 1.

ARM OF THE SEA.—See the titles ADMIRALTY, vol. 1, p. 134; NAVIGABLE WATERS.

ARMS.—See the title WEAPONS.

As to constitutional provision giving right to bear arms, see the titles CIVIL RIGHTS; CONSTITUTIONAL LAW.

nue. *United States v. Hirsch*, 100 U. S. 33, 35, 25 L. Ed. 539.

Cases arising under the constitution or laws of the United States, see the title COURTS.

1. **Armed vessel.**—In *Murray v. The Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208, it was said: "The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps, it would be difficult precisely to mark the limits, the passing of which

would bring a captured vessel within the description of the acts of congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder and a few balls." And in that case it was held that the capacity of the vessel for offense was not sufficient to warrant her capture as an **armed vessel**.

ARMY AND NAVY.

BY J. N. CLAYBROOK.

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See the titles **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 1; **ACCOUNTS AND ACCOUNTING**, vol. 1, p. 70; **ARREST**; **BLOCKADE**; **BOUNTIES**; **CONFEDERATE STATES**; **CONTRACTS**; **DAMAGES**; **DE FACTO OFFICERS**; **EMBEZZLEMENT**; **FALSE IMPRISONMENT**; **MARTIAL LAW**; **MILITARY LAW**; **MILITIA**; **PAROL EVIDENCE**; **PENSIONS**; **PRINCIPAL AND AGENT**; **PRIZE**; **TRESPASS**; **UNITED STATES**; **USAGES AND CUSTOMS**; **WAR**.

As to bounties to soldiers or sailors, see the title **BOUNTIES**. As to extradition, under treaty of seamen deserting from a foreign ship of war, see the titles **EXTRADITION**; **TREATIES**. As to false imprisonments by officers of the army or navy, see the title **FALSE IMPRISONMENT**. As to courts martial and proceedings before them, see the title **MILITARY LAW**. As to proceedings before courts martial for desertion, see the title **MILITARY LAW**. As to public contracts for the benefit of the army and navy, see the title **UNITED STATES**. As to contracts by officers in the military or naval service on behalf of the government, see the title **UNITED STATES**.

I. Raising and Maintaining.

A. Power to Raise and Maintain—1. **IN GENERAL**.—Congress has power to raise and support armies, to provide and maintain a navy, and to make rules for the government of the land and naval forces.¹

1. Power to raise and maintain.—Const., art. 1, § 8; Johnson v. Sayre, 158 U. S. 109, 114, 39 L. Ed. 916; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Tarble's Case, 13 Wall. 397, 408, 20 L. Ed. 597.

Among the powers assigned to the national government is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the

subject is plenary and exclusive. It can determine, without question from any state authority, **how** the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute mili-

2. OF WHOM MILITARY SERVICE MAY BE REQUIRED.—The government has the right to the military services of all of its able-bodied citizens, and may, when emergency arises, justly exact that service from all.²

B. Calling Out Militia.—Congress has power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.³ But the authority to decide whether the exigencies, in which the president has authority to call forth the militia, have arisen, is exclusively vested in the president, and his decision is conclusive upon all other persons.⁴

II. President as Commander in Chief.

The president is the commander in chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States,⁵ and this authority extends to volunteers.⁶

III. Status of Marine Corps.

Primarily, marines are under the control of the navy department,⁷ and though not, in some senses, "seamen," their duties in some respects being different, they are, while employed on board public vessels, persons in the naval service, and are subject to the orders of naval officers, under the government of the naval code as to punishment, and amenable to the navy department.⁸ But they are subject to be ordered to service with the army, and, in that event, are under the command of army officers.⁹

tary offenses, and prescribe their punishment. *Tarble's Case*, 13 Wall. 397, 408, 20 L. Ed. 597.

No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. *Tarble's Case*, 13 Wall. 397, 408, 20 L. Ed. 597.

2. Of whom military service may be required.—*In re Grimley*, 137 U. S. 147, 153, 34 L. Ed. 636.

3. Calling militia into service.—Const., art. 1, § 8; *Johnson v. Sayre*, 158 U. S. 109, 114, 39 L. Ed. 916; *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19. See, generally, the title MILITIA.

4. Authority of president to decide on necessity of calling out militia.—*Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Prize Cases*, 2 Black 635, 688, 17 L. Ed. 459. See, generally, the title MILITIA.

5. President as commander in chief.—*Prize Cases*, 2 Black 635, 17 L. Ed. 459; *Hamilton v. Dillin*, 21 Wall. 73, 87, 22 L. Ed. 528; *United States v. Sweeny*, 157 U. S. 281, 284, 39 L. Ed. 702; *Johnson v. Sayre*, 158 U. S. 109, 115, 39 L. Ed. 916; *Ex parte Milligan*, 4 Wall. 2, 139, 18 L. Ed. 281; *Kurtz v. Moffitt*, 115 U. S. 487, 503, 29 L. Ed. 458.

6. Whether president is commander-in-chief of volunteers.—*United States v. Sweeny*, 157 U. S. 281, 284, 39 L. Ed. 702.

7. Marines primarily under control of navy department.—*United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667.

8. Status of marines while serving on board ship.—*Wilkes v. Dinsman*, 7 How. 87, 124, 12 L. Ed. 618; *United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667.

9. Marines serving with army.—*United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667.

"The marine corps is a military body designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy yards mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the army. The statutes of the United States, in prescribing the duties which they may be required to perform, have not been very clear in any expression which goes to show how far these services are to be rendered under the control of the officers of the navy or of the army. It is clear that they may be ordered to service in either branch; but we are of opinion that, taking all these statutes and the practice of the government together, they are a military body, primarily belonging to the navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers." *United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667.

IV. Regulations.

A. Statutory Regulations.—Congress has power "to make rules for the government and regulation of the land and naval forces,"¹⁰ and in the exercise of this power it has enacted rules for the regulation of the army known as the articles of war.¹¹

B. Departmental Regulations.—Army regulations promulgated by the department of war derive their force from the power of the president as commander in chief, and are binding upon all within the sphere of his legal and constitutional authority.¹² In order to be valid they must be uniform, and applicable to all officers under the same circumstances,¹³ and must not conflict with general law.¹⁴ In so far as such regulations are valid, they have the force of law.¹⁵

V. For What Purposes Military Forces May Be Used.

The entire strength of the nation including its army and militia may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care, and to remove obstructions to the freedom of interstate commerce or the transportation of the mails.¹⁶

VI. Officers.

A. Definition.—An officer in the army or navy is one holding his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment.¹⁷

10. Power of congress to make regulations.—Const., art. I, § 8; *Carter v. Roberts*, 177 U. S. 496, 497, 44 L. Ed. 861.

11. Regulations known as articles of war.—Rev. Stat., § 1342; *Carter v. Roberts*, 177 U. S. 496, 497, 44 L. Ed. 861.

12. Effect of departmental regulations in general.—*Kurtz v. Moffitt*, 115 U. S. 487, 503, 29 L. Ed. 458; *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Glavey v. United States*, 182 U. S. 595, 606, 45 L. Ed. 1247.

Navy blue book not repealed by red book.—The blue book for the regulation of the navy department was not repealed by the red book published in 1831. The latter related chiefly to other matters than those covered by the former. *United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997.

13. Uniformity.—*United States v. Ripley*, 7 Pet. 18, 8 L. Ed. 593.

14. Regulation must not conflict with general law.—*United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558; *Glavey v. United States*, 182 U. S. 595, 606, 45 L. Ed. 1247.

15. Valid regulations have force of law.—*United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Gratiot v. United States*, 4 How. 80, 11 L. Ed. 884; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458; *Swaim v. United States*, 165 U. S. 553, 41 L. Ed. 823; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *Glavey v. United States*, 182 U. S. 595, 606, 45 L. Ed. 1247.

16. For what purposes military forces may be used.—*In re Debs*, 158 U. S. 564, 582, 39 L. Ed. 1092.

17. Definition of officer.—*United States v. Mouat*, 124 U. S. 303, 307, 31 L. Ed. 463; *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482.

The officers in the Texas navy did not become officers in the United States navy on annexation of Texas to the United States. A joint resolution for the annexation of Texas, provided that "said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said republic of Texas, shall retain all the public funds," etc. The term "navy" as here used includes only vessels of war and their armaments and equipments. *Brashear v. Mason*, 6 How. 92, 100, 12 L. Ed. 357.

Paymaster's clerk.—A paymaster's clerk, being appointed by the paymaster, is not, in the constitutional sense of the word an officer of the United States, and is not an officer within the meaning of the act allowing mileage to naval officers. (*United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463.) But it has been held that he is an officer within the meaning of the act of March 3, 1883, providing for longevity pay (*United States v. Hendee*, 124 U. S. 309, 31 L. Ed. 465), and that he is a person in the naval service within the meaning of art. 14, § 16, of the Revised Statutes, and is subject to be tried by a naval

B. Appointment—1. **POWER TO APPOINT.**—Under the constitution, officers are appointed by the president, by and with the consent of the senate, or by a court of law, or the head of a department.¹⁸

2. **WHEN APPOINTMENT COMPLETE.**—The appointment of a paymaster is complete, when made by the president and confirmed by the senate; the giving a bond for the faithful performances of his duties is a mere ministerial act, for the security of the government, and not a condition precedent to his authority to act as a paymaster.¹⁹

C. Commission.—The appointment and the commission are distinct acts, and the terms of the commission cannot change the effect of the appointment as defined by statute.²⁰

D. Rank.—The office of an officer of the army and his rank are not necessarily identical; an office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer, and the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to other officers as to privileges, precedents or command, or to determine his pay.²¹ The rank of retired officers is a matter entirely within the control of congress.²² Brevet rank is conferred for special and meritorious services, by commission from the president, under authority of congress, and does not entitle the holder to corresponding pay or command, except under special circumstances defined by law.²³

court martial. *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538.

Passed assistant surgeon in navy.—The position of passed assistant surgeon in the naval service is an office, and the notification of the secretary of the navy is a valid appointment to it. *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588.

Chaplain in army.—A chaplain employed by the officers composing the council of administration at a military post and actually serving as such, with the approval of the secretary of war, holds the office and rank of chaplain in the army, and is in the military service within the meaning of the longevity pay act. *United States v. La Tourrette*, 151 U. S. 572, 39 L. Ed. 274.

Midshipman.—A midshipman is an officer in the navy. *United States v. Cook*, 128 U. S. 254, 256, 32 L. Ed. 464.

Mates.—Mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers promoted by the secretary of the navy from seamen of inferior grades, who have enlisted for not less than two years, and they are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the president. *United States v. Fuller*, 160 U. S. 593, 596, 40 L. Ed. 549.

Boatswains, gunners, sailmakers and carpenters.—Boatswains, gunners, sailmakers, and carpenters are warrant officers to be appointed by the president. *United States v. Fuller*, 160 U. S. 593, 596, 40 L. Ed. 549.

18. Power to appoint.—*United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482; *United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463.

The notification by the secretary of the

navy is a valid appointment to the office of assistant surgeon. *United States v. Moore*, 95 U. S. 760, 762, 24 L. Ed. 588; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830.

Mode of filling vacancy in recess of senate.—If a vacancy occurs in the recess of the senate, the president may grant a commission to expire at the end of its next succeeding session. Const., art. 2, § 2; *United States v. Corson*, 114 U. S. 619, 622, 29 L. Ed. 254.

19. When appointment complete.—*United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448. See, also, *United States v. Linn*, 15 Pet. 290, 313, 10 L. Ed. 742; *Glavey v. United States*, 182 U. S. 595, 602, 45 L. Ed. 1247; *United States v. Eaton*, 169 U. S. 331, 346, 42 L. Ed. 767.

20. Term of commission cannot change effect of appointment.—*Quackenbush v. United States*, 177 U. S. 20, 27, 44 L. Ed. 654.

21. Office and rank distinguished.—*Wood v. United States*, 107 U. S. 414, 416, 27 L. Ed. 542.

22. Control of rank of retired officers by congress.—*Wood v. United States*, 107 U. S. 414, 27 L. Ed. 542.

23. Brevet rank.—*United States v. Hunt*, 14 Wall. 550, 552, 20 L. Ed. 739.

It may be that in the strict sense of the military term the rank of brigadier and brevet brigadier is the same, but it is well known that practically they are by no means identical, and that the position of the former is, in many respects, better than that of the latter. *United States v. Hunt*, 14 Wall. 550, 552, 20 L. Ed. 739.

When an officer holding rank by brevet receives a regular commission of the same grade, he is said to be promoted and to become a full officer of that rank. *United*

E. Promotion.—An officer eligible to promotion is not entitled to examination until his term for promotion has arrived or is near at hand.²⁴ If an officer is absent on duty at the time when his examination should have been held, and subsequently passed the examination, he is entitled to the increased pay of the new grade from the time when he should have been examined.²⁵ A brevet promotion does not release any officer from any duty imposed by his actual commission.²⁶

F. Pay and Allowances.—1. **PAY**—a. *Control and Regulation by Congress.*—The matter of military and naval salaries is one exclusively within the control of congress.²⁷ The courts may neither increase nor decrease them, correct any supposed inequalities, nor in any manner set aside or modify the action of the legislative branch of the government in respect thereto. If there be inequality, injustice, it can be corrected alone by congress, and the courts may not interfere.²⁸

b. *Necessity for Officer to Be Actually Mustered into Service.*—An officer entering on and performing his duties as a commissioned officer, though for some cause beyond his control not actually mustered into service, may, under an enabling act, become entitled to full pay for his rank for the time he actually served.²⁹

c. *Amount*—(1) *Army Officers*—(a) *Officers Awaiting Orders.*—Where an officer is ordered to proceed to a particular place, including his home, there to await orders, he is entitled to full pay during such time, even though the assignment was made upon his own request.³⁰

States v. Hunt, 14 Wall. 550, 552, 20 L. Ed. 739.

24. When officer entitled to examination for promotion.—Hunt v. United States, 116 U. S. 394, 29 L. Ed. 674.

An assistant engineer in the naval service although eligible to examination for promotion after two years sea service upon a naval steamer, is not entitled to be examined until his term for promotion has arrived, or is near at hand. Hunt v. United States, 116 U. S. 394, 29 L. Ed. 674.

25. Effect of absence on duty at time when examination for promotion should be held.—Act of July 16, 1862 (12 Stat. 586); Hunt v. United States, 116 U. S. 394, 29 L. Ed. 674.

The increased pay of a promoted officer should be allowed only from the time the vacancy occurs to which he could be promoted if an opportunity for examination had been given him. Hunt v. United States, 116 U. S. 394, 29 L. Ed. 674.

26. Brevet promotion.—Gratiot v. United States, 4 How. 80, 117, 11 L. Ed. 884.

27. Control of salary by congress.—Rodgers v. United States, 185 U. S. 83, 86, 46 L. Ed. 816; United States v. McDonald, 128 U. S. 471, 473, 32 L. Ed. 596; Wood v. United States, 107 U. S. 414, 417, 27 L. Ed. 542; United States v. Williamson, 23 Wall. 411, 416, 23 L. Ed. 89.

Control by executive department.—It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the legislative department of the government. United States v. Williamson, 23 Wall. 411, 416, 23 L. Ed. 89.

28. Power of courts over salaries.—Rodgers v. United States, 185 U. S. 83, 86, 46 L. Ed. 816.

The pay and emolument of officers are provided for by law, and must be determined by the court when they are doubtful and are in the subject of dispute between an officer and the government. Wetmore v. United States, 10 Pet. 647, 651, 9 L. Ed. 567.

29. Enabling act curing failure of officer to be mustered in.—Act of July 26, 1866; United States v. Henry, 17 Wall. 405, 21 L. Ed. 673.

An officer who shows that he received a commission from the proper source, and who serves and is recognized as such officer by his superiors until his regiment is mustered out, and who presented himself at the proper time and place to be mustered in, and was refused, makes out a prima facie case for full pay under the joint resolution of congress of July 26th, 1866, "for the relief of certain officers of the army." United States v. Henry, 17 Wall. 405, 21 L. Ed. 673.

It does not rebut this prima facie case to prove that the officer who refused to muster him in alleged that he was not entitled to such muster, because the company to which he was assigned as lieutenant was below the minimum in numbers. Such a statement is not a finding of the fact by the court of claims that the company was reduced below the minimum. Nor does the fact if found, bring the case within section twentieth of the act of March 3d, 1863, forbidding the appointment of officers to a regiment when that regiment has been reduced below the minimum number allowed for regiments. United States v. Henry, 17 Wall. 405, 21 L. Ed. 673.

30. Officer awaiting orders.—United

(b) *Mounted Pay*.—Officers of an army are entitled to mounted pay when their duties are such as may require them to be actually mounted, or such as may at any time subject them to the necessity of rendering mounted service.³¹

(c) *Additional Pay to Aid to Major General*.—An officer of the army acting as aid to a major general is entitled to additional pay while so acting.³²

(d) *Increased Pay for Foreign Service*.—Officers serving beyond the limits of the states comprising the Union, and the territories of the United States contiguous thereto, are entitled to an increase of ten per cent. over and above the pay proper fixed by law for time of peace.³³ The words "pay proper" as here used, and upon which the ten per cent. increase is to be computed mean the same as "pay,"³⁴ and includes longevity pay as well as the stated statutory salary.³⁵

States v. Williamson, 23 Wall. 411, 415, 23 L. Ed. 89; *United States v. Phisterer*, 94 U. S. 219, 221, 24 L. Ed. 116.

Officer waiting orders not "absent from duty on leave."—An officer of the army who is ordered, even on his own request, to proceed to a particular place, including his home, and "there await orders," reporting thence by letter to the adjutant general of the army and to the headquarters of the department to which he then belongs, is not an officer "absent from duty with leave" within the act of congress of March 3d, 1863, which enacts that "any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more." Such an officer is waiting orders in pursuance of law, but not absent from duty on leave. *United States v. Williamson*, 23 Wall. 411, 23 L. Ed. 89.

The distinction between the case of an officer "absent from duty with leave" and that of an officer ordered to proceed to a particular place and there "to await orders, reporting thence by letter to the adjutant general of the army and to these headquarters," is too plain to require much comment. While absent from duty "with leave," the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him. The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time. *United States v. Williamson*, 23 Wall. 411, 415, 23 L. Ed. 89.

31. Mounted pay.—*United States v. Crosley*, 196 U. S. 327, 335, 49 L. Ed. 497.

Aid to major general.—While it may be true that there may be times when the duties of an aid to a major general will

not require him to be mounted, yet as such officers may be at any time required to render mounted service, they are entitled to mounted pay. *United States v. Crosley*, 196 U. S. 327, 336, 49 L. Ed. 497.

Aid to rear admiral.—An aid to a rear admiral is not entitled to mounted pay. *United States v. Crosley*, 196 U. S. 327, 336, 49 L. Ed. 497.

32. Additional pay to aid to major general.—Rev. Stat., § 1261; *United States v. Crosley*, 196 U. S. 327, 335, 49 L. Ed. 497.

33. Increased pay for foreign service.—Act of March 2, 1901, ch. 803; Rev. Stat., § 1261; act of June 30, 1902, ch. 1328 (32 Stat. 512); *United States v. Mills*, 197 U. S. 223, 49 L. Ed. 732; *United States v. Thomas*, 195 U. S. 418, 423, 49 L. Ed. 259.

This allowance was undoubtedly based upon the consideration that service both in foreign countries and upon the voyage going and returning was an exceptional service, attended by peculiar hardships. *United States v. Thomas*, 195 U. S. 418, 423, 49 L. Ed. 259.

34. "Pay proper" synonymous with "pay."—*United States v. Mills*, 197 U. S. 223, 227, 49 L. Ed. 732.

"The words, 'pay proper,' we see no reason to think are to be construed differently from the word 'pay.' The term means compensation, which may properly be described or designated as 'pay,' as distinguished from allowances, commutations for rations or other methods of compensation, not specifically described as pay." *United States v. Mills*, 197 U. S. 223, 227, 49 L. Ed. 732.

35. "Pay proper" includes longevity pay.—*United States v. Mills*, 197 U. S. 223, 227, 49 L. Ed. 732.

The term "current yearly pay" as used in § 1262 of the Revised Statutes providing for longevity pay, the rate being fixed at ten per cent. on the current yearly pay for each term of five years of service, is not distinguished from the term pay proper contained in special acts providing for the increase of salary of officers serving without the United States or the territories contiguous thereto. *United States v. Mills*, 197 U. S. 223, 49 L. Ed. 732.

The officer is entitled to the increase of pay from the day he leaves the country until he returns.³⁶

(e) *Increased Pay to Officers Holding Command in Time of War Higher than Their Grade.*—An officer serving with troops operating against an enemy who exercises, under assignment in orders issued by competent authority, a command above that pertaining to his grade, is entitled to receive the pay and allowances of grade appropriate to the command so exercised, provided that the rate of pay does not exceed that of a brigadier general.³⁷ In order to be entitled to receive increased pay under this statute, the officer must exercise a higher grade under assignment in orders issued by competent authority,³⁸ and the benefits of the statute extend only to the case where such an order is necessary to impose the burden of a higher command upon an officer.³⁹ Where the higher command devolves upon the officer by force of a statute and without any special directions, the officer is not entitled to increased pay.⁴⁰

(f) *Retired Officers.*—The pay as well as the rank of retired officers is a matter entirely within the control of congress.⁴¹ Congress has fixed the pay of officers retired from active service at seventy-five per cent. of the pay of the rank upon which they are retired.⁴² Retired officers, accepting or holding diplomatic or consular appointments, are not entitled to pay as army officers during the

36. When increase commences and terminates.—United States *v.* Thomas, 195 U. S. 418, 420, 49 L. Ed. 259.

37. Increased pay to officer holding command in time of war higher than his grade.—Act of April 26, 1898, ch. 191 (30 Stat. 365); United States *v.* Mitchell, 205 U. S. 161, 168, 51 L. Ed. 752.

38. Higher grade must be exercised under proper assignment in orders.—United States *v.* Mitchell, 205 U. S. 161, 168, 51 L. Ed. 752.

39. Order must be necessary.—United States *v.* Mitchell, 205 U. S. 161, 168, 51 L. Ed. 752.

The statute was not enacted to give increased pay for the discharge of the ordinary duties of the service, but to give compensation for the greater risk and responsibility of active military command, and no assignment in orders when unnecessary to that end can make a case within the statute. United States *v.* Mitchell, 205 U. S. 161, 169, 51 L. Ed. 752.

40. Officer holding higher command under general statute.—United States *v.* Mitchell, 205 U. S. 161, 168, 51 L. Ed. 752.

A second lieutenant assuming command of a company, in the absence of the captain and the first lieutenant in accordance with § 253 of the army regulations of 1895, which provide that in the absence of its captain, the command of a company devolves upon the subaltern next in rank who is serving with it, unless otherwise specifically directed, is not entitled to the pay of captain while exercising such command. United States *v.* Mitchell, 205 U. S. 161, 168, 51 L. Ed. 752.

41. Pay of retired officers.—Wood *v.* United States, 107 U. S. 414, 417, 27 L.

Ed. 542; Bateau *v.* United States, 130 U. S. 439, 451, 32 L. Ed. 997.

A, holding the office of a colonel of cavalry in the army, his retirement with the rank of major general, under the act of 1868, did not confer on him the office of major general. He remained in the office of colonel of cavalry, and acquired a higher rank, and higher pay, as a retired officer. Such rank not being an office, congress could change his rank, and with it his pay, as it did by the act of 1875. His actual rank when he was wounded was that of brigadier general of volunteers, although the rank of the command which he then held was that of a major general. The rank of his command when wounded was the test of rank and pay under the act of 1866, while his actual rank when wounded, whether in the regular or volunteer service, was the test of rank and pay under the act of 1875. Wood *v.* United States, 107 U. S. 414, 417, 27 L. Ed. 542.

42. Retired officer.—Rev. Stat., § 1274; Marshall *v.* United States, 124 U. S. 391, 31 L. Ed. 475.

Retired colonel.—A retired colonel cannot receive more than seventy-five per cent. of \$4,500 a year and this amount is not to be enlarged by longevity increase for length of service under § 1262 of the Revised Statutes. When it is provided, in respect to officers in active service, that in no case shall the pay of a colonel exceed four thousand five hundred dollars a year, and that officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired, there is no room left for construction. Marshall *v.* United States, 124 U. S. 391, 393, 31 L. Ed. 475.

Longevity pay of retired officers.—See post, "Longevity Pay," VI, F, 1, c, (1), (g).

period of time when they are absent from the country in discharge of their duties.⁴³

(g) *Longevity Pay*.—Besides his fixed salary, each commanding officer of the army below the rank of brigadier general is entitled to receive ten per centum of his current yearly pay for each five years of service,⁴⁴ the total amount of such increase not to exceed forty per centum on the yearly pay of the grade as provided by law.⁴⁵ The word "service" in this statute means military service,⁴⁶ but service by a cadet at the military academy,⁴⁷ or a chaplain in the army,⁴⁸ is included within the statute, and an officer of the army, though retired,⁴⁹ is entitled to its benefits. The percentage to which an officer is entitled is to be computed on the total amount of his pay, increased as it may be by the periods of five years of service.⁵⁰

43. Retired officers holding diplomatic or consular appointments.—*Badeau v. United States*, 130 U. S. 439, 451, 32 L. Ed. 997.

"Under the act of 1875 retired officers situated as therein described are so far taken out of the operation of the act of 1868 as not to be held, if they accept or hold diplomatic or consular appointment, to have resigned their places in the army; but this does not change the general policy of the law; and does not entitle them to pay as army officers during the period of time when they are absent from their country in the discharge of continuous official duties inconsistent with subjection to the rules and articles of war, and the other incidents of military service. Notwithstanding § 1223, such officers when in the diplomatic or consular service, may still be borne on the retired list, but cannot receive double compensation." *Badeau v. United States*, 130 U. S. 439, 451, 32 L. Ed. 997.

44. Increase for each five years or service.—Rev. Stat., § 1265; *United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 985; *United States v. La Tourrette*, 151 U. S. 572, 574, 38 L. Ed. 274; *United States v. Morton*, 112 U. S. 1, 7, 28 L. Ed. 613; *United States v. Watson*, 130 U. S. 80, 83, 32 L. Ed. 852.

45. Increase for length of service not to exceed forty per cent of regular pay.—Rev. Stat., § 1263; *United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 985.

46. "Service" means military service.—*United States v. La Tourrette*, 151 U. S. 572, 574, 38 L. Ed. 274.

47. Cadet.—*United States v. Watson*, 130 U. S. 80, 83, 32 L. Ed. 852; *United States v. Morton*, 112 U. S. 1, 28 L. Ed. 613; *Hartigan v. United States*, 196 U. S. 169, 174, 49 L. Ed. 434.

48. Chaplains.—Chaplains, being employed by the officers composing the council of administration at the post, to officiate as chaplain, and actually serving as such, at a military post of the United States, with the approval of the secretary of war; receiving monthly for their services a sum approved by him, and allowed, in addition to their pay, rations and quarters; subject to the same rules as to leave

of absence from duty as commissioned officers of the army; required to report monthly to the adjutant general of the army through the usual military channels; and called indifferently "chaplains attached to the regular army of the United States"—should be considered, according to the understanding and intention of congress, as holding the office and rank of chaplain in the army, and consequently as in the military service, within the meaning of the longevity pay act. *United States v. La Tourrette*, 151 U. S. 572, 576, 38 L. Ed. 274.

The statute includes chaplains by express terms. Rev. Stat., § 1262.

49. Retired officers.—*United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 985.

An officer retired from active service, who was declared by statute to be a part of the army, who could wear its uniform, whose name was required to be borne on its register, who might be detailed by his superior officers to perform specified duties, and who was subject to the rules and articles of war, is in the military service; and the increase of pay given for each term of five years of service, by § 1262 of the Revised Statutes, and by § 24 of the act of July 15th, 1870, 16 Stat. 320, from which that section was taken, apply to the years so passed in the service after, as well as before, retirement. *United States v. Morton*, 112 U. S. 1, 7, 28 L. Ed. 613.

50. Computation of amount to which officer entitled.—*United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 985; *United States v. Mills*, 197 U. S. 223, 226, 49 L. Ed. 732.

Thus the increased pay derived from additional periods of five years' service added to the minimum pay of the grade, and ten per centum of that total is the proper compensation. *United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 985; *United States v. Mills*, 197 U. S. 223, 226, 49 L. Ed. 732.

"Current yearly pay" means the regular ordinary pay which an officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation provided for in § 1262, that compensation is

(2) *Naval Officers*—(a) *Sea Pay*—aa. *In General*.—A higher rate of pay is allowed to naval officers when performing sea duty than when engaged on shore duty.⁵¹ And the general statutory provisions making distinctions between shore and sea pay are not affected by special provisions fixing the salary of particular officers.⁵²

bb. *What Constitutes Sea Service*—(aa) *In General*.—To constitute sea service three things, and three only, are necessary. The service must be performed at sea, under the orders of the department, and in vessels employed by authority of law.⁵³

(bb) *Necessity for Services to Be Performed at Sea*.—In order to entitle a naval officer to sea pay, the services for which he claims such compensation must have been performed at sea.⁵⁴ But the services need not be performed upon the high seas.⁵⁵ Thus services performed on a vessel employed in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high sea,⁵⁶ services on a receiving ship, at anchor in port at a navy yard, communicating with the shore by a rope, and having a roof built over her deck, and not technically in commission for sea service,⁵⁷ and services on a training ship, anchored

his "pay" or his "pay proper," as distinguished from possible other compensation by any allowances, or commutation, or otherwise. *United States v. Mills*, 197 U. S. 223, 227, 49 L. Ed. 732.

51. Sea pay higher than shore pay.—Rev. Stat., § 1556; *United States v. Engard*, 196 U. S. 511, 514, 49 L. Ed. 575.

52. Distinction between shore and sea pay not affected by statute fixing salary of particular officers.—*Rodgers v. United States*, 185 U. S. 83, 46 L. Ed. 816.

Section 7 of the navy personnel act abolishing the rank of commodore and raising those holding that rank to the rank of rear admiral and providing, in effect, that officers so raised to the position of rear admiral should receive pay of a brigadier general in the army, is not to be construed as giving to such officer the pay of a brigadier general for shore duty. The special provision of this section is subject to the general rule of the naval service, and an officer raised to a rear admiral under this section while serving on shore is entitled only to eighty-five per cent. of the pay of a brigadier general in the army. *Rodgers v. United States*, 185 U. S. 83, 84, 46 L. Ed. 816.

53. What constitutes sea service—In general.—Rev. Stat., § 1571; *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675; *United States v. Engard*, 196 U. S. 511, 514, 49 L. Ed. 575; *United States v. Symonds*, 120 U. S. 46, 48, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 52, 30 L. Ed. 558.

54. Necessity for services to be performed at sea.—Rev. Stat., § 1571; *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675; *United States v. Engard*, 196 U. S. 511, 514, 49 L. Ed. 575; *United States v. Thomas*, 195 U. S. 418, 426, 49 L. Ed. 259; *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558;

United States v. Strong, 125 U. S. 656, 31 L. Ed. 823; *Johnson v. Sayre*, 158 U. S. 109, 116, 39 L. Ed. 916.

55. Services need not be performed on high seas.—*United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675; *Johnson v. Sayre*, 158 U. S. 109, 116, 39 L. Ed. 916; *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558.

In order to come within the phrase "at sea," as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is water-borne, even if at anchor in a bay, or port or harbor, and not in condition presently to go to sea. *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675.

56. Services in bays, inlets or arms of sea.—*United States v. Symonds*, 120 U. S. 46, 50, 30 L. Ed. 557; *United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823; *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675; *Johnson v. Sayre*, 158 U. S. 109, 116, 39 L. Ed. 916; *United States v. Bishop*, 120 U. S. 51, 52, 30 L. Ed. 558.

The fact that the ship was not, during the period in question in such condition that she could be safely taken out to sea beyond the mainland is immaterial, where she was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 52, 30 L. Ed. 558; *United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823.

57. Services on receiving ship moored to shore.—*United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823.

The executive officer of a receiving ship anchored at a navy yard and used as a

in a bay, and not in a condition to be taken out to sea, beyond the mainland,⁵⁸ are sea services entitling the officer performing them to sea pay.

(cc) *Necessity for Service to Be Performed under Orders.*—In order to entitle a naval officer to sea pay, the services for which he claims such compensation must have been performed under orders of the navy department.⁵⁹

(dd) *Necessity for Services to Be Performed on Vessel Employed by Authority of Law.*—Services by an officer of the navy are not sea services, entitling him to sea pay, unless performed on a vessel employed by authority of law.⁶⁰ The term "vessels employed by authority of law," is restricted to vessels owned or chartered by the government or otherwise employed in its service.⁶¹

(ee) *Power of Department to Declare Character of Service.*—The secretary of the navy cannot diminish an officer's compensation, as established by law, by declaring that to be shore service which is in fact sea service, or to increase his compensation by declaring that to be sea service which is in fact shore service.⁶²

recruiting station, although the ship is not commissioned for sea service, or in a condition to go to sea, is entitled to sea pay. *United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823.

58. *Services on training ship at anchor in bay.*—*United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558.

Service on training ship of state nautical school.—While a lieutenant in the navy, acting as executive officer of vessel used as a training ship for a state nautical school, the vessel being anchored at and tied to a wharf in the harbor of New York, lived on board of her, wore his uniform, and was subject to the same regulations, as while she was upon the high seas, it was held that he was "at sea," so far as affected his rate of pay, during the whole period of his service as her executive officer. *United States v. Barnette*, 165 U. S. 174, 179, 41 L. Ed. 675.

59. *Necessity for services to be performed under orders.*—Rev. Stat., § 1571; *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675; *United States v. Symonds*, 120 U. S. 46, 48, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 52, 30 L. Ed. 558; *United States v. Engard*, 196 U. S. 511, 514, 49 L. Ed. 575; *United States v. Thomas*, 195 U. S. 418, 426, 49 L. Ed. 257.

Where in obedience to an order of the department of the navy, an officer reported to the commander of a vessel used by a state nautical school as a training ship and served as her executive officer, and, throughout his service upon her, he received no orders, it was held the services were performed under order of the navy department. *United States v. Barnette*, 165 U. S. 174, 179, 41 L. Ed. 675.

60. *Necessity for vessel to be employed by authority of law.*—Rev. Stat., § 1571; *United States v. Thomas*, 195 U. S. 418, 426, 49 L. Ed. 257; *United States v. Barnette*, 165 U. S. 174, 180, 41 L. Ed. 675; *United States v. Symonds*, 120 U. S. 46,

48, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 52, 30 L. Ed. 558; *United States v. Engard*, 196 U. S. 511, 514, 49 L. Ed. 575.

61. *Meaning of phrase "vessel employed by authority of law."*—*United States v. Thomas*, 195 U. S. 418, 426, 49 L. Ed. 259.

Vessel upon which officer takes passage.—A steamer upon which a naval officer takes passage under the orders of the department is not a "vessel employed by authority of law." A person who takes passage upon a steamer or a seat in a railway carriage does not "employ" such steamer or carriage in any just sense. *United States v. Thomas*, 195 U. S. 418, 426, 49 L. Ed. 259.

Vessel used as training ship for state nautical school.—A sailing vessel owned and employed by the United States and furnished by the secretary of the navy to the state of New York for a ship upon which to maintain a nautical school, is a vessel employed by authority of law. *United States v. Barnette*, 165 U. S. 174, 179, 41 L. Ed. 675.

62. *Power of secretary of navy to declare character of service.*—*United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Barnette*, 165 U. S. 174, 179, 41 L. Ed. 675; *United States v. Strong*, 125 U. S. 656, 31 L. Ed. 823; *United States v. Engard*, 196 U. S. 511, 515, 49 L. Ed. 575.

The authority of the secretary to issue orders, regulations, and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. *United States v. Symonds*, 120 U. S. 46, 49, 30 L. Ed. 557.

(ff) *Officer Assigned to Sea Duty Performing Temporary Duties Ashore.*—Where an officer is assigned to a duty which is essentially a sea service, he does not lose his right to sea pay whenever he is called upon to perform a mere temporary service ashore.⁶³

(b) *Officers Detailed for Shore Duty beyond Seas.*—When naval officers are detailed for shore duties beyond the seas, they are entitled to receive the same pay and allowances as officers of the army detailed for duty in similar places.⁶⁴

(c) *Increased Pay for Foreign Service.*—The navy personnel act equalizing the pay of naval and military officers of the same rank and grade, does not entitle a naval officer to the ten per cent. increase upon his regular pay given to army officers serving beyond the limits of the states comprising the Union and the territories of the United States contiguous thereto.⁶⁵

(d) *Additional Pay to Aid to Rear Admiral.*—An officer of the navy acting as aid to a rear admiral is entitled to additional pay while so acting.⁶⁶

63. Effect of temporary services ashore while attached to vessel.—United States v. Engard, 196 U. S. 511, 514, 49 L. Ed. 575.

Where the assignment of an officer to duty by the navy department expressly imposed upon him the continued discharge of his sea duties and qualified the shore duty as merely temporary and ancillary to the regular sea duty, the presumption is that the shore duty was temporary and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty to which he was regularly assigned. United States v. Engard, 196 U. S. 511, 514, 49 L. Ed. 575.

64. Officers detailed for shore duty beyond seas.—United States v. Thomas, 195 U. S. 418, 49 L. Ed. 259.

The proviso that naval officers shall be entitled to army pay "when detailed for shore duties beyond the seas," is not repealed or rendered inoperative by anything contained in the acts of May 26, 1900, and March 3, 1901, providing for increased pay of army officers serving without the United States. United States v. Thomas, 195 U. S. 418, 49 L. Ed. 259.

65. Increased pay for foreign service.—United States v. Thomas, 195 U. S. 418, 49 L. Ed. 259.

The intention of congress was evidently to put officers of the army and navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if congress should thereafter raise the general pay of army officers as fixed by the Revised Statutes, § 1261, a like increase should apply to navy officers. United States v. Thomas, 195 U. S. 418, 420, 49 L. Ed. 259.

"It does not, however, follow that congress may not increase the pay of army officers for services in particular places or under special circumstances, without thereby intending that the same increase shall apply to naval officers performing the same service under like circumstances. Thus, if the act should allow army officers increased pay when ordered to sea or

to a foreign port, it would not follow that naval officers would be entitled to a like increase, since such service would be wholly exceptional in the case of army officers, while it is the natural and normal duty of navy officers to engage in sea service, cruise in foreign waters and lie up in foreign ports. It never could have been the intention of congress to disable itself from awarding to a particular class of army officers an increase of pay for exceptional services without thereby increasing the pay of navy officers, whose lives are largely passed in performing like services." United States v. Thomas, 195 U. S. 418, 421, 49 L. Ed. 259.

A captain in the navy is not entitled to the ten per cent. increase upon his pay for services in the Philippine Islands and in Cuba under the acts of May 26, 1900 and March 2, 1901. United States v. Thomas, 195 U. S. 418, 49 L. Ed. 259.

66. Additional pay to aid to rear admiral.—United States v. Crosley, 196 U. S. 327, 335, 49 L. Ed. 497.

Under the navy personnel act, a lieutenant in the navy acting as aid to a rear admiral is entitled to \$200 additional pay allowed by § 1261 of the Revised Statutes to a lieutenant acting as aid to a major general. United States v. Crosley, 196 U. S. 327, 335, 49 L. Ed. 497.

"The sum of \$200 is allowed to an aid to a major general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind the purpose of the act to give the same compensation to corresponding officers of the army and navy, and that it is expressly provided that officers of the navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of congress to construe this section so as to give to an aid of a rear admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major general." United States v. Crosley, 196 U. S. 327, 333, 49 L. Ed. 497.

(e) *Mounted Pay*.—The navy personnel act providing that officers in the navy shall receive the same pay as officers of a similar rank and grade in the army, does not as a general rule entitle a naval officer to mounted pay,⁶⁷ though they may be entitled to receive the same pay as that received by mounted officers of the same rank and grade in the army.⁶⁸

(f) *Computation of Pay of Officers Appointed from Civil Life*.—The proviso in § 13 of the navy personnel act that "all officers including warrant officers who have been or may be appointed to the navy from civil life shall, on the date of apportionment, be credited, for computing their pay, with five years service," means, so far as it applies to officers theretofore appointed, and who were not receiving maximum pay, to give them a credit of the term of five years advancement towards full pay for the purpose of computing compensation after the beginning of the next fiscal year thereafter, and not was intended to give credit with a view to readjust past compensation and giving gratuities for years past.⁶⁹

(g) *Retired Officers*.—The pay of naval officers retired on account of age or incapacity originating in their line of duty is seventy-five per cent. of the sea pay of the grade or rank held by them at the time of their retirement.⁷⁰ Officers retired for other causes are entitled to only one-half of the sea pay of the grade or rank held by them at the time of their retirement.⁷¹ Officers placed on the retired list on furlough pay, receive one-half the pay which they would have received if on leave of absence on the active list.⁷² But an officer may be transferred from the furlough to the retired pay list by the president with the advice

67. Mounted pay.—United States *v.* Crosley, 196 U. S. 327, 336, 49 L. Ed. 497.

An aid to a rear admiral, though entitled, under the navy personnel act, to the same pay as an aid to a major general in the army, is not entitled to mounted pay, although an aid to a major general is entitled to mounted pay. The duties of an aid to a rear admiral are not such as require him to render mounted service, and as the navy personnel act only undertakes to afford a measure of compensation for duties which can be properly required of a naval officer, it can have no operation to provide pay for services peculiar to the army. United States *v.* Crosley, 196 U. S. 327, 336, 49 L. Ed. 497.

68. Naval officers may be entitled to same pay as mounted army officers of same rank and grade.—United States *v.* Farenholt, 206 U. S. 226, 51 L. Ed. 1036.

Passed assistant surgeons in navy entitled to pay of captain mounted in army. —Section 13 of the act of March 3, 1898, known as the navy personnel act, provides that commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army. Section 1466 of the Revised Statutes assimilates in rank lieutenants in the navy with captains in the army, and § 1261 fixes the pay of a captain mounted at \$2,000 a year and a captain not mounted at \$1,800 a year. Assistant surgeons in the army are entitled to mounted pay. The act of June 7, 1900, pro-

vides that assistant surgeons in the navy shall rank with assistant surgeons in the army. It was held that, under this statute, passed assistant surgeons in the navy, with the rank of lieutenants, were entitled to the pay of captains mounted in the army, namely, \$2,000 a year, the court holding that the words "assistant surgeon" in the act of June 7, 1900, was descriptive of the whole class of assistant surgeons, passed as well as those not passed. United States *v.* Farenholt, 206 U. S. 226, 51 L. Ed. 1036.

69. Computation of pay of officers appointed from civil life.—White *v.* United States, 191 U. S. 545, 48 L. Ed. 295.

70. Officers retired because of age or incapacity originating in line of duty.—Rev. Stat., § 1588; Roget *v.* United States, 148 U. S. 167, 37 L. Ed. 408; Potts *v.* United States, 125 U. S. 173, 176, 31 L. Ed. 661; Brown *v.* United States, 113 U. S. 568, 28 L. Ed. 1079.

Right to longevity pay.—See post, "Longevity Pay." VI. F. 1, c. (2), (h).

71. Officers retired from causes other than age or incapacity originating in line of duty.—Rev. Stat., § 1588; Brown *v.* United States, 113 U. S. 568, 28 L. Ed. 1079; Potts *v.* United States, 125 U. S. 173, 176, 31 L. Ed. 661; Roget *v.* United States, 148 U. S. 167, 37 L. Ed. 408; United States *v.* Burchard, 125 U. S. 176, 31 L. Ed. 662.

72. Officers retired on furlough pay.—Rev. Stat., § 1593; Brown *v.* United States, 113 U. S. 568, 28 L. Ed. 1079.

The furlough pay list was not abolished by the naval appropriation act of July 15, 1870. Brown *v.* United States, 113 U. S. 568, 28 L. Ed. 1079.

and consent of the senate,⁷³ and there is no prohibition against antedating such transfer.⁷⁴ Where an officer is retired as of the next higher grade, he is only entitled to seventy-five per cent. of the salary of the lowest officers of that grade.⁷⁵

(h) *Longevity Pay*.—aa. *In General*.—The salary of naval officers of certain grades is graduated according to the length to time which they have served, and such an officer is to be credited with the actual time he may have served as officer or enlisted man in the regular or volunteer army or navy, or both, and is entitled to receive all the benefits of such actual service in all respects in the same manner as if all of it had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service.⁷⁶

bb. *Officers Entitled to Longevity Pay*.—The act allowing longevity pay is applicable to those officers whose actual service has been continuous, as well as to those who have actually served at two or more distinct periods.⁷⁷ A paymaster's

73. Transfer from furlough pay list to retired list.—Rev. Stat., § 1594; *Potts v. United States*, 125 U. S. 173, 176, 31 L. Ed. 661; *Brown v. United States*, 113 U. S. 568, 28 L. Ed. 1079.

Where the naval retiring board retire an officer for incapacity and report that in their judgment incapacity did not originate in the line of duty, and the officer is retired on furlough pay in accordance with § 1454 of the Revised Statutes, and subsequently the officer is transferred from the furlough pay list to the retired pay list by the president by and with the consent of the senate, he is only entitled to one-half the sea pay for the grade or rank held by him at the time of his retirement as provided for by clause 2, § 1588, of the Revised Statutes. The fact that he is transferred from the furlough pay list to the retired pay list does not affect his status as a retired officer. He still remains an officer retired for incapacity which did not originate in the line of duty. *Potts v. United States*, 125 U. S. 173, 31 L. Ed. 661; *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662.

The object of the statute is not to enable the president and senate to vacate the finding of the retiring board that the incapacity of the officer did not "originate in the line of duty," and to decide that it was "the result of an incident of the service," but to afford a means for his relief from the consequences of such a finding, to the extent of adding to his pay the difference between the half of leave of absence pay and a half of sea pay. It may have been intended as a provision for a remedy for wrongs done by retiring boards, but it limited the power of the president and senate in that behalf to a transfer of the name of the officer from "the furlough to the retired pay list." The cause of his retirement still remains the same, and determines his position on the "retired pay list." *Potts v. United States*, 125 U. S. 173, 176, 31 L. Ed. 661.

74. Antedating transfer.—"There is no prohibition against antedating such a transfer. The statute simply says that the president, by and with the advice and

consent of the senate, may make it, and in our opinion he may with like advice and consent determine whether it shall operate only in the future, or relate back to a time when in his judgment it ought to have been granted." *United States v. Burchard*, 125 U. S. 176, 179, 31 L. Ed. 662.

75. Officer retired with grade above that actually held by him.—*Gibson v. United States*, 194 U. S. 182, 186, 45 L. Ed. 926.

A captain in the navy retired as a rear admiral, under § 1444 of the Revised Statutes of the United States and § 11 of the navy personnel act, does not receive three-fourths of the pay of the rear admirals in the nine higher numbers in the list of rear admirals but the like proportion of the pay of the nine lower numbers of the eighteen rear admirals. *Gibson v. United States*, 194 U. S. 182, 186, 45 L. Ed. 926.

76. Longevity pay of naval officers.—Rev. Stat., § 1556 (act of March 3, 1883); *United States v. Hendee*, 124 U. S. 309, 312, 31 L. Ed. 465; *United States v. Allen*, 123 U. S. 345, 348, 31 L. Ed. 147; *United States v. Mullan*, 123 U. S. 186, 188, 31 L. Ed. 140; *United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463; *United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667; *United States v. Cook*, 128 U. S. 254, 257, 32 L. Ed. 464; *United States v. Foster*, 128 U. S. 435, 437, 32 L. Ed. 486; *Barton v. United States*, 129 U. S. 249, 251, 32 L. Ed. 663; *United States v. Rockwell*, 120 U. S. 60, 30 L. Ed. 561; *Thornley v. United States*, 113 U. S. 310, 313, 28 L. Ed. 999; *United States v. Alger*, 151 U. S. 362, 364, 38 L. Ed. 192; *Roget v. United States*, 148 U. S. 167, 37 L. Ed. 408; *United States v. Green*, 138 U. S. 293, 34 L. Ed. 960; *United States v. Baker*, 125 U. S. 646, 31 L. Ed. 824; *Brown v. United States*, 113 U. S. 568, 28 L. Ed. 1079; *United States v. Stahl*, 151 U. S. 366, 367, 38 L. Ed. 194; *United States v. Thornton*, 160 U. S. 654, 658, 40 L. Ed. 570.

77. Officers whose service has been continuous.—*United States v. Alger*, 151 U. S. 362, 364, 38 L. Ed. 192; *United States v. Mullan*, 123 U. S. 186, 31 L. Ed. 140;

clerk is entitled to the benefits of the statute,⁷⁸ but the act is applicable to officers on the active list of the navy only, and does not apply to retired officers.⁷⁹

cc. *For What Prior Services Officer Entitled to Credit.*—The service with which an officer is to be credited in computing his longevity pay, is that rendered while an officer or enlisted man in the volunteer or regular army or navy, or both, and the statute was intended to include all service by persons regularly in the army or navy.⁸⁰ Service at the naval academy as a midshipman,⁸¹ or cadet midship-

United States *v.* Green, 138 U. S. 293, 34 L. Ed. 960.

In a case where it was contended on the part of the United States that the act of March 3d, 1883, applied to officers serving in the regular navy only when their term of service had not been continuous, the court said: "The view is urged, that the expression, 'since last entering the service' implies that the officer, to be entitled to the benefit of the statute, must have entered the service more than once. But we think that this is an overstrained interpretation. Mullan entered the service once. It was his last entry as well as his first entry. Where an officer has entered the service twice, the second entry is the last entry, and that entry is to be taken in applying the statute to his case; but where an officer has entered the service but once, that entry is to be taken as the last entry, within the meaning of the statute." United States *v.* Mullan, 123 U. S. 186, 188, 31 L. Ed. 140.

78. Paymaster's clerk.—United States *v.* Hendee, 124 U. S. 309, 313, 31 L. Ed. 465, distinguishing United States *v.* Mouat, 124 U. S. 303, 31 L. Ed. 463; United States *v.* Cook, 128 U. S. 254, 257, 32 L. Ed. 464; Barton *v.* United States, 129 U. S. 249, 251, 32 L. Ed. 663; Johnson *v.* Sayre, 158 U. S. 109, 117, 39 L. Ed. 916. "We are of opinion that the word 'officer' is used in that statute in the more general sense which would include a paymaster's clerk; that this was the intention of congress in its enactment, and that the collocation of the words means this, especially when it is added that they 'shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular navy.'" United States *v.* Hendee, 124 U. S. 309, 313, 31 L. Ed. 465.

79. Retired officers.—Thornley *v.* United States, 113 U. S. 310, 313, 28 L. Ed. 999, distinguishing United States *v.* Tyler, 105 U. S. 244, 26 L. Ed. 985; Brown *v.* United States, 113 U. S. 568, 28 L. Ed. 1079; United States *v.* Alger, 151 U. S. 362, 364, 38 L. Ed. 192; Roget *v.* United States, 148 U. S. 167, 37 L. Ed. 408.

"There was, no doubt, an underlying principle and purpose in the introduction of longevity pay into the navy. We think it was intended, first, to induce men to enter the navy and remain in it for life; second, to remove the depressing influence of long periods of service in one

grade without an increase of pay; third, to compensate for increased professional knowledge and efficiency in officers by increasing their pay in advance of promotion. If these views are correct, the whole basis of longevity pay is the officer's capacity for duty, and his performance of it. In other words, longevity pay is for longevity in actual service." United States *v.* Alger, 151 U. S. 362, 363, 38 L. Ed. 192.

By omitting retired officers from the class entitled to longevity pay, congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which congress has left out, namely, that besides the pay to which his grade or rank at the date of his retirement entitled him, the retired officer should also receive, for every period of five years after his retirement, the increased pay allowed officers on the active list. To give the statute this meaning would be legislation and not interpretation. Thornley *v.* United States, 113 U. S. 310, 313, 28 L. Ed. 999.

An officer in the navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than seventy-five per centum of the pay of the grade or rank which he held at the time of retirement. Roget *v.* United States, 148 U. S. 167, 169, 37 L. Ed. 408.

80. With what service officer to be credited.—United States *v.* Hendee, 124 U. S. 309, 313, 31 L. Ed. 465; United States *v.* Cook, 128 U. S. 254, 257, 32 L. Ed. 464.

The words "officers or enlisted men in the regular or volunteer army or navy, or both," was intended to include all men regularly in service in the army or navy, and the expression "officers or enlisted men" is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the president, or by the head of a department, but it was meant to include all men in service, either by enlistment or regular appointment in the army or navy. United States *v.* Hendee, 124 U. S. 309, 313, 31 L. Ed. 465; United States *v.* Cook, 128 U. S. 254, 257, 32 L. Ed. 464.

81. Service as midshipman at naval academy.—United States *v.* Baker, 125 U.

man,⁸² is service for which an officer is entitled to receive credit, and the same is true of service in the marine corps.⁸³

dd. *In What Grade Prior Services Are to Be Treated as Having Been Rendered.*—The rate of increased compensation is fixed by the lowest grade, having graduated pay, held by the officer since last entering the service,⁸⁴ and the pay of the office must have been graduated at the time it was held by the officer.⁸⁵

S. 646, 31 L. Ed. 824; *United States v. Stahl*, 151 U. S. 366, 367, 38 L. Ed. 194.

"That a midshipman is an officer, has been understood ever since there was a navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of the common seamen. (Imp. Dict.) Harris, in the early part of last century, and Johnson in the middle of it, defined 'midshipmen' as 'officers aboard a ship.' Cooper, in his History of the Navy of the United States, speaking of the Colonial period in the middle of the last century, says: 'About this time, it also became a practice among the gentry of the American provinces to cause their sons to be entered as midshipmen in the royal navy.'" *United States v. Cook*, 128 U. S. 254, 256, 32 L. Ed. 464.

82. Service by cadet midshipman.—*United States v. Cook*, 128 U. S. 254, 32 L. Ed. 464; *United States v. Baker*, 125 U. S. 646, 31 L. Ed. 824; *Hartigan v. United States*, 190 U. S. 169, 174, 49 L. Ed. 434; *United States v. Stahl*, 151 U. S. 366, 367, 38 L. Ed. 194.

Prior to the act of 1870, a student at the naval academy was an officer of the navy on the active list, and one serving as such an officer by virtue of his having been appointed a midshipman and continuing to be a student in the naval academy, though, after the passage of the act, styled "cadet midshipman," was still an officer of the navy. *United States v. Cook*, 128 U. S. 254, 256, 32 L. Ed. 464.

"Calling a student a cadet midshipman, without changing his position or duties, does not make his status different from what it was before." *United States v. Cook*, 128 U. S. 254, 32 L. Ed. 464.

83. Service in marine corps.—*United States v. Dunn*, 120 U. S. 249, 252, 30 L. Ed. 667. See ante. "Status of Marine Corps," III.

84. Lowest grade having graduated pay held by officer.—*United States v. Alger*, 151 U. S. 362, 364, 38 L. Ed. 192; *United States v. Mullan*, 123 U. S. 186, 31 L. Ed. 140; *United States v. Green*, 138 U. S. 293, 34 L. Ed. 960; *Barton v. United States*, 129 U. S. 249, 32 L. Ed. 663; *United States v. Foster*, 128 U. S. 435, 32 L. Ed. 486; *United States v. Rockwell*, 120 U. S. 60, 30 L. Ed. 561.

The act deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary, and has no reference to benefits derived from promotion to different grades, but is confined to the

lowest grade having graduated pay. *Barton v. United States*, 129 U. S. 249, 251, 32 L. Ed. 663.

The effect of the act was to lengthen the time of service in the lowest grade, having graduated pay, by crediting all previous services for the purpose only of increasing longevity pay in that grade. *United States v. Rockwell*, 120 U. S. 60, 30 L. Ed. 561; *Barton v. United States*, 129 U. S. 249, 251, 32 L. Ed. 663.

Plaintiff, a commander in the navy, had the following record of entry and promotion: In the volunteer service, acting master mate May 7, 1861; acting ensign November 27, 1862; acting master August 11, 1864; in the regular service, master, March 12, 1868; lieutenant December 18, 1868; lieutenant commander July 3, 1870; commander March 6, 1871. He had never received any benefit of longevity pay under the act of March 3, 1883. By the act of July 15, 1870, the pay of lieutenant and that of lieutenant commander and other officers therein mentioned was graduated from and after June 30, 1870, although prior to this time the pay of lieutenants was not graduated. It was held that as he was lieutenant several days succeeding June 30, 1870, when the act of July 15, took effect, the lowest grade he held having graduated pay was lieutenant. *United States v. Green*, 138 U. S. 293, 34 L. Ed. 960.

85. Pay must have been graduated when office held.—*United States v. Rockwell*, 120 U. S. 60, 63, 30 L. Ed. 561.

The rate of increased compensation is to be determined by the lowest grade having graduated pay at the time the officer was in that grade. The fact that after an officer is promoted a statute graduates the pay of the grade from which he was promoted, but the pay of which was not graduated when the officer held that office, does not make such office the lowest grade having graduated pay held by him within the meaning of the statute, since the service was not graduated, in respect to pay, until after he had ceased to hold it. *United States v. Rockwell*, 120 U. S. 60, 63, 30 L. Ed. 561.

In 1870, A held a position as lieutenant in the navy, and by the act of July 15, 1870 the pay of lieutenants and masters in the navy was graduated, though the office of master was not one having graduated pay at any time before A was promoted to lieutenant. It was held that the lowest grade held by him having graduated pay was that of lieutenant. *United States v. Rockwell*, 120 U. S. 60, 63, 30 L. Ed. 561.

If an officer has been twice in the service, the grade by which his increased compensation is to be computed is the lowest held by him since entering the service for the second time,⁸⁶ but if an officer has entered the service but once, his first entry is to be taken as his last entry, within the meaning of the statute.⁸⁷ Where an officer resigns one commission the day before he receives another, his service is considered as a continuous service, for the purpose of computing longevity pay, and his prior services are to be credited as having been rendered in the lowest grade held by him having graduated pay since first entering the service.⁸⁸ An officer is not entitled to credit, for prior service, in a grade held by him prior to the act giving longevity pay, but only in a grade held by him after that act took effect.⁸⁹

(i) *Increased Pay upon Promotion.*—Under a statute fixing the salary of passed assistant surgeons in the navy and providing for a certain salary the first five years “after such appointment” and for increased pay after five years “from such date,” the words, “after date of appointment” and “from such date,” as here used refer not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered as a passed assistant surgeon.⁹⁰

(3) *Brevet Officers.*—Brevet officers are only entitled to brevet pay and allow-

86. Where officer has been twice in service.—United States *v.* Rockwell, 120 U. S. 60, 30 L. Ed. 561; United States *v.* Alger, 151 U. S. 362, 38 L. Ed. 192; United States *v.* Stahl, 151 U. S. 366, 38 L. Ed. 194; United States *v.* Mullan, 123 U. S. 186, 188, 31 L. Ed. 140.

87. Where officer has entered service but once.—United States *v.* Alger, 151 U. S. 362, 38 L. Ed. 192; United States *v.* Mullan, 123 U. S. 186, 31 L. Ed. 140; United States *v.* Green, 138 U. S. 293, 34 L. Ed. 960.

88. Resignation of office and acceptance of another next day.—United States *v.* Alger, 151 U. S. 362, 38 L. Ed. 192; S. C., 152 U. S. 384, 38 L. Ed. 488; United States *v.* Thornton, 160 U. S. 654, 658, 40 L. Ed. 570; United States *v.* Stahl, 151 U. S. 366, 38 L. Ed. 194.

The habitual requirement of resignation by the navy department, as a preliminary to a new appointment, puts beyond doubt that a resignation was tendered with no intention of leaving the service, and confirms the view that the actual service of each claimant from the time he first entered the navy was for a single and continuous period, within the meaning of the longevity pay act. United States *v.* Alger, 152 U. S. 397, 38 L. Ed. 488.

If a formal resignation were sent in for the purpose of eluding the statute and claiming longevity pay on the higher scale, the attempt would be as unbecoming in the officer or his advisers, as it would be ineffectual to charge the United States. United States *v.* Alger, 151 U. S. 362, 365, 38 L. Ed. 192.

Resignation as ensign and appointment as professor.—Where an ensign in the navy resigned his position one day and was appointed professor of mathematics

the next day, it was held that in computing his longevity pay his term of service was to be taken as a continuous one, and the lowest grade held by him having graduated pay since last entering the service was that of ensign, and not that of professor of mathematics. United States *v.* Alger, 151 U. S. 362, 365, 38 L. Ed. 192.

Resignation as assistant engineer and appointment as assistant naval constructor.—Where an assistant engineer in the navy resigned his commission one day and was appointed as assistant naval constructor the next day, it was held that the term of the officer was to be taken as continuous and the lowest grade held by him since last entering the service was that of assistant engineer and not that of assistant naval constructor. United States *v.* Stahl, 151 U. S. 366, 38 L. Ed. 194.

89. Right to credit in grade held prior to act of 1883.—The acts of 1882 and 1883 do not require or authorize a restatement of the pay accounts of an officer of the navy who served in the regular or volunteer army or navy, so as to give him credit in the grade held by him, prior to their passage, for the time he served in the army or navy before reaching that grade. Congress only intended to give him credit in the grade held by him, after those acts took effect, for all prior services, whether as an enlisted man or officer, counting such services, however separated by distinct periods of time, as if they had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service. United States *v.* Foster, 128 U. S. 435, 437, 32 L. Ed. 486.

90. Increased pay upon promotion.—United States *v.* Moore, 95 U. S. 760, 24 L. Ed. 588.

ances when holding a command equal to their brevet rank.⁹¹ This rule is applicable to brevet officers in the marine corps as well as to the brevet officers in the army.⁹² A brevet officer in command of a company is entitled to compensation given by statute to officers in command of companies for special duties incident to the command.⁹³

(4) *Reinstated Officers*.—Where an officer dismissed from the service is reinstated by special act authorizing his reappointment by the president, to take effect as of the date of his dismissal, his right to pay during the time between his dismissal and reappointment is governed by the act authorizing his reappointment.⁹⁴

(5) *Extra Pay on Discharge*.—Extra pay is sometimes given by statute to officers serving in time of war upon their honorable discharge at the end of the war, or upon the termination of their engagement.⁹⁵ The extra pay which officers

91. Brevet officers.—United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724.

92. Brevet officers in the marine corps.—United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724.

A brevet field officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field officer of infantry of a similar grade to brevet pay and rations. United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724.

A brevet field officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. United States *v.* Freeman, 3 How. 556, 557, 11 L. Ed. 724.

93. Compensation for special duties incident to actual command.—United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724.

A brevet lieutenant colonel in the marine corps having actual command of a company was held entitled to the benefit of the act of March 2, 1827, providing that every officer in the actual command of a company shall be entitled to receive \$10 a month additional pay as compensation for his duties and responsibilities with respect to the clothing, arms, and accoutrements of the company, while in actual command thereof. United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724.

94. Reinstated officers.—Quackenbush *v.* United States, 177 U. S. 20, 44 L. Ed. 654.

The act of February 16, 1897, c. 235, for the relief of Commander Quackenbush enacted "that the provisions of law regulating appointments in the navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the president of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the senate, to ap-

point said John N. Quackenbush, late a commander in the navy of the United States, to the same grade and rank of commander in the United States navy as of the date of August first, eighteen hundred and eighty three, and to place him on the retired list of the navy, as of the date of June first, eighteen hundred and ninety five: Provided, that he shall receive no pay or emoluments except from the date of such reappointment." In an action by Commander Quackenbush to recover pay as on leave or waiting orders from August 1, 1883 to June 1, 1895, when claimant reached the age of sixty two years, and pay as a retired officer from June 1, 1895 to May 26, 1897, when he took the prescribed oath on his appointment, it was held that he was not entitled to recover, but that an amount improperly paid him by the government could not be recovered back by way of counterclaim, as the act providing for his reappointment was to be construed as ratifying prior payments. Quackenbush *v.* United States, 177 U. S. 20, 44 L. Ed. 654.

95. Extra pay on discharge.—United States *v.* North, 112 U. S. 510, 512, 28 L. Ed. 808 (construing act of 1848 providing for extra pay to officers serving in war with Mexico); United States *v.* Hite, 304 U. S. 343, 51 L. Ed. 514 (construing act of March 3, 1899 providing for extra pay to officers in war with Spain); United States *v.* Merrill, 9 Wall. 614, 19 L. Ed. 664 (construing act of July 13, 1866 providing for extra pay to officers in the war of the rebellion); Williams *v.* United States, 137 U. S. 113, 34 L. Ed. 590; S. C., 154 U. S. 648, 25 L. Ed. 309 (construing the acts of Oct. 21, 1780, and March 22, 1783, providing for extra pay to officers in the revolutionary war).

In United States *v.* Brown, 206 U. S. 240, 51 L. Ed. 1046, a volunteer officer mustered out of service who was allowed two months' extra pay for foreign service, was held not entitled to one month's extra pay for services within the country.

Extra pay to officers serving in war with Mexico. Officers of the navy and of the regular army who were employed in

are to receive under such statutes is that they were receiving at the time of their discharge or the termination of their engagement.⁹⁶ An officer of volunteers who is honorably discharged and who resumes his duty and rank in the regular army, is not entitled to extra pay.⁹⁷

(6) *Extra Pay for Extra Services*—(a) *In General*.—An equitable allowance should be made for extra services performed by an officer, which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of peculiar emergency.⁹⁸

the prosecution of the war with Mexico are entitled to the three months' extra pay provided for by the act of 1848. *United States v. North*, 112 U. S. 510, 512, 28 L. Ed. 808.

Extra pay to officers serving in revolutionary war.—The acts of Oct. 3, 1780, and of October 21, 1780, for consolidating and reducing the army, provided that the officers who became supernumerary by reason of the reduction and consolidation of regiments should be entitled to half pay for seven years. *Williams v. United States*, 137 U. S. 113, 114, 34 L. Ed. 590.

By the acts of Oct. 3, 1780, and Oct. 21, 1780, providing for the reduction and consolidation of the army, reduced officers were entitled to half pay for life. *Williams v. United States*, 137 U. S. 113, 114, 34 L. Ed. 590.

Under the act of March 22, 1783, it was provided that officers then in the service, and who continued therein until the end of the war, should be entitled to receive the amount of five years' full pay. *Williams v. United States*, 137 U. S. 113, 114, 34 L. Ed. 590, wherein the evidence was held insufficient to show that an officer continued in service until the end of the war.

A supernumerary officer in the continental line who accepted an appointment by the state of Virginia in a regiment of guards thereby ceased to be an officer of the line, and, the regiment of guards having been discharged before the end of the war, he was not entitled to the benefits of the acts of congress of Oct. 21, 1780, and March 22, 1783, providing for pay to those officers who continued in the service "until the end of the war." *Williams v. United States*, 154 U. S. 648, 25 L. Ed. 309.

Officers entitled to half pay for life under a statute, which may be commuted for five years' full pay, who accept the commutation, are not entitled to recover arrearages of half pay. *Roach v. Commonwealth*, 2 Dall. 206, 1 L. Ed. 350.

96. Rate of pay.—*United States v. North*, 112 U. S. 510, 513, 28 L. Ed. 808; *United States v. Hite*, 204 U. S. 343, 347, 51 L. Ed. 514.

Under the act of March 3, 1899 providing that the officers and enlisted men comprising the temporary force of the navy during the war with Spain, who served creditably beyond the limits of the United States shall be entitled to two

months' extra pay upon their honorable discharge, an officer in the navy, detached from a vessel on December 17, 1898, and ordered home, and discharged five days later, is entitled to two months' extra pay at the rate of pay he received during sea service and not at the rate he was receiving at the time of his discharge. The two months' extra pay is given because of creditable service beyond the limits of the United States, and therefore upon discharge officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States. *United States v. Hite*, 204 U. S. 343, 51 L. Ed. 514.

The language of the act of 1848 was that officers "shall be entitled to receive three months' extra pay," evidently meaning the same pay they would have received if they had remained in the same service three months' longer. It follows that, an officer serving at sea when he was ordered away, was entitled to three months' sea pay. *United States v. North*, 112 U. S. 510, 513, 28 L. Ed. 808.

97. Right of officer resuming duty in regular army to extra pay on discharge from volunteer service.—Under the act of July 13th, 1866, amendatory of the 4th section of the act of March 3d, 1865, an officer in the regular army who during the rebellion accepted a commission of colonel in the volunteer organization, is not entitled to the three months' pay given by those acts to officers of that grade on being honorably discharged, under the terms of the act, from "military services;" he resuming his duty and rank in the regular army, and being still in the said service. *United States v. Merrill*, 9 Wall. 614, 19 L. Ed. 664.

The word service, as used in that act, means, beyond question, the military service of the United States, and it is equally clear that no such officer is entitled to that allowance unless it is shown that he was mustered out of the military service of the United States, or was otherwise honorably discharged from that service subsequent to the time specified in the amendatory act. *United States v. Merrill*, 9 Wall. 614, 616, 19 L. Ed. 664.

98. Allowance for extra services.—*United States v. Ripley*, 7 Pet. 18, 8 L. Ed. 593; *United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596; *United States v. Barnette*, 165 U. S. 174, 41 L. Ed. 675; *United*

(b) *Determination as to Amount.*—The compensation should be equal to the amount paid others for similar services,⁹⁹ and may be ascertained by evidence of usage in such cases.¹

(c) *Set-Off of Claim against Government.*—A claim for compensation for extra services may be set off against a demand of the government.²

(7) *Officers Wrongfully Dismissed from Service.*—Where a volunteer officer in the army is dismissed upon the sentence of a court martial improperly constituted, he is entitled to his pay up to the time of the final muster out of his regiment,³ but not thereafter.⁴

(8) *Suspended Officers.*—Suspended officers are not entitled to receive pay and allowances during their suspension.⁵

d. *Presumption of Payment.*—It is presumed that every person who has been engaged in the public service has received the compensation allowed by law, until the contrary appear.⁶

e. *Compelling Payment by Mandamus.*—A mandamus against the secretary of the navy will not lie at the instance of an officer, to enforce the payment of his pay.⁷

f. *Recovery Back of Amount Improperly Paid to Officer.*—Money paid to an officer under a mistake of law cannot be recovered back,⁸ and if a person, though

States v. MacDaniel, 7 Pet. 1, 2, 8 L. Ed. 537. See, also, post, "Disbursing Agents," VIII.

Necessity of request for or necessity of service.—However valuable the plans for fortifications, prepared by a public officer, may have been, unless they were prepared at the request of the government, or were indispensable to the public service, as a matter of right, a compensation for them cannot be claimed. United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593.

Quartermaster serving as assistant commissary.—A quartermaster of a regiment of cavalry, who also serves as acting assistant commissary, is entitled to the additional compensation of \$100 per annum provided for by § 1261 of the Revised Statutes. United States v. Morrison, 96 U. S. 232, 24 L. Ed. 688.

The additional pay which the law gives an acting assistant commissary is not, in the case of a quartermaster performing that service, pay for a second staff appointment. As such quartermaster receives no compensation for staff service separate from that of rank, he does not, within the meaning of the army regulations, receive pay for his staff appointment. United States v. Morrison, 96 U. S. 232, 24 L. Ed. 688.

Lieutenant in navy serving as instructor in state nautical school.—A lieutenant in the navy detailed as an instructor in a nautical school conducted upon a naval vessel of the United States is entitled to full sea pay although receiving pay from the state for his services as instructor. United States v. Barnette, 165 U. S. 174, 41 L. Ed. 675.

Pleading in action to recover for services.—If services for which compensation is claimed were not such as were ordinarily attached to the duties of the officer, the fact should be stated; and also that the service was performed under the sanc-

tion of the government, or under such circumstances as rendered the extra labor and responsibility assumed in performing it necessary. United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593.

99. Compensation equal to that paid others for similar services.—United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593.

1. Evidence of usage to establish amount of compensation to which officer entitled.—United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593.

2. Set-off of claim against demand of government.—United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

3. Officer wrongfully dismissed.—United States v. Brown, 206 U. S. 240, 51 L. Ed. 1046.

4. Right of volunteer officer wrongfully dismissed to pay after regiment is mustered out.—United States v. Brown, 206 U. S. 240, 51 L. Ed. 1046.

Where such an officer applies after his regiment is mustered out for certificate of honorable discharge, which is refused upon the ground that he has already been dishonorably discharged, this does not amount to an active retention of the officer in service and entitle him to pay after his regiment is mustered out. United States v. Brown, 206 U. S. 240, 51 L. Ed. 1046.

5. Suspended officers.—Swain v. United States, 165 U. S. 553, 41 L. Ed. 823.

6. Presumption of payment.—United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593. See, generally, the titles PAYMENT; PUBLIC OFFICERS.

7. Compelling payment by mandamus.—Brashear v. Mason, 6 How. 92, 12 L. Ed. 357. See, generally, the title MANDAMUS.

8. Money paid under mistake.—United States v. Freeman, 3 How. 556, 11 L. Ed.

not an officer *de jure*, acted as an officer *de facto*, and received pay for such services, the government cannot recover it back.⁹ But the government is not concluded by a payment to an officer, where at the time, the officer asserts that the amount thereof is insufficient and reserves the right to sue for the residue, and if the amount paid was in excess of the amount due, the government may recover it back.¹⁰ An amount improperly paid to an officer which the government is entitled to recover back, may be set off by the government in an action by the officer for pay.¹¹

2. ALLOWANCES—*a. Definition.*—The term allowances includes everything which can be recovered from the government by an officer except the stipulated monthly compensation designated as pay.¹²

b. Power of Secretary of Army or Navy to Make Allowances.—The head of the department has power to make allowances to officers of the army or navy out of funds in his hands.¹³ The secretary of the navy may make an allowance to an officer to defray medical expenses incurred.¹⁴

c. For What Purpose Allowances Are to Be Made—(1) *Mileage*—(*a*) *Control of Mileage by Congress.*—The compensation paid to officers of the army or navy for traveling expenses is under the control of congress,¹⁵ and a claim for mileage or traveling expenses is to be governed by the law in force at the time the travel is performed and not by that in force at the time it is undertaken.¹⁶

724. See, also, *Quackenbush v. United States*, 177 U. S. 20, 44 L. Ed. 654.

9. **Recovery back of amount paid to de facto officer.**—*Badeau v. United States*, 130 U. S. 439, 452, 32 L. Ed. 997. See, generally, the title PAYMENT.

10. **Estoppel of government where officer objects that payment is not correct and reserves right to sue.**—*McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

Where at the time of the settlement of the accounts of an officer in the army, he protests that the action was insufficient and declared that he would not be bound by it, but accepted it under protest and would sue in the court of claims for the residue, it was held, that even if the United States would have been concluded had the officer made no protest, the fact that he accepted the amount under protest, reserving the right to sue, operated to defeat the estoppel which might otherwise have existed as to the government. *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

11. **Set-off against officer.**—*United States v. Stahl*, 151 U. S. 366, 367, 38 L. Ed. 194; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189, *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

12. **Allowances defined.**—*United States v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

13. **Power of head of department.**—*United States v. Philbrick*, 120 U. S. 52, 58, 30 L. Ed. 559; *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *United States v. Jones*, 18 How. 92, 15 L. Ed. 274.

"The power of the executive to establish rules and regulations for the government of the army is undoubted. The power

to establish implies, necessarily, the power to modify or repeal, or to create anew. The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken." *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968.

14. **Allowance for medical expenses.**—*United States v. Jones*, 18 How. 92, 15 L. Ed. 274.

Where an officer of the navy was detached on special duty in France, and a sum of money was transmitted to him by the secretary of the navy, to be disbursed for medical attendance, the propriety of this act was peculiarly within the jurisdiction and discretion of the head of the department; and the officer cannot be charged with the amount so transmitted, by the accounting officers of the treasury department. *United States v. Jones*, 18 How. 92, 15 L. Ed. 274.

15. **Mileage under control of congress.**—*United States v. McDonald*, 128 U. S. 471, 473, 32 L. Ed. 506.

16. **Governed by law in force when travel performed.**—*United States v. McDonald*, 128 U. S. 471, 473, 32 L. Ed. 506.

By the act of June 16th, 1874, 18 Stat. 72, c. 285, "only actual traveling expenses" were "allowed to any person holding employment or appointment under the United States." By the act of June 30th, 1876, 19 Stat. 65, c. 159, so much of the preceding act as was "applicable to officers of the navy" was repealed; "and the

(b) *Persons Entitled to Mileage.*—A paymaster's clerk is not entitled to mileage under statutes providing for mileage to "officers of the navy."¹⁷

(c) *For What Travel Mileage Allowed*—aa. *Travel by Sea.*—The statutes allowing mileage apply to travel by sea as well as travel by land.¹⁸

bb. *Domestic or Foreign Travel.*—Formerly no distinction was made between the mileage of officers traveling within the country and those traveling abroad.¹⁹ Under a statute providing for mileage for officers traveling in the United States, and for actual expenses only when traveling abroad, the question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken.²⁰ An officer is to be understood as traveling abroad when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port.²¹ But where an officer is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he ought not thereby to be disentitled to his mileage by the nearest traveled route.²²

sum of eight cents per mile" was "allowed such officers" "in lieu of their actual expenses." A, an officer in the navy, commenced a journey before the passage of the latter act and completed it thereafter. Held, that he was entitled to receive only his actual expenses for that part of his journey performed prior to the passage of the act and mileage for that portion performed afterwards. *United States v. McDonald*, 128 U. S. 471, 473, 32 L. Ed. 506.

The claim of the officer in such case does not rest upon any contract, expressed or implied, with the government, but upon the acts of congress which provide for his compensation. *United States v. McDonald*, 128 U. S. 471, 473, 32 L. Ed. 506.

17. Paymaster's clerk.—*United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463; *Johnson v. Sayre*, 158 U. S. 109, 117, 39 L. Ed. 916.

Under the act of June 30, 1866, repealing so much of the act of June 16, 1874, as provides that officers of the navy should only be entitled to actual traveling expenses while engaged on public business, and providing that the sum of eight cents a mile should be allowed to such officers while so engaged in lieu of their actual expenses, does not apply to the paymaster's clerk, a paymaster's clerk not being an officer of the navy within the meaning of the act of June 30, 1876. *United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463.

18. Travel by sea.—*United States v. Temple*, 105 U. S. 97, 26 L. Ed. 967; *United States v. Graham*, 110 U. S. 219, 28 L. Ed. 126.

The act of June 30, 1876, allows eight cents a mile to officers holding employment or appointment under the government, for traveling while engaged in public business, in lieu of the actual expenses, and this statute applies as well to travel by sea as to travel by land. *United States v. Temple*, 105 U. S. 97, 26 L. Ed. 967.

19. Domestic or foreign travel.—In general.—*United States v. Graham*, 110 U. S. 219, 28 L. Ed. 126 (holding that under the act of 1835, officers in the navy were entitled to mileage for travel out of the United States as well as for that within the country, and that the plain provisions of the statute were not affected by a contrary construction long put upon it by the department).

20. Termini of journey as governing as to whether travel is within United States or abroad.—*United States v. Hutchins*, 151 U. S. 542, 544, 38 L. Ed. 264.

21. Travel to foreign port.—*United States v. Hutchins*, 151 U. S. 542, 544, 38 L. Ed. 264.

22. Travel from one place within country to another.—*United States v. Hutchins*, 151 U. S. 542, 544, 38 L. Ed. 264.

Instances are frequent where an officer ordered from one place to another within the United States is obliged to perform the whole or a substantial part of his journey either upon the high seas or upon foreign soil. If, for example, he were ordered from Buffalo to Detroit, or from New York to Galveston, by sea, it would be sticking in the bark to speak of either as "travel abroad," because in one case the most direct route lies through Canada, and in the other the voyage is made upon the high seas. While the voyage in question was not literally "in the United States," it was such within the intent and spirit of the enactment. *United States v. Hutchins*, 151 U. S. 542, 544, 38 L. Ed. 264.

A naval officer traveling under orders from San Francisco to New York, by the way of the Isthmus of Panama, is to be considered as traveling under orders in the United States, for which he is entitled to eight cents per mile. *United States v. Hutchins*, 151 U. S. 542, 543, 38 L. Ed. 264.

cc. *Change of Station by Officer*.—An officer changing his station at his own request is not entitled to mileage.²³

dd. *Officer Ordered Home to Await Orders*.—An officer ordered to his home to await orders is entitled to mileage.²⁴

(2) *Servant's Pay*.—Officers in the army entitled to an allowance for each servant kept by them equal to the amount of the pay and allowances of a private soldier were formerly held entitled to the benefits of statutes increasing the amount of pay and allowances of private soldiers.²⁵ But this rule has since been disapproved, and now statutes increasing the pay of private soldiers do not have the effect of increasing the allowances of officers for servant's pay.²⁶

(3) *Rations*—(a) *Sea Rations*.—Prior to the navy personnel act, officers at sea or attached to a seagoing vessel were entitled to rations or an allowance therefor,²⁷ but the statute providing for rations was repealed by implication by that act.²⁸

23. Officer exchanging station upon his own request.—United States *v.* Phisterer, 94 U. S. 219, 24 L. Ed. 116.

"If A. at one station and B. at another desire to exchange stations or regiments or companies with each other, and prefer a request to that effect, the provision assumes that the commanding officer may, in his discretion, grant it; but, as no public interest is advanced by it, and it is consented to for the advantage or pleasure of the two officers, they must bear their own expense of transportation in making the exchange. This is just and reasonable." United States *v.* Phisterer, 94 U. S. 219, 221, 24 L. Ed. 116.

Going home to await orders not equivalent to exchange of station.—An officer of the army, who, under the consolidating act of March 3, 1869, is ordered from a military post, at which he is doing duty, to his home, to await orders, does not exchange his station, within the meaning of § 1117 of the army regulations, which provides that "when officers are permitted to exchange stations, or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves." United States *v.* Phisterer, 94 U. S. 219, 24 L. Ed. 116.

The home of the officer to which he is ordered is not a military station. A military "station" is merely synonymous with military "post." In each case it means not an ordinary residence, having nothing military about it, except that one of its occupants holds a military commission, but a place where military duty is performed, or stores are kept or distributed, or something connected with war or arms is kept or done. United States *v.* Phisterer, 94 U. S. 219, 24 L. Ed. 116.

24. Officer ordered home to await orders.—United States *v.* Phisterer, 94 U. S. 219, 24 L. Ed. 116; United States *v.* Mears, 94 U. S. 225, 24 L. Ed. 118. (note); United States *v.* Graham, 110 U. S. 219, 28 L. Ed. 126.

Section 1109 of the army regulations,

authorized and confirmed by the act of July 28, 1866, providing that "an officer who travels not less than ten miles without troops, escort, or military stores, and under special orders in a case from a superior, or a summons to attend a military court, shall receive ten cents mileage," applies to the case of an officer, who under the consolidating act of March 3, 1869, is ordered from a military post to await orders. United States *v.* Phisterer, 94 U. S. 219, 221, 24 L. Ed. 116.

25. Formerly statute increasing pay of privates construed to increase allowance of officers for servant's pay.—United States *v.* Gilmore, 8 Wall. 330, 19 L. Ed. 393.

26. Former construction disapproved.—United States *v.* Gilmore, 8 Wall. 330, 19 L. Ed. 396.

The act of July 17, 1862, provided that the act of Aug. 6, 1861, increasing the pay of private soldiers, should not be construed as increasing the allowance of officers for servant's pay. The act of June 20, 1864, further increasing the pay of enlisted men, contained no such provision and made no reference to the subject. It was held that the act of July 17, 1862, was a disapproval of the construction formerly given by the department to the acts increasing the pay of privates, and congress was to be taken as having intended that the construction first established by that act was to govern in the construction of the act of 1864. United States *v.* Gilmore, 8 Wall. 330, 19 L. Ed. 396.

27. Rations allowed prior to navy personnel act.—Gibson *v.* United States, 194 U. S. 182, 191, 45 L. Ed. 926.

A mate employed on a receiving ship is entitled to the emoluments of a petty officer, among which are rations. United States *v.* Fuller, 160 U. S. 593, 40 L. Ed. 549.

28. Rations not allowed under navy personnel act.—Gibson *v.* United States, 194 U. S. 182, 191, 45 L. Ed. 926 (holding that § 1578 of the Revised Statutes providing for rations was repealed by the navy personnel act). See, also, United States *v.* Thomas, 195 U. S. 418, 426, 49 L. Ed. 259.

(b) *Additional or Double Rations*—aa. *In General*.—Additional rations can only be allowed to officers commanding at separate posts,²⁹ and not to more than one officer at the same station.³⁰ The fact of appropriations having been made by congress for double rations, does not determine what officers in command are entitled to them,³¹ as the president is vested with discretionary power as to the allowance of additional rations to such officers,³² and may allow or refuse them as in his opinion he may deem proper.³³ But when an officer presents, with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the war department, in conformity with the provisions of the army regulations, allowing double rations, his right to them is established, and they cannot be withheld.³⁴ The power to allow additional rations may be exercised by the secretary of war acting on behalf of the president under general authority.³⁵

bb. *Longevity Rations*.—One who has served in a volunteer regiment is not entitled to the benefits of a statute giving additional rations to persons who have served five years in the army of the United States.³⁶

29. Allowance limited to commandants of separate posts.—*Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

Who are officers commanding separate posts.—An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander in chief, or of a superior officer in command in the neighborhood; he must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. *Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

The adjutant and inspector general has no distinct command; his duties consist in details of service, and not in active military command and he is therefore not entitled to additional rations. *Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

The general order of the war department, of March 16th, 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country into which the two divisions of the army are divided, and which were dominated "departments," and intended to designate the extent of actual command given to the officer commanding such department; it does not relate to the law of the 3d of March, 1813, "for the better organization of the general staff of the army." *Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

Brevet field officer of marines.—By force of the army regulation No. 1125, authorizing the issues of double rations to officers commanding departments, posts and arsenals, a brevet field officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations. *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

A brevet field officer of the marine

corps is not entitled by law to brevet pay and rations, by reasons of his commanding a separate post or station, if the force under his command would not entitle a brevet field officer of infantry of a similar grade to brevet pay and rations. *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

30. Allowance to more than one officer at same post.—*Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

31. Effect of appropriation by congress for double rations.—*United States v. Freeman*, 3 How. 556, 567, 11 L. Ed. 724.

32. Power of president as to allowance of additional rations.—*Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

33. Discretion of president as to allowance of additional rations.—*Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150.

34. Presentation of certificate of command of separate post as entitling officer to additional rations.—*United States v. Freeman*, 3 How. 556, 567, 11 L. Ed. 724.

35. Power of secretary of war to make allowance.—*Parker v. United States*, 1 Pet. 293, 7 L. Ed. 150; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

36. Service in volunteer regiment.—In computing the time of service which entitles an officer to longevity pay, service in a volunteer regiment is not service "in the army of the United States," within the meaning of the act of July 3, 1838, c. 162, § 5 Stat. 256, the fifteenth section of which enacts "that every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the army of the United States." *United States v. Sweeney*, 157 U. S. 281, 283, 39 L. Ed. 702.

By the act of March 2, 1867, volunteer officers serving in the army since the breaking out of the civil war have the same privilege as to longevity rations as officers in the regular army. *United States v. Sweeney*, 157 U. S. 281, 284, 39 L. Ed. 702.

(c) *Commutation of Rations.*—A statute increasing the commutation price of officer's subsistence, by fixing it at fifty cents per ration, "provided that said increase shall not apply to the commutation price of the rations of any officer above the rank of brevet brigadier general" does not entitle a brigadier general to an increase, as a brigadier general is to be regarded as above the rank specified.³⁷

(4) *Commutation of Fuel and Quarters.*—When the government cannot furnish quarters to its officers, it sometimes allows them a money compensation in lieu thereof, called commutation.³⁸ In order to entitle an officer to commutation of fuel and quarters in any case, he must be actually engaged in the public service,³⁹ and they must be necessary to the proper discharge of his duty.⁴⁰ Commutation is not allowed to an officer ordered home awaiting orders,⁴¹ or to an officer in the field,⁴² but an officer ordered to the headquarters of the department to await orders is entitled to commutation of fuel and quarters.⁴³ The percentage of his salary which an officer is entitled to receive in commutation of fuel, quarters, etc., is to be ascertained by reference to the amount statedly received by the officer, as statutory pay, and is not to be increased by the additional compensation allowed by the act providing for longevity pay.⁴⁴

(5) *Allowance, upon Discharge, for Transportation and Subsistence.*—An officer discharged at his own request or for his own pleasure and convenience is not entitled to travel pay and commutation of subsistence to the place where he was mustered in.⁴⁵

37. *Commutation of rations.*—United States *v.* Hunt, 14 Wall. 550, 20 L. Ed. 739.

38. *Compensation in money in lieu of quarters.*—United States *v.* Phisterer, 94 U. S. 219, 224, 24 L. Ed. 116.

Allowances formerly allowed.—Prior to the act of March 3, 1835 special allowances to seamen, officers and marines were allowed to be made by appropriation in gross proportioned by the secretary of the navy in commutation of furniture, lights and fuel. United States *v.* Philbrick, 120 U. S. 52, 30 L. Ed. 559.

By the act of April 17, 1866, the act of March 3, 1835, forbidding such allowances was repealed, and practice prior to the act of 1835 was thus revived. United States *v.* Philbrick, 120 U. S. 52, 30 L. Ed. 559.

Allowances to an officer of the navy in commutation of quarters, furniture, lights and fuel for a period between Nov. 12, 1869, and July 1, 1870, made after the act of April 17, 1866, and prior to the passage of the act of February 25, 1871, providing that the repeal of an act repealing a former act should not revive the former act, and of July 15, 1870, prohibiting such allowances, were not improper. United States *v.* Philbrick, 120 U. S. 52, 30 L. Ed. 559.

Allowances prohibited.—By the act of July 15, 1870 (Rev. Stat., § 1558), providing for the pay of officers of the navy, allowances to officers are, as a general rule, prohibited and this was also the rule under the act of March 3, 1835. United States *v.* Philbrick, 120 U. S. 52, 30 L. Ed. 559.

39. *Officer must be actually engaged in public service.*—United States *v.* Phisterer, 94 U. S. 219, 224, 24 L. Ed. 116.

40. *Quarters must be necessary to discharge of officer's duty.*—United States *v.* Phisterer, 94 U. S. 219, 224, 24 L. Ed. 116.

41. *Officer ordered home.*—United States *v.* Phisterer, 94 U. S. 219, 220, 24 L. Ed. 116; United States *v.* Chilson, 94 U. S. 225, 24 L. Ed. 118, note (officer ordered home under act of March 3, 1869).

The home of an officer is not a "station," within the meaning of § 1080 of the army regulations, in the sense that he is entitled to public quarters, or to a compensation in the form of commutation for rooms and apartments or fuel, obtained or supposed to be obtained in lieu of those expected to be furnished by the government. United States *v.* Phisterer, 94 U. S. 219, 225, 24 L. Ed. 116.

42. *Officers, when in field.*—United States *v.* Phisterer, 94 U. S. 219, 220, 24 L. Ed. 116.

In such case fuel and quarters are not necessary to the discharge of the officer's duty, and apartments, kitchen and offices are not necessary, and cannot be commuted for. United States *v.* Phisterer, 94 U. S. 219, 220, 24 L. Ed. 116.

43. *Awaiting orders at headquarters of department.*—Pursuant to orders, the colonel of a regiment reported, July 25, 1863, to the headquarters of a department, there to "await further orders." While awaiting them, he was not furnished fuel or quarters. Held, that he is entitled to recover their commuted value. United States *v.* Lippitt, 100 U. S. 663, 25 L. Ed. 747.

44. *Effect of act providing for longevity pay.*—United States *v.* Allen, 123 U. S. 345, 348, 31 L. Ed. 147.

45. *Right of officer discharged by request to travel pay and commutation of subsistence.*—United States *v.* Sweet, 189 U. S. 471, 47 L. Ed. 907.

d. *Forfeiture of Allowance*.—Where an officer is suspended from duty, he is not entitled to emoluments or allowances.⁴⁶

G. Liability of Government for Acts of Officers.—No claim exists as a matter of course against the government for a wrong done by one officer against another officer, or by one officer against an individual, when the liability of the officer himself for public acts is often questionable; and when the liability of the government for his acts, private or public, is still more in doubt.⁴⁷

H. Powers, Duties and Liabilities of Officers—1. **POWERS AND DUTIES**—
a. *Power to Contract*.—The acts of the assistant surgeon general, appointed under the act of congress and located at St. Louis, are the acts of the surgeon general, and have the same validity until countermanded or revoked. Where parties in the effort to fulfill an order for a large amount of ice for the use of the government, which by their contract they were bound to furnish, purchased ice which was lost by the suspension of the order of the assistant surgeon general by his superior officer, they are entitled to recover the cost of the ice so lost and the expense of the care and attempt to preserve it.⁴⁸

b. *Powers and Duties of Commissary Department*.—The duty of the commissary department, in general terms, is to feed the army, to provide supplies for its subsistence.⁴⁹ Transportation is not understood to be among its duties.⁵⁰

c. *Powers and Duties of Quartermaster's Department*.—The duties of the quartermaster's department, and of the department of subsistence, are separate and distinct. The departments are managed by different officers, whose authority is confined to the matters connected with their departments.⁵¹ What the commissary provides to feed the army it is the duty of the quartermaster to transport to such points as may be needed.⁵²

2. **LIABILITIES**—a. *To Government*.—An officer who receives from another a sum of money and gives a receipt therefor in his official capacity, may be treated by the government as its debtor.⁵³

b. *To Third Persons*—(1) *Wrongs or Injuries to Subordinates in Service*.—The commanding officer of a squadron, acting as a public officer, is invested with certain discretionary powers, and cannot be made answerable for any injury to his subordinates when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty,⁵⁴ and his acts are presumed legal till shown to

46. *Suspension from duty as forfeiting allowances*.—Swaim v. United States, 165 U. S. 553, 566, 41 L. Ed. 823; United States v. Phisterer, 94 U. S. 219, 24 L. Ed. 116.

47. *Liability of government for acts of officers*.—United States v. Buchanan, 8 How. 83, 106, 12 L. Ed. 997.

The only remedy is resort to congress for relief. United States v. Buchanan, 8 How. 83, 106, 12 L. Ed. 997.

48. *Power to contract*.—Parrish v. United States, 100 U. S. 500, 25 L. Ed. 763. See, generally, the title UNITED STATES.

49. *Duty of commissary department*.—Shrewsbury v. United States, 18 Wall. 664, 669, 21 L. Ed. 850.

50. *Transportation not duty of commissary department*.—Shrewsbury v. United States, 18 Wall. 664, 669, 21 L. Ed. 850 (holding that transportation is the duty of the quartermaster).

51. *Quartermaster's department distinguished from department of subsistence*.—Shrewsbury v. United States, 18 Wall. 664, 669, 21 L. Ed. 850.

52. *Duty to transport stores, etc.*—Shrewsbury v. United States, 18 Wall. 664, 669, 21 L. Ed. 850.

53. *Liability to government*.—United States v. Buford, 3 Pet. 12, 7 L. Ed. 585.

B., a deputy commissary of the United States, received from M., a deputy quartermaster general of the United States, the sum of \$10,000, and acknowledged the same, by a receipt signed by him, with his official description; the United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar. United States v. Buford, 3 Pet. 12, 7 L. Ed. 585.

54. *No liability in absence of malice, corruption or cruelty*.—Wilkes v. Dinsman, 7 How. 89, 12 L. Ed. 618.

Commander not liable for error in judgment.—Wilkes v. Dinsman, 7 How. 89, 12 L. Ed. 618; Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036.

The commander being the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination, it not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object. Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036.

be unjustifiable.⁵⁵ The commander may detain a marine after his term of enlistment has expired, if the public interest requires it,⁵⁶ may inflict corporal punishment,⁵⁷ when necessary to maintain discipline, and due subordination,⁵⁸ or imprison a refractory sailor ashore.⁵⁹

(2) *Wrongs or Injuries to Civilians*.—No civil liability attaches to officers or soldiers for acts done in accordance with the usages of civilized warfare, under and by military authority.⁶⁰ But the wrongful seizure of private property by an

55. Presumption as to legality of acts.

—*Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

56. Detention of marines after expiration of term of enlistment.—Under the act of congress, passed on the 2d of March, 1837 (5 Stat. at L., 153), the commander of a squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036; *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

At the time of enlistment, the marine corps being subject to such laws and regulations as might, at any time, be established for the better government of the navy, it was a part of the contract of enlistment that the party should obey them, whenever passed. It was, therefore, no objection to such laws, that they were passed after his entering the service. *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

The decision of the question whether the public interest requires detention of a marine after expiration of his enlistment by the commander, is final and conclusive; and if the marine does not conform to it, he is liable to punishment. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

Admissibility of evidence.—In a suit brought by a marine against the commanding officer of a squadron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evidence a letter which he had written to the secretary of the navy, relating to the circumstances of the enlistment. *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

Evidence that the commander refused to give to the marine, a certificate that he was detained under the act providing for detaining marines after expiration of their period of enlistment is not admissible where the commander claims to hold him by voluntary enlistment. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

57. Power to inflict corporal punishment on subordinates.—*Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

By the third article for the government of the navy, the commander is authorized to cause twelve lashes to be inflicted, for scandalous conduct, without a court martial. Every successive disobedience of

orders is a fresh offense, and subject to additional punishment. *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

58. Punishment must be necessary.—*Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

Evidence.—An acquittal of the commanding officer by a court martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual. *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

The proceedings of a court martial, for the trial of men for offenses committed long before, was not evidence, because it did not show the spirit existing at that time. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

Evidence of the flogging of two other persons merely by the authority of the commander without a court martial is not admissible. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

A letter from one of the officers of the squadron to the commander, upon the temper and disposition of the marines in one of the ships, was proper evidence for the jury. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

Province of jury.—The question being one of motives, the jury are to judge whether he was actuated alone by an upright intention to maintain the discipline of his command, or whether punishment was in any manner or degree increased or aggravated by malice or vindictive feeling. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

In deciding this question, the jury are to take into consideration all the circumstances of the case. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

59. Means which may be adopted to enforce authority.—*Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618.

In order to show the motive by which the commander was actuated in confining the marine in a fort, on shore, it was admissible for the commander to offer evidence that merchant seamen from American ships were confined there, and also for the marine to offer evidence to rebut it. *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036.

60. Civil liability for acts done under military authority.—*Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632; *Freeland v. Williams*, 131 U. S. 405, 416, 33 L. Ed. 193.

officer renders him liable to the owner,⁶¹ and orders from a superior are no justification for a trespass.⁶² The commander of a squadron,⁶³ or of a single ship,⁶⁴ is liable for the acts of his subordinates in case of positive or permissive orders, or of actual presence and co-operation.

c. *Liability of Superior on Contracts of Subordinate.*—The relation of a superior and inferior officer does not, of itself, bind the former to pay the contracts of the latter, whether in the staff or line. But if the inferior officer had an authority to

61. Seizure of private property.—*Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Maley v. Shattuck*, 3 Cranch 458, 2 L. Ed. 498.

During the war between the United States and Mexico, where a trader went into the adjoining Mexican provinces which were in possession of the military authorities of the United States, for the purpose of carrying on a trade with the inhabitants which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

An officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

Whether or not the owner of the goods resumed the possession of them at any time after their seizure, is a fact for the jury. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

When private property may be seized.—Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

Exemption from liability by statute.—The acts of congress, respectively approved March 3, 1863 (12 Stat. 756), and May 11, 1866 (14 Stat. 46), extend protection to all persons for acts they committed in subordination to the military authorities engaged in conducting the war, and confer upon them the same exemption from liability to suit which belonged to the president, the secretary of war, and the department commanders. *Beard v. Burts*, 95 U. S. 434, 24 L. Ed. 485.

Wrongful seizure of vessels.—The commander of a United States ship of war, if he seize a vessel on the high seas without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel be taken

out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon, and hold the original captor liable for the whole loss. *Maley v. Shattuck*, 3 Cranch 458, 2 L. Ed. 498.

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages. *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 2 L. Ed. 209.

Wrongful seizure as prize.—See, generally, the title PRIZE.

62. Act done under orders of superiors.—*Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *The Flying Fish*, 2 Cranch 170, 2 L. Ed. 243.

An officer making a seizure cannot justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was executed. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

Military officers can no more protect themselves than civilians for wrongs committed in time of peace under orders emanating from a source which is itself without authority in the premises. Hence a military officer, seizing liquors supposed to be in Indian country when they are not, is liable to an action as a trespasser. *Rates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

In obeying instructions from the president of the United States, the commander of a ship of war acts at his peril and if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. *The Flying Fish*, 2 Cranch 170, 2 L. Ed. 243.

The act of the 9th of February, 1799, did not authorize the seizure upon the high seas or any vessels sailing from a French port; and the orders of the president of the United States could not justify such a seizure. *The Flying Fish*, 2 Cranch 170, 2 L. Ed. 243.

63. Liability of commander of squadron for acts of subordinates.—*The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

64. Liability of commander of ship for acts of subordinates.—The owner of a privateer is responsible for acts of commander appointed by him. *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

contract, and having obtained money for the use of the army, applied it accordingly, in such case the superior would be liable for the debt, provided he had sufficient public funds to discharge it.⁶⁵

d. *Criminal Liability*.—As to liability of disbursing officers for embezzlement or misappropriation of funds, see post, "Criminal Liability—Embezzlement or Misappropriation of Funds," VIII, D, 2.

I. Resignation.—An officer voluntarily placing an undated resignation in the hands of his superior to be forwarded to the department upon a certain contingency, authorizes the superior officer to insert a proper date and forward it for acceptance, and when accepted his resignation is complete.⁶⁶ Where an officer receives notice of the acceptance by the president of his resignation, the office becomes vacant,⁶⁷ and the revocation of his acceptance by the president does not restore the officer to the service.⁶⁸

J. Retirement—1. **WHAT OFFICERS MAY BE RETIRED.**—Warrant officers as well as commissioned officers may be placed on the retired list of the navy.⁶⁹

2. **PROCEEDINGS BEFORE RETIRING BOARD.**—In proceedings before a retiring board, the burden of proof is on the officer to show that his incapacity resulted from some incident of service, and that he is thus entitled to be placed on the retired list rather than on the retired list on furlough pay.⁷⁰

3. **OBJECTIONS TO REPORT OF RETIRING BOARD.**—If there had been any irreg-

65. Liability of superior on contracts of subordinate.—*Morris v. DeMars*, 1 Dall. 140, 1 L. Ed. 72.

66. Undated contingent resignation placed in hands of third party.—*Mimmack v. United States*, 97 U. S. 426, 24 L. Ed. 1067.

Charges of drunkenness on duty having been preferred against A, a captain in the army, he proposed that if they should not be acted upon he would place his resignation in the hands of his commanding officer, to be held, and not forwarded to the war department, if he should entirely abstain from the use of intoxicating liquors. Accordingly, May 10, 1868, he enclosed in a letter to that officer his resignation, stating that it was without date, and authorizing him, subject to the condition above stated, to place it in the hands of the department commander, to be forwarded to the war department if he, A, should become intoxicated again. On A's again becoming intoxicated on duty prior to Oct. 3, 1868, the department commander, on being notified of the fact, inserted the date of the 5th of that month in the resignation, and duly forwarded it. On the 29th, it was accepted by the president, and the notification of his action thereon was received by A Nov. 11. The president revoked his acceptance, Dec. 11; but no order promulgating the revocation, or restoring A to duty, was issued by the war department. Dec. 22, 1869, the senate advised and consented to the appointment of B to be a captain, vice A resigned. Held, that A, by voluntarily placing his resignation, without date, in the hands of his commanding officer, authorized him, upon his (A) becoming again intoxicated, to insert a proper date in such resignation, and forward it for acceptance. That A's office became vacant

upon his receipt of the notification of the acceptance by the president of the resignation. That the action of the president, revoking such acceptance, did not restore A to the service. *Mimmack v. United States*, 97 U. S. 426, 24 L. Ed. 1067.

67. When the office becomes vacant.—*Mimmack v. United States*, 97 U. S. 426, 24 L. Ed. 1067.

Nothing short of a written resignation to the president, or the proper executive department, by a commissioned officer of the army, navy, or marine corps, and the acceptance of the same duly notified to the incumbent of the office, in the customary mode, will of itself create a vacancy in such an office, or prevent the incumbent, if the president consents, from withdrawing the proposed resignation; in which event the rights, privileges, duties, and obligations of the officer remain just as if the resignation had never been tendered. *Mimmack v. United States*, 97 U. S. 426, 432, 24 L. Ed. 1067.

68. Revocation of acceptance of resignation.—*Mimmack v. United States*, 97 U. S. 426, 24 L. Ed. 1067.

69. Warrant officers.—*Brown v. United States*, 113 U. S. 568, 570, 28 L. Ed. 1079 (construing act of Aug. 3, 1861, 12 Stat. 291).

70. Proceedings before retiring board—burden of proof.—*United States v. Burchard*, 125 U. S. 176, 179, 31 L. Ed. 662.

The report of the board that there was no evidence to support such a finding is to all intents and purposes a report that the incapacity was not the result of an incident of the service, and justifies and order retiring the officer on furlough pay. *Brown v. United States*, 113 U. S. 568, 573, 28 L. Ed. 1079.

ularity or defect in the report of the board, it is the duty of the officer to object to it without unreasonable delay.⁷¹

4. **APPROVAL OF REPORT OF BOARD BY PRESIDENT.**—A record of the proceedings and decision of the retiring board must be made and transmitted to the secretary of the navy, and by him laid before the president for his approval or disapproval, or orders in the case.⁷²

5. **CONCLUSIVENESS OF REPORT AFTER APPROVAL.**—Where a finding of the retiring board is to the effect that the officer's incapacity did not result from causes incident to the services is approved by the president, and orders made thereon, they are no longer open to review, and neither the department nor the president can change them.⁷³

K. Dismissal—1. **DISMISSAL OF OFFICERS**—a. *Power of Congress.*—An officer in the military or naval service has no vested interest or contract right in his office of which congress cannot deprive him.⁷⁴ When congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.⁷⁵

b. *Power of President*—(1) *In Absence of Statute.*—In the absence of any statute upon the subject, the president may dismiss an officer in the army or navy.⁷⁶

(2) *Under Statute*—(a) *In General.*—During the war of the rebellion, the president was authorized by statute to discharge any officer in the army, navy, marine corps or volunteer force, for any cause which in his judgment either rendered the officer unsuitable for, or whose dismissal would promote, the public service.⁷⁷ But by an act which went into effect at the close of the war, it is provided that the president alone shall not, in time of peace, dismiss an officer in the military or naval service, except upon and in pursuance of the sentence of a court martial

71. Objection to report for irregularity.—*Brown v. United States*, 113 U. S. 568, 573, 28 L. Ed. 1079.

After his acquiescence in the proceedings during the remainder of his life, it does not lie with his administratrix to object to them, even for a substantial defect, much less for such an irregularity. *Brown v. United States*, 113 U. S. 568, 573, 28 L. Ed. 1079.

72. Approval of report by president.—*United States v. Burchard*, 125 U. S. 176, 179, 31 L. Ed. 662.

73. Conclusiveness of findings of retiring board.—*United States v. Burchard*, 125 U. S. 176, 179, 31 L. Ed. 662.

74. No contract right in office.—*Crenshaw v. United States*, 134 U. S. 99, 104, 33 L. Ed. 825.

Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation. *Crenshaw v. United States*, 134 U. S. 99, 108, 33 L. Ed. 825; *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *United States v. McDonald*, 128 U. S. 471, 32 L. Ed. 506.

The act of Aug. 5, 1882, providing for the honorable discharge of surplus graduates of the naval academy with one

year's sea pay is not unconstitutional upon the ground that it impairs the obligation of contracts. *Crenshaw v. United States*, 134 U. S. 99, 33 L. Ed. 825.

75. Power of congress to limit, restrict and regulate power of removal.—*United States v. Perkins*, 116 U. S. 483, 485, 29 L. Ed. 700.

76. In absence of statute.—*Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *United States v. Corson*, 114 U. S. 619, 621, 29 L. Ed. 254.

"From the organization of the government, under the present constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the president, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy was not questioned in any adjudged case, or by any department of the government." *Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462; *United States v. Corson*, 114 U. S. 619, 621, 29 L. Ed. 254; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

77. During the war or the rebellion.—Act, July 27, 1862, ch. 200 (12 Stat. 596); *United States v. Corson*, 114 U. S. 619, 621, 29 L. Ed. 254.

to that effect, or in commutation thereof.⁷⁸ By a later act, the purpose of which was to reduce the military force, the president was authorized to muster out such officers as were reported, by a board of examination, to be unfit for duty for causes not originating in the line of their duty, or by placing unassigned officers on a supernumerary list, and selecting the best for assignment and mustering the residue.⁷⁹

(b) *Appointment of Successor with Advice and Consent of Senate.*—The statute providing that the president shall not alone in time of peace exercise the power of dismissal with respect to any officer in the military or naval service, except in pursuance of the sentence of a court martial or in commutation thereof, did not withdraw from the president the power, with the advice and consent of the senate, to supersede an officer in the military or naval service by the appointment of someone in his place.⁸⁰

78. Power to dismiss under act of July 13, 1866.—Act July 13, 1866 (14 Stat. 92); *Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462; *Crenshaw v. United States*, 134 U. S. 99, 108, 33 L. Ed. 825; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *United States v. Corson*, 114 U. S. 619, 621, 29 L. Ed. 254; *Quackenbush v. United States*, 177 U. S. 20, 25, 44 L. Ed. 654; *Mullan v. United States*, 140 U. S. 240, 35 L. Ed. 489; *Parsons v. United States*, 167 U. S. 324, 42 L. Ed. 185.

Time when act became operative.—The act of July 13, 1866, which provides that no officer in the military or naval service was in time of peace to be dismissed from service except upon and in pursuance of the sentence of the court martial to that effect, or in commutation thereof, was a measure intended to operate only in times of peace and was not in force until the close of the war which was on August 20, 1866. *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189; *United States v. Corson*, 114 U. S. 619, 621, 29 L. Ed. 254; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462.

79. Effect of act of July 15, 1870.—Act of July 15, 1870; *Street v. United States*, 133 U. S. 299, 301, 33 L. Ed. 631.

Time within which officer to be mustered out.—By § 12 of the act of July 15, 1870, the president was authorized to transfer officers to the list of supernumeraries and to fill such vacancies as might occur before the first day of January next from such list, and it was provided that if any officers remained on that list after that day they should be honorably mustered out of the service. The first day of January 1871 fell upon Sunday, and the plaintiff was transferred to the supernumerary list and mustered out on the second day of January 1871. Held, that plaintiff was properly mustered out of the service, and that even if he was not subsequent legislative recognition of the action as valid was a ratification thereof. *Street v. United States*, 133 U. S. 299, 301, 33 L. Ed. 631.

Right to abandon proceedings under one section and proceed under other.—

Under § 11 of the act of July 15, 1871, providing for the mustering out of officers unfit for the discharge of their duties and whose unfitness springs from no cause of meritorious claim upon the consideration of the government, and § 12, granting general power to the president to reduce the number of officers by selecting the best and mustering out the residue, the government could abandon the proceedings initiated under § 11 and proceed to muster out an officer under § 12. *Street v. United States*, 133 U. S. 299, 301, 33 L. Ed. 631.

80. Dismissal by appointment of successor.—*Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462; *Crenshaw v. United States*, 134 U. S. 99, 107, 33 L. Ed. 825; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189; *Quackenbush v. United States*, 177 U. S. 20, 25, 44 L. Ed. 654; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Mullan v. United States*, 140 U. S. 240, 35 L. Ed. 489; *Parsons v. United States*, 167 U. S. 324, 42 L. Ed. 185; *United States v. Corson*, 114 U. S. 619, 622, 29 L. Ed. 254.

The act of July 13, 1869 only operated to withdraw from the president the power previously existing in him of removing officers at will, and without the concurrence of the senate. It was not intended to place an officer where he never before had been—beyond the power of congress to make any provision for his removal even by the executive who appointed him. *Crenshaw v. United States*, 134 U. S. 99, 108, 33 L. Ed. 825; *Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Mullan v. United States*, 140 U. S. 240, 35 L. Ed. 489.

The president on June 27, 1866, nominated A to the senate for appointment as lieutenant of the marine corps. Vice B dismissed. The senate ratified the appointment and B was accordingly commissioned in July 13, 1866. It was held that by the appointment of B by and with the consent of the senate A was dismissed as effectively as if he had been directly dis-

c. *Relief of Officer Wrongfully Dismissed*.—When through mistake, or misapprehension, or for any other reason, injustice has been done by the dismissal of an officer in the military or naval service, congress has the power to accord relief, but the courts cannot of their own motion revise the grounds of action taken in the constitutional exercise of executive power.⁸¹

2. **DISMISSAL OF CADETS**.—While cadets at the military or naval academy may be dismissed by the president when found deficient at any examination or for misconduct,⁸² yet, except for these causes, it seems that they cannot be dismissed except in pursuance of a sentence of court martial or in commutation thereof.⁸³ A statute providing for the honorable discharge of surplus naval cadet graduates is prospective only,⁸⁴ but it applies to a cadet whose course at the academy was completed before the act went into effect, but whose two years course at sea was incomplete at that time.⁸⁵

L. Reinstatement.—Where a person has ceased to be an officer in the military or naval service, he cannot be reinstated except upon a new appointment by and with advice and consent of the senate.⁸⁶ He cannot be reinstated by order revoking his dismissal, after the order of dismissal has taken effect.⁸⁷

VII. Privates.

A. Enlistment—1. **DEFINITION AND NATURE**.—While enlistment is a contract, it also effects a change of status.⁸⁸

missed by order of the president. *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

81. Relief of officer wrongfully dismissed.—*Quackenbush v. United States*, 177 U. S. 20, 25, 44 L. Ed. 654.

82. Dismissal for deficiency or misconduct.—*United States v. Perkins*, 116 U. S. 483, 29 L. Ed. 700; *Hartigan v. United States*, 196 U. S. 169, 49 L. Ed. 434.

A cadet at the military academy, not being an officer of the army within the meaning of the statute prohibiting dismissal by the president alone, may be dismissed by the president, upon charges of maltreating a new cadet and other misconduct, without trial and conviction by a court martial. *Hartigan v. United States*, 196 U. S. 169, 49 L. Ed. 434.

83. Dismissal for causes other than deficiency or misconduct.—*United States v. Perkins*, 116 U. S. 483, 29 L. Ed. 700.

A naval cadet engineer not found deficient at any examination, and not dismissed for misconduct under the provision of § 1555 of the Revised Statutes, nor upon and in pursuance of the sentence of a court martial to that effect or in commutation thereof, according to § 1229 of the Revised Statutes is still in office and is entitled to pay attached to the same although honorably discharged from the service by the secretary of the navy against his will. *United States v. Perkins*, 116 U. S. 483, 29 L. Ed. 700.

84. Act providing for discharge of surplus cadets prospective in operation.—*United States v. Redgrave*, 116 U. S. 474, 29 L. Ed. 697 (holding the act of Aug. 13, 1882 not to be applicable to classes of 1881 and 1882).

Cadet engineers who finished their four years' course in the naval academy passed their final academic examinations, and re-

ceived their diplomas before the passage of the act of Aug. 5, 1882, 22 Stat. 284, became graduates, and are not made naval cadets by that act, and they are therefore entitled to the pay provided by § 1556 of the Revised Statutes. *United States v. Redgrave*, 116 U. S. 474, 29 L. Ed. 697.

85. Application of act to cadet whose course at academy is completed but whose course at sea is incomplete.—*Crenshaw v. United States*, 134 U. S. 99, 109, 33 L. Ed. 825.

"The cadet afloat was a member of the academy. He still was subject to a final examination at that institution, and without such examination successfully sustained never became a graduate. He was not so denominated until then, either in the naval register or elsewhere; and it was not until that final test had been sustained that, either by the practice of the academy, or by the provision of the statute he did or could receive his certificate of graduation." *Crenshaw v. United States*, 134 U. S. 99, 109, 33 L. Ed. 825.

86. Reappointment necessary to reinstatement.—*Blake v. United States*, 103 U. S. 227, 26 L. Ed. 162; *Minnick v. United States*, 97 U. S. 426, 24 L. Ed. 1067; *United States v. Corson*, 114 U. S. 619, 29 L. Ed. 254; *Quackenbush v. United States*, 177 U. S. 20, 25, 44 L. Ed. 654; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Mullan v. United States*, 140 U. S. 240, 35 L. Ed. 489; *Parsons v. United States*, 167 U. S. 324, 42 L. Ed. 185; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

87. Revocation of order of dismissal.—*United States v. Corson*, 114 U. S. 619, 29 L. Ed. 254.

88. Definition and nature.—In re *Grimley*, 137 U. S. 147, 152, 34 L. Ed. 626.

Enlistment is a contract; but it is one

2. **WHO MAY ENLIST.**—An infant over sixteen years of age may enlist in the army or navy with the consent of his parent or guardian.⁸⁹ The want of the consent of a parent or guardian of an infant to his enlistment can be taken advantage of only by the parent or guardian or the government, and not by the infant himself.⁹⁰ A person over the prescribed age enlisting in the army cannot set up that fact as a defense to desertion.⁹¹

3. **FORMALITIES REQUIRED.**—A person who undergoes a physical examination, takes the oath of allegiance, signs the clothing rolls, and is placed in the charge of a sergeant, is duly enlisted in the army, although the articles of war are not read to him.⁹²

B. Enrollment and Draft.—Enrollment is the act of inserting in a list or roll, and, with reference to the purpose of calling able-bodied men of the country into its service, means placing their names on a roll or register.⁹³ Enrollment and draft are not synonymous terms,⁹⁴ and a statute providing for punishment of

of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. In *re Grimley*, 137 U. S. 147, 151, 34 L. Ed. 636.

By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated. In *re Grimley*, 137 U. S. 147, 152, 34 L. Ed. 636.

89. **Infants.**—In *re Morrissey*, 137 U. S. 157, 158, 34 L. Ed. 644. See the title **INFANTS**.

An enlistment is not a contract only, but effects a change of statute. In *re Grimley*, 137 U. S. 147, 34 L. Ed. 636. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. In *re Morrissey*, 137 U. S. 157, 159, 34 L. Ed. 644.

90. **Infant cannot take advantage of want of consent of parent or guardian.**—In *re Morrissey*, 137 U. S. 157, 159, 34 L. Ed. 644. See, also, *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597.

The provision requiring the written consent of parent or guardian is for the benefit of the parent or guardian. It means simply that the government will

not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control, but it gives no privilege to the minor. In *re Morrissey*, 137 U. S. 157, 159, 34 L. Ed. 644.

Habeas corpus to secure release of infant.—See the title **HABEAS CORPUS**.

91. **Right of person over prescribed age at time of enlistment to take advantage of fact.**—In *re Grimley*, 137 U. S. 147, 34 L. Ed. 636.

"The age of thirty-five, as prescribed in the statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter which in any given case it may waive; and it does not lie in the mouth of any one above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge." In *re Grimley*, 137 U. S. 147, 154, 34 L. Ed. 636.

92. **Formalities required.**—In *re Grimley*, 137 U. S. 147, 155, 34 L. Ed. 636 (holding such person to be liable to punishment for desertion).

Under the statute the articles may be read to him within six days from his enlistment. In *re Grimley*, 137 U. S. 147, 155, 34 L. Ed. 636.

93. **Enrollment defined.**—*United States v. Scott*, 3 Wall. 642, 18 L. Ed. 218; *United States v. Murphy*, 3 Wall. 649, 18 L. Ed. 217.

94. **Enrollment and draft distinguished.**—There is a distinction between enrollment and draft, and the word enrollment does not include draft. The boards of

any person resisting or opposing enrollment does not apply to a person resisting or opposing a draft,⁹⁵ and vice versa.⁹⁶ The draft of a person for military service is not an interference with the liberty secured by the constitution.⁹⁷

C. Pay and Allowances—1. **PAY**—a. *Pay of Musicians*.—The marines who compose the corps of musicians known as the marine band are entitled to increased pay while serving upon the capitol grounds or president's grounds.⁹⁸ A private in the marine corps so serving is entitled to increased pay while so serving although not rated as a musician.⁹⁹

b. *Retained Pay*.—It was formerly provided that a certain part of the salary of enlisted men should be retained by the government and paid to them upon their discharge from the service.¹ To entitle a soldier to retained pay it is necessary to show his discharge from service,² and an honest and faithful service to the date of the discharge.³ The fact that he has not rendered such service may be shown

enrollment ascertain the persons liable to military duty, determine their exemptions, classify them and make proper lists. They have no authority to make a draft or call-out forces, this being dependent on the proclamation of the president. The enrollment may be completed and all the duties of the board performed and ended, without a draft taking place. Enrollment is a matter which is under the joint control and supervision of all the officers constituting the board of enrollment, but by § 3 of the act of 1861 the provost marshal alone is charged with the duty of making and supervising the draft. *United States v. Scott*, 3 Wall. 642, 649, 18 L. Ed. 218; *United States v. Murphy*, 3 Wall. 649, 650, 18 L. Ed. 217.

95. Statute punishing resistance of enrollment not applicable to resistance of draft.—*United States v. Scott*, 3 Wall. 642, 18 L. Ed. 218; *United States v. Murphy*, 3 Wall. 649, 650, 18 L. Ed. 217.

Upon a comparison of the 25th section of the act of March 3d, 1863, passed during the rebellion, "for enrolling and calling out the national forces, and for other purposes," with the 12th section of the act of February 24th, 1864, enacting that any person who shall forcibly resist or oppose any enrollment of persons for military service, etc., shall be punished, etc.; held, that the former act is limited to the prevention of resistance to the draft, and the latter to preventing resistance to the enrollment. Comparing the two acts together, the latter one is to be regarded as a legislative construction of the first, by which a service in relation to the draft, is not a service in relation to the enrollment. *United States v. Scott*, 3 Wall. 642, 18 L. Ed. 218.

96. Statute punishing resistance of draft not applicable to resistance of enrollment.—*United States v. Murphy*, 3 Wall. 649, 650, 18 L. Ed. 217; *United States v. Scott*, 3 Wall. 642, 18 L. Ed. 218.

The twenty-fifth section of the act of March 3d, 1863, "for enrolling and calling out the national forces and for other purposes," must be construed by the twelfth section of the amendatory act of

February 24th, 1864; and so construed it does not embrace services in relation to an enrollment. *United States v. Murphy*, 3 Wall. 649, 650, 18 L. Ed. 217.

97. Draft not interference with liberty.—*Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643.

98. Members of marine band, serving on capitol grounds or president's grounds.—*United States v. Bond*, 124 U. S. 301, 31 L. Ed. 473.

It is provided by § 1613 of the Revised Statutes that the marines who compose the corps of musicians known as the marine band shall be entitled to receive at the rate of \$4.00 a month each in addition to their pay as noncommissioned officers, musicians, or privates of the marine corps, so long as they shall perform, by order of the secretary of the navy or other superior officer on the capitol grounds or president's grounds. *United States v. Bond*, 124 U. S. 301, 31 L. Ed. 473.

99. Private in marine corps serving in marine band on capitol or president's grounds.—*United States v. Bond*, 124 U. S. 301, 31 L. Ed. 473.

It is not necessary for a person serving in the marine band on the capitol grounds or president's grounds to be rated as a musician in order to be entitled to the benefits of § 1613 of the Revised Statutes, but a private of the marine corps playing in the band, although not rated as a musician is within the terms of the statute and entitled to the additional pay therein provided for. *United States v. Bond*, 124 U. S. 301, 31 L. Ed. 473.

1. Retained pay.—Rev. Stat., § 1281; *United States v. Kingsley*, 138 U. S. 87, 90, 34 L. Ed. 896.

The statute providing for retained pay (Rev. Stat., § 1281), was repealed by the army appropriation act of March 16, 1896 (29 Stat. 60).

2. Necessity of showing discharge from service.—*United States v. Kingsley*, 138 U. S. 87, 90, 34 L. Ed. 896.

3. Necessity of showing honest and faithful service.—Rev. Stat., § 1281; *United States v. Kingsley*, 138 U. S. 87, 90, 34 L. Ed. 896.

as well by his military record as by the judgment of a court martial.⁴

c. *Increased Pay upon Re-Enlistment.*—Private soldiers, who, after five years' service, re-enlist within three months after having been honorably discharged, are entitled to increased pay.⁵

2. **ALLOWANCES**—a. *Definition.*—Under the term "allowances," every thing is embraced which can be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay.⁶

b. *Allowance, upon Discharge, of Travel Pay and Subsistence to Place of Enlistment.*—A soldier discharged from service, except by way of punishment for an offense,⁷ or at his own request or for his own convenience,⁸ is entitled to transportation and subsistence from the place of his discharge to the place of his enlistment or original muster into the service.⁹ The allowance is for expenses

4. **Mode of showing forfeiture of retained pay by unfaithful service.**—United States *v.* Kingsley, 138 U. S. 87, 90, 34 L. Ed. 896.

"It is true the word 'forfeited' is used in the statute, but we think it is not used in the technical sense of a punishment after judgment, but rather in the sense of a disability incurred by the nonperformance of a contract. A similar meaning is attached to the word when used in connection with the claim of a mariner for his wages. By his contract of shipment the seamen also bargains for honest and faithful service, and obedience to the lawful commands of the master and other officers of his vessel, and in case of desertion or gross misconduct, it is the constant practice of courts of admiralty to forfeit the whole or a part of his wages, irrespective of the actual damage suffered by the owner or master of the vessel." United States *v.* Kingsley, 138 U. S. 87, 90, 34 L. Ed. 896.

5. **Increased pay upon re-enlistment.**—United States *v.* Thornton, 160 U. S. 654, 658, 40 L. Ed. 570.

Formerly (Rev. Stat., §§ 1282 and 1284) the re-enlistment must have been within one month after having been honorably discharged, but this was changed by act of Aug. 1, 1894. United States *v.* Thornton, 160 U. S. 654, 658, 40 L. Ed. 570.

6. **What term "allowances" includes.**—United States *v.* Landers, 92 U. S. 77, 80, 23 L. Ed. 603.

Under the term "allowances," bounty is included. United States *v.* Landers, 92 U. S. 77, 23 L. Ed. 603. Generally, as to bounty, see the title BOUNTIES.

7. **Discharge by way of punishment for offense.**—Rev. Stat., § 1290; United States *v.* Thornton, 160 U. S. 654, 40 L. Ed. 570; United States *v.* Kingsley, 138 U. S. 87, 92, 34 L. Ed. 896; United States *v.* Sweet, 189 U. S. 471, 473, 47 L. Ed. 907.

Discharge must be inflicted by judgment of court martial or other military authority.—The statute contemplates a discharge as a punishment inflicted by the judgment of a court martial or other military authority, for a specific offense. United States *v.* Kingsley, 138 U. S. 87, 92, 34 L. Ed. 896.

"In the military services the word 'discharge' is the word applied to an order ending the service of an officer at his own request. But in other connections it conveys the notion of a movement beginning with the superior and more or less adverse to the object, as, for instance, when we speak of discharging a servant. Usually it is a slightly discrediting verb. If it is taken in its ordinary meaning here, the exception in case of a discharge by way of punishment raises no difficulty, because a discharge on resignation is not within the meaning of the principal clause. The course of the departments has amounted to no more than interpreting the word in this exact sense." United States *v.* Sweet, 189 U. S. 471, 473, 47 L. Ed. 907.

Discharge for unfitness or bad character.—The statute does not embrace a discharge for unfitness for service and general bad character. While this may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, it is not a discharge as "punishment for an offense" within the meaning of the statute. United States *v.* Kingsley, 138 U. S. 87, 92, 34 L. Ed. 896.

8. **Discharge of soldier at his own request.**—United States *v.* Barnette, 189 U. S. 474, 47 L. Ed. 908; United States *v.* Sweet, 189 U. S. 471, 47 L. Ed. 907.

9. **Right to transportation and subsistence.**—Rev. Stat., § 1290; United States *v.* Barnette, 189 U. S. 474, 47 L. Ed. 908; United States *v.* Sweet, 189 U. S. 471, 47 L. Ed. 907; United States *v.* Thornton, 160 U. S. 654, 656, 40 L. Ed. 570; United States *v.* Kingsley, 138 U. S. 87, 92, 34 L. Ed. 896.

The government may furnish the same in kind, but in case it does not do so, the soldier is to be allowed travel pay and commutation of subsistence, for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, enrollment, or original muster into the service, computed at the rate of one day for every twenty miles. Rev. Stat., § 1290; United States *v.* Thornton, 160 U. S. 654, 656, 40 L. Ed. 570; United States *v.* Kingsley, 138 U. S. 87, 92, 34 L. Ed. 896.

actually incurred in returning to the place of enlistment, which is treated as presumptively the home of the soldier, and if it be shown that he cannot possibly intend to incur the expense or for any other reason that he has not within the spirit of the statute, he is not entitled to the allowance.¹⁰

3. **FORFEITURE OF PAY AND ALLOWANCES.**—The pay and allowances of a soldier for past services are forfeited by desertion,¹¹ and once forfeited are not restored by an honorable discharge subsequently granted.¹² The fact of desertion need not be established by the findings of a court martial, it being sufficient for it to appear on the muster rolls of the company.¹³ But forfeiture of pay and allowances for future services, as a condition of restoration to duty, can only be imposed by a court martial.¹⁴

D. **Discharge.**—The honorable discharge is a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in the status of honor, amounting of itself to the removal of any charge against him;¹⁵ but it does not restore to a soldier the right to recover pay and allowances forfeited by desertion.¹⁶

VIII. Disbursing Agents.

A. **Appointment.**—The chief signal officer of the army has the right to designate one of the officers detailed for service under him as a property and disbursing officer, to whom shall belong the custody of all government property and funds pertaining to the office of the chief signal officer, and to provide that he shall be responsible for the due execution of his duties.¹⁷

10. **Right to allowance where no expense incurred by soldier.**—United States *v. Thornton*, 160 U. S. 654, 40 L. Ed. 570.

A soldier originally enlisted at Washington in August, 1878, and was discharged at Mare Island, California, November 6, 1886, receiving travel pay and commutation of subsistence from there to Washington. He did not return, however, but four days later re-enlisted at Mare Island as a private, and in the course of his service was returned to Washington where he was subsequently discharged and claimed transportation and commutation of subsistence from Washington to Mare Island as the place of his enlistment. It was held that his service was practically a continuous one and as a second discharge occurred at the place of the original enlistment he was not entitled to commutation for travel and subsistence to the place of his second enlistment. United States *v. Thornton*, 160 U. S. 654, 40 L. Ed. 570.

11. **Pay and allowances already earned forfeited by desertion.**—United States *v. Kingsley*, 138 U. S. 87, 91, 34 L. Ed. 896; United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

Forfeiture of pay and allowances up to the time of desertion follows from the conditions of the contract of enlistment, which is for faithful service. The contract is an entirety; and, if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603; United States *v. Kingsley*, 138 U. S. 87, 91, 34 L. Ed. 896.

12. **Forfeited pay not restored by honorable discharge.**—United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

13. **How desertion may be shown.**—United States *v. Kingsley*, 138 U. S. 87, 91, 34 L. Ed. 896; United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

If the entry of desertion has been improperly made, its cancellation can be obtained by application to the war department. United States *v. Landers*, 92 U. S. 77, 80, 23 L. Ed. 603; United States *v. Kingsley*, 138 U. S. 87, 91, 34 L. Ed. 896.

14. **Forfeiture of pay for future services.**—United States *v. Kingsley*, 138 U. S. 87, 91, 34 L. Ed. 896; United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

15. **Effect of honorable discharge.**—United States *v. Kelly*, 15 Wall. 34, 36, 21 L. Ed. 106.

A soldier, who had deserted, but was restored to duty by order of his department commander, without trial, on condition that he make good the time lost (about two months), and who complied with the condition, and was honorably discharged at the expiration of his term of service, held entitled to bounty money, notwithstanding his desertion. United States *v. Kelly*, 15 Wall. 34, 21 L. Ed. 106. See, generally, the title BOUNTIES.

16. **As restoring pay and allowances forfeited by desertion.**—United States *v. Landers*, 92 U. S. 77, 23 L. Ed. 603.

17. **Appointment of disbursing officers of signal service of army.**—Moses *v. United States*, 166 U. S. 571, 588, 41 L. Ed. 1119.

B. Pay and Allowances—1. **IN GENERAL**.—The pay of disbursing agents and paymasters is regulated by statute,¹⁸ and while sometimes fixed on the basis of a per diem allowance,¹⁹ it is usually fixed by commissions on disbursements.²⁰

2. **RIGHT TO COMMISSIONS**—a. *Salaried Officer Making Disbursements*.—An officer liable to perform the duties of disbursing agent, at a fixed compensation, is not entitled to commissions while so acting,²¹ but the mere fact that one making disbursements is receiving a salary from the government for services in another capacity, does not debar him from commissions on disbursements.²² But such al-

18. Pay regulated by statute.—Wetmore v. United States, 10 Pet. 647, 9 L. Ed. 567.

A paymaster in the army of the United States, appointed under the act of congress, passed the 24th of April, 1816, is entitled to the pay and emoluments of a major of infantry, and not those of a major of cavalry. Wetmore v. United States, 10 Pet. 647, 9 L. Ed. 567.

19. Per diem allowance.—Gratiot v. United States, 15 Pet. 336, 337, 10 L. Ed. 759.

Officer performing double service entitled to double per diem allowance.—The regulations of the army of the United States, which were sanctioned by the president in 1821, art. 67, and in 1823, art. 67, which allow two dollars per diem, not to exceed two and a half per cent. on the sum disbursed, to the agents for disbursing money at fortifications, do not limit this allowance to the engineer superintending the construction and disbursing the money, as agent for fortifications, to a single per diem allowance of two dollars for all the fortifications for which a distinct appropriation has been made; when he is employed at the same time upon several fortifications, each requiring separate accounts of the disbursements to be kept, on account of there being distinct and independent appropriations therefor. It would be unreasonable to suppose that these regulations intended to give the same amount of compensation to a person disbursing money upon two or more distinct fortifications that he would be entitled to if he were disbursing agent for one only; although his duties might be thus doubled, and even trebled. Gratiot v. United States, 15 Pet. 336, 337, 10 L. Ed. 759.

20. Commissions on disbursements.—Gratiot v. United States, 4 How. 80, 11 L. Ed. 884.

21. Officer liable to perform duty of disbursing agent at fixed pay not entitled to disbursements.—Gratiot v. United States, 4 How. 80, 11 L. Ed. 884; Gratiot v. United States, 15 Pet. 336, 337, 10 L. Ed. 759.

Pursers making disbursements.—The duty of paying mechanics and laborers at the navy yard was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed

to a purser for performing this service. United States v. Buchanan, 8 How. 83, 12 L. Ed. 997.

Superintending engineer making disbursements.—A superintending engineer may be required to act as agent of fortifications, his compensation being fixed by the army regulations where there is no such agent, and is not entitled to commissions on disbursements while so acting. Gratiot v. United States, 4 How. 80, 11 L. Ed. 884.

The 67th article of the general regulations of the army, published in 1821, recognized two disbursing officers upon fortifications; namely, the agent of fortifications and the superintending engineer. Where there was no agent, the superintending engineer could be required to perform his duty for a compensation which was fixed by the army regulations. The receipt of a sum of money by the superintending engineer, and custody of it until it could be turned over to the agent, did not justify a charge of two and one half per cent. commission. And in case of such a charge, there was no foundation for a question of usage to be left to the jury. Gratiot v. United States, 4 How. 80, 11 L. Ed. 884.

Whether services in disbursing money within duty of officer a question of law.—It is the province of the court to decide, as matter of law, what were the duties of an officer, and to judge whether any evidence has been introduced tending to show that the plaintiff has performed any services not appertaining to his station. Gratiot v. United States, 4 How. 80, 11 L. Ed. 884; United States v. Buchanan, 8 How. 83, 12 L. Ed. 997.

22. Officer receiving salary may also be entitled to commissions.—United States v. Fillebrown, 7 Pet. 28, 8 L. Ed. 596; United States v. McDaniel, 7 Pet. 1, 2, 8 L. Ed. 587.

By an act passed July 10th, 1832, congress authorized the appointment of a separate and permanent navy agent at Washington, and directed the performance of the duties "not only for the navy yard in the city of Washington, but for the navy department, under the direction of the secretary of the navy, in the payment of such accounts and claims as the secretary may direct." These duties would not have been so specially stated in this act, if they had been considered by congress as coming within the ordinary du-

lowances are sometimes prohibited by statute.²³

ties of an agent for the navy yard at Washington, under the act of 1804, and he was held entitled to commissions on disbursements especially as duties in question were discharged by the defendant, under the construction given to the law by the secretary of the navy. *United States v. MacDaniel*, 7 Pet. 1, 2, 8 L. Ed. 587.

The act of the 27th of March, 1804, by which the president of the United States was authorized to attach to the navy yard at Washington a captain of the navy, for the performance of certain duties, was correctly construed by the head of the navy department until 1829, allowing to the defendant commissions on the sums paid by him, as the special agent of the navy department in making the disbursements. *United States v. MacDaniel*, 7 Pet. 1, 2, 8 L. Ed. 587.

Right of secretary of naval board to commissions on disbursements.—The United States instituted an action to recover a balance, certified at the treasury, against the defendant, on the settlement of his accounts as secretary to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what is considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board; these claims were rejected by the accounting officers of the treasury, and were, on the trial, set up by a way of set-off against the demand on the part of the United States. Held, that the allowance of compensation by a fixed salary to the defendant, as the secretary of the board of the navy hospital commissioners, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund. *United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596.

Where the secretary of the navy considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation, and it was fairly deducible from his deposition, that all this received the direct sanction of all the commissioners, and at any rate were approved by the secretary of the navy who was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law, it was held that this was an express contract entered into between the board or its agent, and the defendant; and that it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind

the contract, and withhold from the defendant the stipulated compensation. *United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596.

It is not necessary to entitle the claimant to such compensation, that the board of commissioners should have passed a resolution for the payment of such commissions, and that the claim of commissions should have been sanctioned and settled by the board, in order to enable the defendant to set up a claim against the United States. *United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596.

Right of clerk of navy department to commission on disbursements.—A clerk in the navy department disbursing public money is entitled to commissions on disbursements. *United States v. MacDaniel*, 7 Pet. 1, 2, 8 L. Ed. 587.

That the duties in question were discharged by the defendant, during office hours, can form no objection to the compensation claimed; they were required of him by the head of the department; and being a subordinate, he had no discretion to decline the labor and responsibility thus imposed; but seeing that his responsibility would be greatly increased, and perhaps his labor, the secretary of the navy increases his compensation, as in justice he was bound to do. *United States v. MacDaniel*, 7 Pet. 1, 2, 8 L. Ed. 587.

Parol evidence of usage as to allowance of commissions.—Parol testimony of a general usage of the different departments of the government to allow commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties is admissible. *United States v. Fillebrown*, 7 Pet. 28, 29, 8 L. Ed. 596.

23. Statute prohibiting commissions on disbursements made by officers.—*Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791; *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.

In the act of congress of March 3d, 1835, ch. 303, entitled an act making certain additional appropriations for the Delaware Breakwater, etc., a proviso is introduced: "Provided, that no officer of the army shall receive any per cent, or additional pay, extra allowance or compensation, in any form whatsoever, on account of the disbursing any public money appropriated by law, during the present session, for fortifications, etc., or for any other service or duty whatsoever, on account of disbursing any public money appropriated by law, during the present session, for fortifications, etc., or for any other service or duty whatsoever, unless authorized by law." Held, that this proviso applied only to the appropriations made for military purposes by that act, and to any which might be made during

b. *For What Services Commissions Allowed.*—Disbursing agents are not entitled to commissions for drawing bills of exchange.²⁴

3. *PRESENTATION OF CLAIM AS PREREQUISITE TO RECOVERY.*—A disbursing agent sued by the government for funds in his hands may set off a claim for commissions on disbursements, although such claim has not been previously presented or passed upon by the accounting officers of the government.²⁵

that session of congress; and was not a general permanent regulation, applicable to all cases of expenditures for the military purposes of the United States, under the provisions of acts of congress. It would be somewhat novel to find engrafted upon an act making special and temporary appropriations, any proviso which was to have a general and permanent application to all future appropriations; nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791.

A surgeon in the service of the army of the United States, was appointed a military disbursing agent for removing and subsisting the Cherokee Indians; he charged two and a half per cent. on the sum of \$514,237 actually disbursed by him in the course of his agency, in 1836-37; the charge was rejected at the treasury, on the authority of a clause in the act of congress of March 3d, ch. 303. It was contended by the plaintiff in error: 1. That this act of congress did not apply to the case; 2. That from the long established practice of the government, as well as from the established law of the land, he was entitled to commissions, there being no law, prior to 1839, disallowing commissions on moneys disbursed for the government; 3. That the charge of commissions should be allowed because the charge was made on disbursements of moneys appropriated during the session of congress of 1836-37, and therefore, neither the act of 1835, nor of 1839, were applicable to the claim. Held, that the claim was not supported by the laws of the United States; and that no commissions were chargeable to the United States on the moneys disbursed by the agent of the United States for removing and subsisting the Cherokee Indians. The case falls directly within the act of 30th June 1834, ch. 162, for organizing the Indian department; that act authorizes the president of the United States to require any military officer of the United States to execute the duties of Indian agent; and prohibits any other compensation for their services, than an allowance for actual travelling expenses. *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791.

Per diem allowances for disbursements prohibited by act of 1835.—By a regulation of the war department, of March

14th, 1835, adopted in consequence of the provisions of an act of congress of 3d March 1835, all extra compensation of every kind, for which provision had not been made by law, was disallowed. The defendant's intestate claimed that the provisions of the act of March 3d, 1835, were applicable only to the disbursing of public money appropriated by law during the session of congress in which that act was passed and claimed a per diem compensation of two dollars a day while engaged in making disbursements under army regulations of 1821. Held, that the order of the war department of March 14th, 1835, took away all right to the extra allowances claimed under the prior army regulations. *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.

24. *Drawing bills of exchange.*—*United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997.

Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished. *United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997.

25. *Necessity for claim to be presented and passed on by government.*—*United States v. MacDaniel*, 7 Pet. 1, 8 L. Ed. 587; *United States v. Hawkins*, 10 Pet. 125, 9 L. Ed. 369.

The United States instituted a suit to recover a balance charged on the books of the treasury department against the defendant, who was a clerk in the navy department, at a fixed annual salary, and acted as agent for the payment of moneys due to the navy pensioners, the privateer pensioners, and for navy disbursements; for the payment of which, funds were placed in his hands by the government; he had received an annual compensation for his services in the payment of the navy pensioners; and for fifteen years, he had received, in preceding accounts, commissions of one per cent., on the moneys paid by him for navy disbursements; he claimed these commissions at the treasury, and the claim was there rejected by the accounting officers; if allowed the same, he was not indebted to the government. The United States, on the trial of the case in the circuit court, denied the right of the defendant to these commissions, as they had not been allowed to him by any department of the government, and asserted, that the jury had not power to

4. ARMY REGISTERS AS EVIDENCE WITH RESPECT TO PAY AND EMOLUMENTS.—

The army registers, published by the adjutant and inspector general of the army, containing the general regulations of the army, which are delivered by the department to the officers of the army, are not evidence to establish the pay and emoluments of disbursing agents or paymasters.²⁶

C. Bond—1. **POWER TO REQUIRE BOND IN ABSENCE OF STATUTE.**—Although there is no statute specially providing for the execution of a bond by a person acting as disbursing officer, the secretary of war has power to order the giving of such a bond, and, when given, it is not void upon the ground that it was extorted from him.²⁷

2. **FORM.**—A bond not in the form prescribed by statute is not void for that reason,²⁸ and a bond regular in form is presumed to have been duly executed and to have been consented to by the sureties.²⁹

allow them on the trial. The rejection of the claim, to commissioners by the treasury department, formed no objection to the admission of it as evidence of set-off before the jury; had the claim never been presented to the department, it could not have been admitted as evidence by the court; but, as it had been made in form, and presented to the proper accounting officers, and had been rejected, the circuit court did right in submitting it to the jury, if the claim was considered equitable. *United States v. MacDaniel*, 7 Pet. 1, 8 L. Ed. 587.

26. Army registers as evidence of amount of pay to which officer entitled.

—*Wetmore v. United States*, 10 Pet. 647, 9 L. Ed. 567.

The registers are compilations issued and published to the army by the direction of the secretary at war, in the exercise of his official authority; and when authenticated by him, would be evidence of the facts, strictly so, they may contain; such as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong; but from none of these can an inference be drawn by a jury, to establish the pay and emoluments of officers; as they are provided for by law, and must be determined by the court, when they are doubtful, and the subject of dispute in a suit between an officer and the United States. *Wetmore v. United States*, 10 Pet. 647, 9 L. Ed. 567.

What officers are of the staff, or general staff, depends upon acts of congress, which are to be expounded by the courts, when an officer claims a judicial determination of his rights as to pay and emoluments, from his having been arranged as belonging to the staff. *Wetmore v. United States*, 10 Pet. 647, 9 L. Ed. 567.

27. Power of secretary to require bond in absence of statute to that effect.—*Moses v. United States*, 166 U. S. 571, 585, 41 L. Ed. 1119 (disbursing officer of signal service).

28. Bond not in statutory form.—*United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

"The act of congress of 1816 nowhere declared that all other bonds, not taken in the prescribed form, shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act; it would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intendment of the act, that the bond should be utterly void; nothing but very strong and express language should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void as to any conditions which are imposed upon a party, beyond what the law requires; this is not only the dictate of the common law, but of common sense." *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

The misdescription of the corporate or politic name of the government in the bond, by calling them "The United States of North America," instead of America, may be cured by the averment of identity in the declaration. *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

29. Presumption of regularity in execution and consent of sureties.—*Moses v. United States*, 166 U. S. 571, 580, 41 L. Ed. 1119.

Where the proof is full as to the original signing of the bond by the sureties, and no pretense of any forgery or any irregularity in that respect, the only defect being the lack of seals, and it appears that this defect was pointed out by the government, and the officer took back the bond to have the seals put on, and in due time returned it with the seals upon it, and there is no direct evidence as to when or where the seals were put on or as to the actual consent of the sureties, the presumption is with the government, that the seals were placed upon the instrument with the consent of the parties, and if there was no such consent, it

3. **VALIDITY**—a. *Bond Voluntarily Executed by Officer*.—A bond voluntarily executed, though not required, is binding upon the parties.³⁰

b. *Bond Illegally Extorted from Officer*.—A bond improperly extorted from an officer is invalid.³¹

4. **WHEN BOND TAKES EFFECT**.—The bond takes effect on the date of acceptance.³²

5. **LIABILITY OF SURETIES**.—The sureties on the bond of a disbursing agent or paymaster are liable for his failure to account for government funds upon leaving the service.³³

is matter of defense to be affirmatively established. *Moses v. United States*, 166 U. S. 571, 580, 41 L. Ed. 1119.

30. **Validity of bond voluntarily given when not required**.—*United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66; *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

A voluntary bond, taken by authority of the proper officers of the treasury department to whom the disbursement of public money is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department, and the United States being authorized, in a political capacity, to take it, there is no objection to its validity in a moral or a legal sense. *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66.

A bond, voluntarily given to the United States, and not prescribed by law, is a valid instrument upon the parties to it, in point of law; the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided by law; it is an incident to the general right of sovereignty; and the United States being a body politic may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation; a doctrine, to such an extent, is not known to this court, as ever having been sanctioned by any judicial tribunal. *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66.

31. **Validity of bond extorted from officer**.—*United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66.

Where the United States instituted an action for the recovery of a sum of money on a bond given, with sureties, by a purser in the navy, and the defendants, in sub-

stance, pleaded that the bond, with the condition thereto, was variant from that prescribed by law, and was, under color of office, extorted from the obligor and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of the purser's remaining in office and receiving its emoluments; and the United States demurred to this plea; it was held, that the plea constituted a good bar to the action. *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66.

32. **Bond takes effect from date of acceptance**.—*Moses v. United States*, 166 U. S. 571, 578, 41 L. Ed. 1119; *United States v. Le Baron*, 19 How. 73, 15 L. Ed. 525; *United States v. Le Baron*, 4 Wall. 642, 647, 18 L. Ed. 309.

33. **Liability of sureties**.—*United States v. Curtis*, 100 U. S. 119, 25 L. Ed. 571.

The United States, in an action against the sureties of a paymaster in the army, assigned as the breach of the conditions of his official bond that he did not, when thereunto required, refund \$3,320.02, with interest. He rendered his account Nov. 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account at the treasury department, that sum was found to be due at said date. No demand therefor was made of his personal representatives, and the sureties had no notice of the claim before the service of the writ in the action. The adjustment was the only evidence of the sum due. Held, that the United States is entitled to recover that sum, but with interest only from the date of such service. *United States v. Curtis*, 100 U. S. 119, 25 L. Ed. 571.

Liability of sureties on purser's bond for defalcation while performing duties of navy agent.—The sureties of a purser, stationed at a navy yard, are liable for the defaults of their principal, in failing to disburse or account for moneys remitted to him as purser, notwithstanding the principal disbursed moneys during the period of the defalcation, which would have been disbursed by a navy agent, if there had been such an officer at that navy yard. Such disbursement does not constitute the purser making them a navy agent as distinguished from a purser. *Strong v. United States*, 6 Wall. 788, 18 L. Ed. 740.

The legal effect of the provisions of the

6. **DISCHARGE OF SURETIES.**—Delay in commencing proceedings against a disbursing officer for defalcations while in office may discharge the sureties on his bond,³⁴ but, while the accounts of disbursing officer should be adjusted within a reasonable time,³⁵ it seems that delay in adjusting them, even though the officer became insolvent in the meantime, will not discharge the sureties on his bond, in the absence of notice by them to the government of unwillingness to continue their responsibility.³⁶ A certificate as to correctness of the accounts of a disbursing officer does not release him or his bondsmen, and, upon subsequent discovery of fraud, they are still liable.³⁷ Placing new funds in the hands of an agent after delinquency, does not discharge the surety.³⁸

7. **ACTION ON BOND.—Evidence.**—In an action against the sureties of a disbursing officer, transcripts from the books and proceedings of the treasury department are admissible to show the true state of his accounts.³⁹

Set-Off.—Wrongs or torts to him while in the service or any unliquidated damages sustained are not permitted as a set-off.⁴⁰

act of August 26th, 1842 (5 Stat. at Large 535)—requiring purchases of supplies for the use of the navy to be made with the public moneys appropriated for the purpose, under such directions and regulations as the executive may prescribe—was to repeal former regulations in respect to pursers, and to require new “directions and regulations” in their place. And since the enactment just mentioned (even if the case was not so before), pursers in the navy may be directed to make such purchases on public account, and to disburse any moneys for the use of the navy as appropriated by law. *Strong v. United States*, 6 Wall. 788, 18 L. Ed. 740.

34. **Delay in suing officer.**—*Moses v. United States*, 166 U. S. 571, 41 L. Ed. 1119 (holding that there was no such delay in this case).

35. **Accounts should be adjusted with dispatch.**—*Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

Sound policy requires, that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable; this is alike due to the public and to the persons who are held responsible as sureties. *Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

36. **Surety not discharged by delay in adjusting accounts.**—*Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

The fiscal operations of the government are extensive and often complicated; it is extremely difficult, at all times, and sometimes, impracticable, to settle the accounts of public officers with as little delay as attends the private accounts of a mercantile establishment; but it is always in the power of an individual, who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled, and the payment of any balance enforced. A notice to the government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary

steps for his release. *Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

Sureties pleaded that the officer was removed from office on the 1st of April, 1815, and on the 15th of September, reported himself to the treasurer of the United States as ready for the settlement of his accounts; at which time, and long afterwards, he was solvent, and able to pay the full amount of his defalcation; that no notice was given to him by the treasury to account for moneys in his hands, nor to the defendant, until the commencement of the suit, and that before the commencement of the suit, the officer became insolvent. Held, that the plea was demurrable. *Smith v. United States*, 5 Pet. 292, 293, 8 L. Ed. 130.

37. **Certificate as to correctness of account does not release bondmen.**—*Moses v. United States*, 166 U. S. 571, 41 L. Ed. 1119.

38. **Placing funds in hands of paymaster after default.**—*United States v. Vanzandt*, 11 Wheat. 184, 6 L. Ed. 448.

An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 24th of April, 1816, c. 69, does not discharge his surety. *United States v. Vanzandt*, 11 Wheat. 184, 6 L. Ed. 448.

The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety. *United States v. Vanzandt*, 11 Wheat. 184, 6 L. Ed. 448.

39. **Transcript from books of treasury department admissible to show state of officer's accounts.**—*Moses v. United States*, 166 U. S. 571, 41 L. Ed. 1119.

40. **Set-Off.**—*United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

The government is not responsible for a wrong committed by one officer upon another. The party injured has other

Judgment against Officer as Evidence against Surety.—A judgment against a disbursing officer is admissible against his sureties, although they are not parties to it.⁴¹

D. Liabilities—1. **LIABILITY FOR INTEREST ON FUNDS.**—Where an officer of the government has money committed to his charge, with the duty of disbursing or paying it out as occasion may arise, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order.⁴²

2. **CRIMINAL LIABILITY—EMBEZZLEMENT OR MISAPPROPRIATION OF FUNDS.**—A disbursing officer who embezzles,⁴³ or pays out money on false accounts,⁴⁴ is guilty of a felony. An indictment or information for embezzlement by an army officer must be found or instituted within two years from the time of the commission of the offense.⁴⁵

3. **RELIEF FROM LIABILITY FOR LOSS OF FUNDS STOLEN WITHOUT AGENT'S FAULT.**—Where funds are stolen from the paymaster in the army and he makes them good out of his own funds, an action by him in the court of claims for relief is barred in six years.⁴⁶

4. **ACTIONS AGAINST OFFICER TO ENFORCE LIABILITY.**—In an action against a disbursing agent for defalcation while in office, his private books,⁴⁷ or unofficial letters of a subordinate officer of the treasury,⁴⁸ are not admissible to contradict,

modes of redress than setting off the damages as a defense when sued upon his bond by the United States. Hence, losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond. *United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997.

41. **Judgment against officer admissible against sureties.**—*Moses v. United States*, 166 U. S. 571, 572, 41 L. Ed. 1119. See the title SURETYSHIP.

42. **Liability for interest.**—*United States v. Curtis*, 100 U. S. 119, 25 L. Ed. 571; *United States v. Denver*, 106 U. S. 536, 27 L. Ed. 264. See the title INTEREST.

43. **Paymaster embezzling public money guilty of felony.**—*United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538. See, generally, the title EMBEZZLEMENT.

No exception or proviso of any kind is contained in the act of congress of August 6th, 1846 (9 Stat. at Large, 63), making a paymaster in the army who embezzles public money guilty of felony. *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538.

An additional paymaster in the army is an officer within an act against "all officers and other persons charged by this act or any other act within the safe-keeping," etc., of public money and is liable to indictment for embezzlement under such act. *United States v. Cook*, 154 U. S. 555, 18 L. Ed. 835.

44. **Paying out money on false accounts.**—*Carter v. McClaughry*, 183 U. S. 365, 46 L. Ed. 236.

An army officer in charge of harbor and river improvements, who pays out as disbursing officer, on false accounts, money

not due or owing from the United States, applies such money for a purpose not authorized by law within the meaning of § 5488, Revised Statutes of the United States. *Carter v. McClaughry*, 183 U. S. 365, 46 L. Ed. 236.

The embezzlement by an army officer of money appropriated for harbor and river improvements in violation of § 5488, Rev. Stat., is not embezzlement of money "furnished or intended for the military service" within the meaning of subdivision 9 of the 60th article of war. *Carter v. McClaughry*, 183 U. S. 365, 46 L. Ed. 236.

45. **Limitation as to prosecution for embezzlement.**—*United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538. See the titles CRIMINAL LAW: LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

46. **Relief of paymaster from whom funds have been stolen.**—*United States v. South*, 105 U. S. 620, 26 L. Ed. 1191, distinguishing *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

47. **Private books of agent not admissible to contradict official adjustment of accounts.**—*Strong v. United States*, 6 Wall. 788, 18 L. Ed. 740.

Disbursing agents, being required by law to settle their receipts and disbursements with the accounting officers of the treasury, cannot introduce their private books in a suit for defalcation to contradict the official adjustment of their accounts. *Strong v. United States*, 6 Wall. 788, 18 L. Ed. 740.

48. **Admissibility of unofficial letters of subordinate treasury officer to contradict official adjustment of accounts.**—*Strong*

or explain, the adjustment of his accounts as shown in the certified transcripts.

E. Settlement of Accounts.—Agent to Be Debited with Improper Payments.—If the navy agent, without a receipt from a purser, upon a requisition for money, volunteer to pay demands which it is the purser's duty to pay, or pay the orders of a purser, and permit the receipts for the sums paid by him to get into the purser's possession, by whom they are exhibited at the treasury, and allow in the final settlement of his account, without the purser's having given credit to the navy agent, or to the government, for the amount, it assumes the character of a private transaction between the purser and the navy agent, or becomes a debt due from the purser, as an individual, to the navy agent, as a private person; and the latter cannot claim the amount at the treasury, as an allowance in the settlement of his account, nor as a legal and equitable credit, in a suit against him by the United States.⁴⁹

Settlement of Accounts by Court of Claims under Special Act of Congress.—An act of congress specially referring to the court of claims a paymaster's claim for credits and differences in his accounts with the United States, and providing that the evidence of the claimant may be received, and that, if the court shall be satisfied that just and equitable grounds exist for credits claimed by him, it shall make a decree setting forth the amount for which he shall receive credit, confers no equity jurisdiction upon that court, but only the ordinary jurisdiction of the subject as a court of law, subject to be proceeded with as in ordinary suits, and subject to the rules regulating appeals in ordinary judgments.⁵⁰

F. Restating Accounts after Settlement.—The accounts of an officer may be restated where the settlement was fraudulent.⁵¹

G. Recovery for Advancements Made to Government.—Advancements made by a disbursing officer to the government out of his own funds may be recovered by him or his representatives in a suit in the court of claims.⁵²

IX. Soldiers' Homes.

Power of Officers to Allow Commissions to Officers Where By-Laws Provide for Stated Salaries.—Where the by-laws of a soldier's home provide for payment of stated salaries to all officers, in payment in full for all services, a building committee of the home cannot bind it by contracting to allow an officer commissions on disbursements made by him.⁵³

Surrender of Pension to Home upon Becoming an Inmate.—While one who has been granted a pension for wounds or disabilities received in the military service may become an inmate of a soldier's home, he must, if he has not contributed to its funds, surrender his pension to the home during the time he remains there and receives its benefits.⁵⁴ But one who has contributed to the soldiers' home need not surrender his pension.⁵⁵

⁴⁹ United States, 6 Wall. 788, 18 L. Ed. 740.

⁴⁹ Improper payments by disbursing agents.—United States *v.* Hawkins, 10 Pet. 125, 9 L. Ed. 369.

⁵⁰ Settlement of accounts by court of claims under special act of congress.—McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572. See the titles COURTS; JURISDICTION.

⁵¹ Restatement of accounts after fraudulent settlement.—Moses *v.* United States, 166 U. S. 571, 572, 41 L. Ed. 1119. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 70.

⁵² Recovery of advancements made by disbursing officer to government.—United States *v.* Borcheling, 185 U. S. 223, 46 L.

Ed. 884; Price *v.* Forrest, 173 U. S. 410, 43 L. Ed. 749. See generally, the title PAYMENT.

⁵³ Effect of by-laws providing for stated salaries to officials.—Yates *v.* National Home, 103 U. S. 674, 26 L. Ed. 452.

⁵⁴ Surrender of pension to home upon becoming an inmate.—Rev. Stat., § 4820; United States *v.* Bowen, 100 U. S. 508, 511, 25 L. Ed. 631.

⁵⁵ Contributor to home not required to surrender pension.—United States *v.* Bowen, 100 U. S. 508, 25 L. Ed. 631.

Section 4820 of the Revised Statutes admits of no other reasonable construction than that only the invalid pensioners who had not contributed to the funds of the soldiers' home were bound to surrender to it their pensions while receiving its

X. Recovery for Property Lost by Persons in Service.

A contractor with the government to transport from post to post, remote from any seat of war, stores and supplies not forming any portion of the stores or supplies of an advancing or retreating army, is not a person "in the military service of the United States" within the second section of the act of March 3d, 1849, "to provide for the payment of horses and other property lost" in that service.⁵⁶

XI. Desertion from Service.

Congress has power to provide for the trial and punishment of persons deserting from the naval or military service.⁵⁷ Neither a police officer nor a private citizen has a right, without warrant or express authority, to arrest a military deserter.⁵⁸ It is no defense to a charge of desertion that the defendant, at the time of enlistment, was over the prescribed age.⁵⁹ On a trial for desertion, the defendant may be found guilty of attempting to desert.⁶⁰ A deserter from a Russian ship of war may be extradited under the treaty of 1832 between the United States and Russia.⁶¹

ARRAIGN.—See the title **CRIMINAL LAW**.

"To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment."¹

ARRAY.—As to challenge to array, see the title **JURY**.

ARREARS.—As to arrears of rent, see the title **LANDLORD AND TENANT**. As to arrears of taxes, see the title **TAXATION**.

benefits. *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631. See, generally, the title **PENSIONS**.

56. Recovery for property lost by persons in service.—*Stuart v. United States*, 18 Wall. 84, 21 L. Ed. 816.

A petition which represents that a party transporting, etc., was "attacked by a band of hostile Indians," who, without any fault of the party transporting or his agents, captured certain oxen, part of the property in transit, which had never been recovered, is not sufficiently full and specific to answer the requirement of the said section, which provides compensation for "damage sustained by the capture or destruction by an enemy." *Stuart v. United States*, 18 Wall. 84, 21 L. Ed. 816.

57. Power of congress to provide for trial and punishment.—*Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838.

In the exercise of this power, congress provided for the punishment of desertion and of other crimes not specified in the articles, which should be punished according to the laws and customs in such cases at sea. *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838.

Trial by court martial.—See, generally, the title **MILITARY LAW**.

58. Who may arrest soldier for desertion.—*Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458.

59. Fact that soldier was over prescribed age at time of enlistment no defense.—*In re Grimley*, 137 U. S. 147, 34 L. Ed. 636.

60. Attempting to desert.—*Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838.

61. Extradition of deserter from Russian warship.—*Tucker v. Alexandroff*, 183 U. S. 424, 46 L. Ed. 264.

One detailed for service on a vessel launched and being built for the Russian government, is subject to extradition for desertion from "a Russian ship of war" although, at the time of desertion, the ship is in an unfinished state, and has not received her armament, been commissioned for service, nor received her crew on board. *Tucker v. Alexandroff*, 183 U. S. 424, 46 L. Ed. 264. See, generally, the title **EXTRADITION**.

1. Arraign.—*Crain v. United States*, 162 U. S. 625, 638, 40 L. Ed. 1097.

In *Crain v. United States*, 162 U. S. 625, 638, 40 L. Ed. 1097, it is said: "In capital or other infamous crimes an arraignment has always been regarded as a matter of substance. 'The arraignment of the prisoner,' Lord Coke said, 'is to take order that he appear, and for the certainty of the person to hold up his hand and to plead a sufficient plea to the indictment or other record.' Co. Litt. 263a. According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is the 'demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him cul. prist, and enters the prisoner's plea; then he demands how he will be tried, the common answer is, by God and the country, and thereupon the clerk enters po. se, and prays to God to send him a good deliverance.' 2 Hale's Pl. Cr. 219."

ARREST.

BY R. E. MAXWELL.

- I. General Consideration of the Term, 541.
- II. Arrest under Warrant, 541.
 - A. Illegal Warrant, 541.
 - B. Necessity of Showing Official Character of Officer, 541.
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CROSS REFERENCES.

See the titles BAIL AND RECOGNIZANCE; ESCAPE; EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES; EXTRADITION; FALSE IMPRISONMENT; HABEAS CORPUS; HOMICIDE; MALICIOUS PROSECUTION; PRIVILEGE FROM ARREST; SEARCHES AND SEIZURES; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS; WARRANTS.

As to the rights of sureties upon bail bond to arrest their principal, see the title BAIL AND RECOGNIZANCE. As to circuit court commissioner's rights to fee for issuing warrants, see the title COURTS. As to arrest of deserting seamen, see the title SEAMEN. As to United States marshal's fees for making arrest, see the title UNITED STATES MARSHALS.

I. General Consideration of the Term.

Use in Admiralty Process.—The term arrest is the technical term used in admiralty process to indicate an actual seizure of property.¹

Blockade as an Arrest.—The term blockade cannot be considered as an arrest.²

II. Arrest under Warrant.

A. Illegal Warrant.—If a warrant is illegal upon its face, no one has a right to make an arrest thereunder.³

Name and Description of Person.—An arrest will not be justified, where the person arrested has never been known or called by the name in the warrant, and he is not otherwise designated or described therein.⁴

B. Necessity of Showing Official Character of Officer.—An officer making an arrest, must, if required, show the official character upon which he acts.⁵

1. **Use in admiralty process.**—Pelham v. Rose, 9 Wall. 103, 107, 19 L. Ed. 602.

2. **Blockade as an arrest.**—Olivera v. Union Ins. Co., 3 Wheat. 183, 188, 4 L. Ed. 365.

3. One cannot be legally arrested upon a warrant illegal upon its face. Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495.

4. An officer has authority to arrest under a warrant, though it purports to be issued by a "Commissioner of the United States court, Western District of Arkansas," instead of a "Commissioner of the Circuit Court," as required by statute. Starr v. United States, 164 U. S. 627, 41 L. Ed. 577. See the title WARRANTS.

4. **Name and description of person.**—West v. Cabell, 153 U. S. 78, 38 L. Ed. 643.

"The principle of the common law, by which warrants of arrest, in cases criminal, or civil must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer making the arrest." West v. Cabell, 153 U. S. 78, 38 L. Ed. 643. See the title WARRANTS.

5. Starr v. United States, 153 U. S. 614, 38 L. Ed. 841.

C. Liability of One Issuing Warrant.—A magistrate who issues a warrant will not be liable, if there is probable cause of the arrest of the party.⁶

III. Arrest without Warrant.

Either an officer or private person may arrest, without a warrant, one who has committed a felony;⁷ or one who has committed, or attempted any public offense in his presence.⁸

IV. Force Used in Making Arrest.

No more force can be used than is necessary to accomplish the object; and if the power is exercised for the purposes of oppression, or any injury willfully

6. *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765. See the titles FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

7. "The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several states to be in force in cases of felony punishable by the civil tribunals." *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458.

Must be reasonable ground to believe one arrested committed the crime.—If you believe in the theory that there was an attempt made to arrest upon the part of private citizens, then the fact that robberies that have been proven may be taken into consideration to show that crime had been committed, that would give the citizens the right to make an arrest provided there was reasonable ground to believe, in your judgment, at the time, that the parties they were seeking to arrest were the ones that had committed those crimes, is a correct charge. *Boyd v. United States*, 142 U. S. 450, 35 L. Ed. 1077.

For engaging in insurrection.—After martial law was declared, an officer might lawfully arrest any one whom he had reasonable ground to believe was engaged in an insurrection. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, 585.

Misdemeanors.—There is no statute of the United States or of the state of South Dakota giving any right to an officer to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence. *Elk v. United States*, 177 U. S. 529, 44 L. Ed. 874.

"By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate. 1 Hale P. C. 587, 590; 2 Hale P. C. 76, 81; 4 Bl. Com. 292, 293, 296; *Wright v. Court*, 6 D. & R. 623; S. C., 4 B. & C. 596." *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458.

The trial court charged the jury that

"The deceased, John Kills Back (an officer), had been ordered to arrest the defendant (on charge of a misdemeanor); hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. * * *. In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgotten his duties as an officer and had gone beyond the force necessary to arrest defendant, and was about to kill him or inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest." The supreme court said: "The court clearly erred in charging that the policeman had the right to arrest the plaintiff in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it." *Elk v. United States*, 177 U. S. 529, 44 L. Ed. 874.

Arrest of a military deserter.—A police officer or a private citizen has no right, without warrant or express authority, to arrest a military deserter. Such right cannot be derived either from a rule of the law of England which has become part of our law, or from any legislation of congress. *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458.

8. *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458; *Elk v. United States*, 177 U. S. 529, 44 L. Ed. 874.

done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.⁹

V. Resisting Arrest.

An arrest may be resisted when it is not known that the one making the arrest is the proper person to make the arrest,¹⁰ or where the warrant is illegal;¹¹ and such force may be used as is absolutely necessary to resist the arrest.¹²

ARREST OF JUDGMENT.—See the titles *APPEAL AND ERROR*, vol. 1, p. 994; *JUDGMENTS AND DECREES*.

ARRIVE—ARRIVAL.—Chief Justice Marshall, when discussing the general meaning of the words arrival and to arrive, said: "To arrive is a neuter verb, which, when applied to an object moving from place to place, designates the fact of 'coming to' or 'reaching' one place from another, or of coming to or reaching a place by travelling, or moving towards it. If the place be designated, then the object which reaches that place has arrived at it. A person who is coming to Richmond has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate designation, or the end of his journey. A person going from Richmond to Norfolk, by water, arrives within Hampton Roads, when he reaches that place; or, if he diverges from the direct course, he arrives in Petersburg, when he enters that town. This is, I believe, the universal understanding of the term."¹

9. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

10. One may resist arrest if he has no knowledge that the person attempting the arrest is a proper person to make the arrest, even though his violent conduct prevented the officer from giving notice of his official character. *Starr v. United States*, 153 U. S. 614, 38 L. Ed. 841. See ante, "Arrest without Warrant," III.

11. **Resisting when warrant insufficient.**—"In *Commonwealth v. Crotty*, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of 'John Doe or Richard Roe, whose other or true name is to your complainant unknown,' the conviction was set aside by the supreme judicial court of Massachusetts, upon the grounds that the warrant was insufficient, illegal, and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was in effect a general warrant, upon which any other person might as well have been arrested, as being included in the description; and that 'the warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it; he acted without warrant, and was a trespasser; the defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer; an officer who acts under a void precept, and a person doing the same act who is not an officer,

stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose.' 10 Allen 404, 405." *West v. Cabell*, 153 U. S. 78, 38 L. Ed. 643.

12. "If the officer have no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." *Elk v. United States*, 177 U. S. 529, 44 L. Ed. 874.

1. **Arrive—Arrival.**—Gray, J., dissenting in *Rhodes v. Iowa*, 170 U. S. 412, 433, 42 L. Ed. 1088, quoting *The Patriot*, 1 Brock. 407, 411, 412.

A contract was for the sale of goods shipped upon a certain steamer, sea damage, if any to be taken at a fair allowance, no arrival, no sale. The court said: "In the clause 'no arrival, no sale,' the word arrival evidently refers, as the word 'sale' must necessarily refer, to the goods which are the subject of the contract, and not to the particular vessel on which they are shipped; and the whole effect of the clause is that, if the goods never arrive at their destination, the buyers acquire no property in them, and do not become liable to the sellers for the price." *Harri-son v. Fortlage*, 161 U. S. 57, 64, 40 L. Ed. 616.

An act of congress provided that it should be the duty of every master of a ship on his arrival at a foreign port to deposit his register and sea letter with the consul at such port. It was held that arrival as thus used did not mean any touching at a foreign port for any time however short or for any purpose or reason

ARSON.—See the titles CONFESSIONS; CRIMINAL LAW; INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

ART.—See the title PATENTS. See note 1.

ARTICLE.—In common usage, article is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity.²

whatever but an **arrival** to transact commercial business followed in due time by the entry of the vessel. *Harrison v. Vose*, 9 How. 372, 13 L. Ed. 179.

In *The Appollon*, 9 Wheat. 362, 368, 6 L. Ed. 111, it was held that the mere transit through a river for the purpose of proceeding to a foreign port could not be deemed an **arrival** within the limits of the United States from a foreign port. See, generally, the title SHIPS AND SHIPPING.

Revenue law.—The phrase persons **arriving** in the United States has been held to extend to citizens returning or foreigners visiting or emigrating as used in the custom act exempting wearing apparel from duties. *Astor v. Merritt*, 111 U. S. 202, 28 L. Ed. 401. See, generally, the title REVENUE LAWS.

Arrival—Wilson act.—Where goods had not been delivered to the consignees and there was no showing of notice to them from the carrier, it was held that they had not **arrived** within the state within the meaning of **arrival** as used in the Wilson act. The court said that the language contained in the opinion in *Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, to the effect that delivery was essential to constitute **arrival** within the Wilson act was not merely obiter. *Heyman v. Southern R. Co.*, 203 U. S. 270, 271, 51 L. Ed. 178. See, also, *American Express Co. v. Iowa*, 196 U. S. 133, 49 L. Ed. 417; *Foppiano v. Speed*, 199 U. S. 501, 50 L. Ed. 288; *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100. See, generally, the titles INTERSTATE COMMERCE; INTOXICATING LIQUORS.

1. Art.—In *Jacobs v. Baker*, 7 Wall. 295, 297, 19 L. Ed. 200, it is said: "Now, without attempting to define the term **art** with logical accuracy, we take as examples of it, some things which, in their concrete form, exhibit what we all concede to come within a correct definition, such as the **art** of printing, that of telegraphy, or that of photography. The **art** of tanning leather might also come within the category, because it requires various processes and manipulations. The difficulty still exists, however, under which category of the patent act an improvement in the construction of jails is to be classed, or whether under any."

In *O'Reilly v. Morse*, 15 How. 63, 130, 14 L. Ed. 601, it is said: "It is not easy to give a precise definition of what is meant by the term **art**, as used in the acts of congress—some, if not all, the traits which distinguish an **art** from the other

legitimate subjects of a patent, are stated with clearness and accuracy by Mr. Curtis, in his treatise on patents. 'The term **art**, applies,' says he, 'to all those cases where the application of a principle is the most important part of the invention, and where the machinery, apparatus, or other means, by which the principle is applied, are incidental only and not of the essence of his invention. It applies also to all those cases where the result, effect, or manufactured article is old, but the invention consists in a new process or method of producing such result, effect, or manufacture.' *Curt. on Pat.* 80."

In *Corning v. Burden*, 15 How. 252, 267, 14 L. Ed. 682, it is said: "A process, *eo nomine*, is not made the subject of a patent in our act of congress. It is included under the general term 'useful **art**.' An **art** may require one or more processes or machines in order to produce a certain result or manufacture."

In *Baker v. Selden*, 101 U. S. 99, 105, 25 L. Ed. 841, it is said: "The description of the **art** in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the **art** itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent." And again it is said: "But there is a clear distinction between the book, as such, and the **art** which it is intended to illustrate. The mere statement of the proposition is so evident that it requires hardly any argument to support it. The same distinction may be predicated of every other **art** as well as that of bookkeeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the **art** or manufacture described therein." See, generally, the titles COPYRIGHT; PATENTS.

2. Article.—*Junge v. Hedden*, 146 U. S. 233, 238, 36 L. Ed. 953.

A revenue law prescribed a tax on **articles** composed of india-rubber. The court said: "The learned circuit judge was of opinion that the word **articles** was used in this paragraph in a broad sense,

ARTICLES FOR THE GOVERNMENT OF THE NAVY.—See the title **ARMY AND NAVY**, ante, p. 494.

ARTICLES OF WAR.—See the title **ARMY AND NAVY**, ante, p. 494.

ARTICULATE SPEECH.—See note 1.

AS.—See note, 2.

and covered equally things manufactured, things unmanufactured and things partially manufactured, and he sustained this view by reference to the use of the word elsewhere in the statute. * * * We agree with the circuit court that the word must be taken comprehensively and cannot be restricted to **articles** put in condition for final use, but embraces as well things manufactured only in part, or not at all." *Junge v. Hedden*, 146 U. S. 233, 238, 36 L. Ed. 953.

In *The Conqueror*, 166 U. S. 110, 114, 41 L. Ed. 937, it is said: "This act requires duties to be levied upon all **articles** imported from foreign countries and mentioned in schedules therein contained, none of which schedules mention ships or vessels eo nomine. An abstract furnished us of the corresponding clauses in all the principal tariff acts from 1789 to the present date shows that duties are laid either upon **articles**, as in the present act, or upon 'goods, wares and merchandise'—words which have a similar meaning. Indeed, the words **articles** and 'goods, wares and merchandise' seem to be used indiscriminately, and without any apparent purpose of distinguishing between them. While a vessel is an **article** of personal property, and may be termed 'goods, wares and merchandise,' as distinguished from real estate, it is not within either class, as the words are ordinarily used. In all this class of cases, the meaning of the words as used in the particular statute must be gathered from the context and from the evident purpose of the act. Thus, in *Iron Co. v. Claytor*, L. R. 4 Q. B. 209, it was held that a ship was not an **article**, within the meaning of an act forbidding the employment of children to labor in the manufacture of **articles** or part of **articles**, but that an iron plate was an **article** of metal, even though used in shipbuilding, and the shaping of the plate was part of the manufacture."

See, generally, the title **REVENUE LAWS**.

1. **Articulate speech.**—See *Telephone Cases*, 126 U. S. 1, 532, 31 L. Ed. 863, 989.

2. **As fully as an individual.**—A city was authorized to subscribe for stock in a railway company as fully as any individual. It was held that the city could issue its negotiable bonds in payment of the stock. The court said: "The authority given was to subscribe as fully as an individual; and as an individual (by agreement with the company) could have given his bond, the city corporation had the same power." *Seibert v. Pittsburg*, 1 Wall. 272, 273, 17 L. Ed. 553.

As near as may be.—See **NEAR**. And see the title **COURTS**.

As soon as.—A paper promised to pay a sum of money as soon as the property could be sold or the money raised from any other source. In construing this language the court said: "No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly." *Nunez v. Dautel*, 19 Wall. 560, 562, 22 L. Ed. 161.

As trustee.—In *Duvall v. Craig*, 2 Wheat. 56, 4 L. Ed. 180, it is said: "A trustee merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally and the addition of the word 'as trustee' is but matter of description, to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party."

ASSAULT AND BATTERY.

BY R. C. MAXWELL.

I. Force Necessary, 546.

II. Particular Examples, 546.

III. Evidence, 547.

CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63; BANKRUPTCY; BREACH OF THE PEACE; CRIMINAL LAW; DAMAGES; DUELLING; EXTRADITION; HOMICIDE; MAYHEM; MISTAKE AND ACCIDENT; RAPE; RIOT; TRESPASS.

As to assaults upon foreign ministers, see the title AMBASSADORS AND CONSULS, vol. 1, p. 273. As to assaults by or upon officers, see the title ARMY AND NAVY, ante, p. 494. As to corporation's liability for assault and battery of an agent, see the titles CARRIERS; CORPORATIONS. As to the rights of one assaulted to kill, see the title HOMICIDE. As to joinder of an indictment for assaults with indictments for other offenses, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS. As to assaults upon United States Judges, see the titles JUDGES; UNITED STATES.

I. Force Necessary.

To come within the definition of an assault and battery, it is not necessary that the force charged caused any great bodily pain.¹

II. Particular Examples.

Criminal Conversation with Wife of Another.—For a man to have criminal conversation with the wife of another man constitutes an assault upon the husband's exclusive rights with regard to the person of his wife.²

Assault by One Attempting to Regain Possession of Real Estate.—A claimant of real estate out of possession cannot assault the actual occupant in attempting to regain possession, and the fact that he had a superior title will not justify the assault.³

Assaults upon the High Seas.—The act of March 3rd, 1825, § 22, makes an

1. Force necessary.—"Though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery." *Respublica v. De Longchamps*, 1 Dall. 111, 114, 1 L. Ed. 59.

Striking a cane in the hand of another may amount to an assault and battery. *Respublica v. De Longchamps*, 1 Dall. 111, 1 L. Ed. 59.

2. "We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's

rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful." *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754.

"The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children." *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754. See, generally, the title HUSBAND AND WIFE.

3. *Denver, etc., Railway v. Harris*, 122 U. S. 597, 30 L. Ed. 1146. See, also, *Iron Mountain, etc., R. Co. v. Johnson*, 119 U. S. 608, 611, 30 L. Ed. 504.

assault upon the high seas with a dangerous weapon an offense against the United States.⁴

Self-Defense.—One charged with assault and battery may defend upon the ground that the force used was necessary to repel a present danger.⁵

III. Evidence.

Admission in Evidence of Declarations of Persons Assaulted.—This subject is treated in another title.⁶

ASSESSMENT.—An assessment is only determining the value of the thing taxed and the amount of tax required of each individual. It may be made by designated officers or by the law itself.¹ The term assessment is often used as

4. Assault upon the high seas.—United States *v.* Arwo, 19 Wall. 486, 22 L. Ed. 67.

Jurisdiction.—Under the act of March 3d, 1825, § 22, by which an assault on a person upon the high seas with a dangerous weapon is made an offense against the United States, and the trial of the offense is to be "in the district where the offender is apprehended, or into which he may first be brought," a person is triable in the southern district of New York who, on a vessel owned by citizens of the United States, has committed on the high seas the offense specified; has been then put in irons for safe-keeping, and, on the arrival of the vessel at anchorage at the lower quarantine in the eastern district of New York, has been delivered to officers of the state of New York, in order that he may be forthcoming, etc.; and has been by them carried into the southern district and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued. United States *v.* Arwo, 19 Wall. 486, 22 L. Ed. 67. See the title JURISDICTION.

Section 5346, Rev. Stat.—In § 5346, Rev. Stat., making every person liable for assaults committed by him upon the high seas within the admiralty jurisdiction of the United States, the term "high seas" applies to the Great Lakes which the Detroit river connects, and the United States courts have jurisdiction to try a person for an assault committed upon a vessel belonging to a United States citizen, when such vessel is in the Detroit river, but within the territorial limits of the Dominion of Canada. United States *v.* Rogers, 150 U. S. 249, 37 L. Ed. 1071.

The provision in § 5346, Rev. Stat., limiting the jurisdiction of the United States courts to arms of sea, rivers, havens, creeks, basins or bays without the jurisdiction of any particular state of the Union, applies only to vessels on the waters connecting the high seas of the lakes, and there is no limitation to the authority of the United States as far as those seas are concerned. United States *v.* Rogers, 150 U. S. 249, 37 L. Ed. 1071. See the title CRIMINAL LAW.

5. Self-defense.—See, also, the title HOMICIDE.

No liability, civil or criminal, follows, if an assault is committed in an honest and reasonable belief of immediate danger, and, if an injury be inflicted upon the person from whom danger was apprehended, no liability attaches. New Orleans, etc., R. Co. *v.* Jones, 142 U. S. 18, 35 L. Ed. 919.

Must be present danger of great injury.

—With reference to the right to commit an assault in self-defense by reason of the presence of a real danger, the court charged that it could not be a past danger, or a danger of a future injury, but a present danger and a danger of "great injury to the person injured that would maim him, or that would be permanent in its character, or that might produce death." In this nothing was stated correctly, and that there was a fair definition of what is necessary to constitute self-defense by reason of the existence of a real danger. Acres *v.* United States, 164 U. S. 388, 391, 41 L. Ed. 481.

6. See the titles DECLARATIONS AND ADMISSIONS; RES GESTÆ.

1. Assessment.—Dollar Sav. Bank *v.* United States, 19 Wall. 227, 240, 22 L. Ed. 80; United States *v.* Erie R. Co., 107 U. S. 1, 27 L. Ed. 385. See, also, the titles SPECIAL ASSESSMENTS; TAXATION.

National bank shares.—In *People v. Weaver*, 100 U. S. 539, 545, 25 L. Ed. 705, it is said: "This valuation, then, is part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than the rate assessed upon other capital? We see that congress had in its mind an assessment, a rate of assessment, and a valuation; and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."

Revised Statutes, § 5219, provide that the shares of national banks shall not be taxed at a greater rate than is assessed on other moneyed capital. In construing

a synonym of "taxes." Indeed, one of the definitions of this term given by Webster is a "tax."²

ASSETS.—See *EQUITABLE ASSETS*. See note 1.

ASSIGNMENT OF ERRORS.—See the title *APPEAL AND ERROR*, ante, p. 263.

this provision, the court said: "That the words 'at a greater rate than is **assessed** upon other moneyed capital in the hands of individual citizens' refer to the entire process of **assessment**, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the act of congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the state law establishes or permits a mode of **assessment** by which such shares are valued higher in proportion to their real value than is other moneyed capital." *Boyer v. Boyer*, 113 U. S. 689, 695, 28 L.

Ed. 1089. See, generally, the title *TAXATION*.

2. *Wells v. Savannah*, 181 U. S. 531, 541, 45 L. Ed. 986.

1. Assets.—In *United States v. Walker*, 109 U. S. 258, 264, 27 L. Ed. 927, it is said: "We think the meaning of this act is plain. When it was passed, the words '**assets** or estate of the decedent which remain unadministered,' had a uniform and well-settled meaning in the statute law of Maryland, in force in the District of Columbia, and that meaning, as we have seen, was **assets** or estate remaining in specie and unchanged in form." See, generally, the title *EXECUTORS AND ADMINISTRATORS*.

ASSIGNMENTS.

BY R. C. WALKER.

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See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; BANKS AND BANKING; BILLS, NOTES AND CHECKS; BONDS; CHAMPERTY AND MAINTENANCE; CHATTEL MORTGAGES AND CONDITIONAL SALES; CONTRACTS; COPYRIGHT; CORPORATIONS; COVENANTS; DEEDS; EASEMENTS; FORMER ADJUDICATION OR RES ADJUDICATA; GOOD WILL; INFANTS; INSURANCE; JUDGMENTS AND DECREES; LANDLORD AND TENANT; LIENS; MINES AND MINERALS; MORTGAGES AND DEEDS OF TRUST; NOTICE; PATENTS; PUBLIC LANDS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION; VENDOR AND PURCHASER; WATERS AND WATERCOURSES.

As to assignment of dower, see the title DOWER. As to assignment of homestead, see the title HOMESTEAD EXEMPTIONS. As to transfer of corporate stock, see the title STOCK AND STOCKHOLDERS. As to assignments and transfers fraudulent as to creditors and purchasers, see the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT AND VOLUNTARY CONVEYANCES. As to assignments for the purpose of making a case cognizable by the federal courts, see the title COURTS.

I. Definition and Distinctions.

An assignment is "a transfer or making over to another of the whole of any property, real or personal, in possession or in action or of any estate or right therein."¹

Assignments by operation of law are different from assignments by the act of the parties.²

II. Modes, Requisites and Validity.

A. Modes and Sufficiency—1. IN WRITING OR ORAL.—The assignment of a judgment may be made without written evidence of the transfer.³ Written instru-

1. **Definitions.**—Bouvier's Law Dict., vol. 1, p. 179. See, also, *Potter v. Holland*, 4 Blatchf. 206. See post, "By Delivery," II. A. 2.

2. **By operation of law.**—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246.

"There the plaintiffs were the general assignees of the effects of an insolvent debtor, by operation of law." *Corbin v. Black Hawk County*, 105 U. S. 659, 666, 26 L. Ed. 1136. See *Sere v. Pitot*, 6 Cranch 332, 3 L. Ed. 240. See the titles

ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; INSOLVENCY; JUDICIAL SALES; SHERIFFS' SALES; TRUSTS AND TRUSTEES.

3. **Necessity for writing.**—Philadelphia, etc., *R. Co. v. Trimble*, 10 Wall. 367, 382, 19 L. Ed. 948. See *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173. See post, "Equitable Assignment," III. A. 3. And see the title JUDGMENTS AND DECREES.

ments evidencing indebtedness may or may not be assigned by indorsement, as dependent upon the nature of the instrument.⁴ Unless the law authorize the assignment of land warrants by indorsement or by an instrument annexed thereto, the transfer may be made on a separate paper.⁵

2. BY DELIVERY.—The delivery of choses in action,⁶ or the written evidence of a debt is sufficient to create an assignment thereof.⁷

4. Assignment by indorsement.—Certificates issued by the treasury department, under a treaty with Mexico, payable to a claimant or his assigns upon presentation being legally assignable under an act of congress, an indorsement in blank by the original payee was always considered sufficient evidence of the title in the holder to enable him to receive the amount of the certificate when presented to the treasury department for payment. The possession of them with a blank indorsement is *prima facie* evidence of ownership. *Baldwin v. Ely*, 9 How. 580, 13 L. Ed. 266; *Coombs v. Hodge*, 21 How. 397, 16 L. Ed. 115.

But where certificates of the public debt of a state were transferable only by the owner, or his legal representative or attorney, and there is no sufficient evidence of the existence of a power of attorney, a mere endorsement in blank by the owner is not sufficient to justify a purchaser in drawing a conclusion that the holder is entitled to sell or discount it. *Coombs v. Hodge*, 21 How. 397, 16 L. Ed. 115, distinguishing *Baldwin v. Ely*, 9 How. 580, 13 L. Ed. 266.

"When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (*Birdeback v. Wilkins*, 10 Harris 26; *Ames v. Drew*, 11 Foster 475; *Symonds v. Atkinson*, 37 L. & Eq. 585; 25 L. and Eq. 318.) Nor can the holder write an assignment or guarantee not authorized by the endorser. (4 Duer 45; 25 L. and E. 19; 6 Harris 434.) This doctrine has been applied to determine conflicting claims to public securities which were not negotiable on their face, though the subject of frequent transfers." *Coombs v. Hodge*, 21 How. 397, 406, 16 L. Ed. 115. See, generally, the titles **BILLS, NOTES AND CHECKS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.**

Assignment of bill of lading.—See post, "Delivery," II. B. 5. See the title **BILL OF LADING.**

5. Assignment on separate paper.—*Bouldin v. Massie*, 7 Wheat. 122, 157, 5 L. Ed. 414; See post, "In General," II. A. 3, a; "Power of Attorney," II. A. 3, f.

"If any particular mode of authentication (of assignment) was necessary, the law ought to have prescribed that mode. This not being done, the mode was left to the parties." *Bouldin v. Massie*, 7 Wheat. 122, 157, 5 L. Ed. 414.

6. Delivery of chose in action.—"Whatever difficulties may be suggested, on the technical meaning of the term 'assignment,' it is very clear, that he who acquires a chose in action, by mere delivery, has been recognized in the laws of the United States as an assignee." *Bank v. Planters' Bank*, 9 Wheat. 904, 913, 6 L. Ed. 244. See *Thompson v. Perrine*, 106 U. S. 589, 593, 27 L. Ed. 298; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 38 L. Ed. 338; *American Colortype Co. v. Continental Co.*, 188 U. S. 104, 47 L. Ed. 404.

7. Written evidence of debt.—The title to interest coupons passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title, but does not import a guaranty of payment. *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

"To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men." *Ketchum v. Duncan*, 96 U. S. 659, 663, 24 L. Ed. 868.

A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls. *Basket v. Hassell*, 107 U. S. 602, 614, 27 L. Ed. 500.

"Contrary decisions have been made in respect to donations *mortis causa* of savings-bank books, some courts holding that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. *Pierce v. Boston Savings Bank*, 129 Mass. 425; *Hill v. Stevenson*, 63 Me. 364; *Tillinghast v. Wheaton*, 8 R. I. 536. The contrary was held in *Ashbrook v. Ryan*, 2 Bush (Ky.), 228, and in *McGonnell v. Murray*, Irish Rep. 3 Ed. 460." *Basket v. Hassell*, 107 U. S. 602, 613, 27 L. Ed. 500. See the title **GIFTS.**

3. **EQUITABLE ASSIGNMENT**—*a. In General.*—To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary.⁸ The general rule is that any words or transaction, based on a valuable consideration, which show an intention to assign on the one hand and to receive on the other, will operate as an equitable estoppel.⁹ An order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund.¹⁰ The reason is that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity.¹¹ A valid equitable assignment of a chose in action which is evidenced by a written instrument, may be made by a separate written instrument.¹²

b. Necessity for Actual Appropriation.—To make an equitable assignment there should be such an actual or constructive appropriation of the subject matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise.¹³ The

8. **No particular form.**—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173.

9. **Form and words immaterial.**—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704.

"The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice." *Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762. See, also, *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753.

"The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. This conveyance of all right, title and interest 'in and to' the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself." *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 31 L. Ed. 574.

Verbal direction.—Where a debtor pledged certain notes as security, his equitable interest in a judgment recovered upon one of them may be validly assigned, and the debtor's verbal directions to the pledgee is sufficient to create an assignment thereof. *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173.

10. **Order, writing or act.**—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859.

An act of a state legislature authorizing the loan of county bonds to a railroad, and providing for payment of interest out of earnings collected by the state commissioner, operated, on its acceptance by the parties interested, as an equitable assignment of a fixed portion of that fund—an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing. *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999.

11. **The reason.**—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762.

12. **Separate writing.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614. See, also, ante, "In Writing or Oral," II. A. 1.

13. **Actual or constructive appropriations.**—*Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Porter v. White*, 127 U. S. 235, 245, 32 L. Ed. 112; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424.

"The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include this case. It is indispensable to a lien thus created, that there should be a distinct appropriation of the

transfer must be of such a character that the holder of the fund can safely pay, and is compellable to do so, though forbidden by the assignor.¹⁴ A mere agreement or promise, though of the clearest and most solemn kind, to pay a debt out of a fund, is not an assignment of the fund in equity.¹⁵ A covenant in the most solemn form has no greater effect.¹⁶

c. *Bill of Exchange or Check*.—A bill of exchange or a check in the ordinary form does not of itself operate as an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee,¹⁷ but if the drawee accepts the check,

fund by the debtor, and an agreement that the creditor should be paid out of it." It is not enough that the fund may have been created through the effects and outlays of the party claiming the lien. *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 535.

If the holder of a fund retain control over it, as where he retains power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment. *Christmas v. Russell*, 14 Wall. 69, 70, 20 L. Ed. 762; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593.

To create, for future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them on payment of such services, upon which the contractor relies, but there must be some act of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them thus applied when the services are rendered. *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673.

14. *Character of transfer*.—*Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762.

15. *Mere promise or agreement*.—*Christmas v. Russell*, 14 Wall. 69, 70, 20 L. Ed. 762; *Peugh v. Porter*, 112 U. S. 737, 741, 28 L. Ed. 859; *Trist v. Child*, 21 Wall. 441, 447, 22 L. Ed. 623; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593.

A mere personal agreement by one setting up a claim on the government, with another person, to pay to such person a percentage of whatever sum Congress, through the instrumentality of such person, may appropriate in payment of the claim, does not constitute any lien on the fund to be appropriated; there being no order on the government to pay the percentage out of the fund so appropriated, nor any assignment to the party of such percentage. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

In an indenture of mortgage executed by a railroad corporation to trustees to secure bonds issued to raise moneys to pay off its existing indebtedness, and to complete and equip its road, the corporation covenanted with the trustees, among other things, that the expenditure of all sums of money realized from the sale of the bonds should be made with the ap-

proval of at least one of the trustees, and that his assent in writing should be necessary to all contracts made by the company before the same should be a charge upon any of the sums received from such sales; held, that a contractor, agreeing with the corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work, under this covenant of the indenture, upon the funds received by the corporation from the bonds. *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673.

16. *Covenant*.—*Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762; *Removal Case*, 100 U. S. 457, 25 L. Ed. 593.

17. *Bill of exchange or check*.—*Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500; *Bank v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 854; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; See, also, *Boatman's Sav. Bank v. State Sav. Bank*, 114 U. S. 265, 29 L. Ed. 174.

"A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money, which the holder can enforce against the bank. It does not of itself operate as an equitable assignment." *Florence Min. Co. v. Brown*, 124 U. S. 385, 391, 31 L. Ed. 424.

"The mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors. *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704." *Fourth St. Bank v. Yardley*, 165 U. S. 634, 643, 41 L. Ed. 854.

"But while this may be considered as the established doctrine of this court in regard to the rights of the parties at law, and is probably the prevailing doctrine in nearly all the courts, it is urged in this

or bill of exchange, or otherwise subjects himself to liability, the equitable title, to the amount thereof, will pass to the payee or holder.¹⁸ The certification of a check is equivalent to an acceptance thereof.¹⁹ Where it is shown to have been the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund.²⁰

case and several respectable courts have so decided, that such a check is an appropriation of the amount for which it is drawn of the funds of the drawer in the hands of the bank. *Roberts v. Austin, Corbin & Co.*, 26 Iowa 315; *Fogaties v. State Bank*, 12 Rich. (S. C.) Law, 518 (S. C., 78 Am. Dec. 468); *Munn v. Burch*, 25 Ill. 32; *German Savings Inst. v. Adae*, 1 McCrary C. C. 501. But however this doctrine may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment—a question which we do not here decide—we are of opinion, that, as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it or demand made upon it for its payment." *Laclede Bank v. Schuler*, 120 U. S. 511, 514, 30 L. Ed. 704.

The holder of a bank check or bill of exchange cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer. *Bank v. Millard*, 10 Wall 152, 19 L. Ed. 897; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 854; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Merchants' Nat. Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008.

The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. So held, where a check of the treasurer of the United States upon a national bank duly designated as a depository of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank. *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229.

The fact that the check was properly drawn on a national bank (a public depository) by an officer of the government in favor of a public creditor, does not alter this general rule. *Bank v. Millard*, 10 Wall. 152, 19 L. Ed. 897.

The rights of the parties are not changed by the fact that, on a settlement of accounts between the treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the bank. Such an error does not

affect the real state of the accounts; when it is discovered, they are open to correction. *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229.

18. Where subjects himself to liability.—*Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500; *Bank v. Millard*, 16 Wall. 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 854. See, also, *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424.

"A bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer, * * * where the bill has been accepted, whether it be drawn on general funds, or a specific fund, and whether the bill be, in its own nature, negotiable or not; for, in such a case, the acceptor, by his assent, binds and appropriated the funds for the use of the payee. And to this effect are the authorities cited at the bar. *Yeates v. Groves*, 1 Ves. jr. 280; *Gibson v. Minet*, per Eyre, C. J., 1 H. Bl. 569, 602; *Tatlock v. Harris*, 3 T. R. 174." *Mandeville v. Welch*, 5 Wheat. 277, 288, 5 L. Ed. 87.

19. See the title BANKS AND BANKING.

20. Intention and agreement of parties.—*Fourth St. Bank v. Yardley*, 165 U. S. 634, 653, 41 L. Ed. 854.

"Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice. This is but an application of the general doctrine of equitable assignments or liens announced by this court in *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, where it was held, citing various authorities and text writers, that: 'A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement.' It is immaterial, for the purposes of this case, to draw a line of distinction between equitable assignments and equitable liens

d. *Order or Draft*.—Where an order is drawn for the whole of a fund, it amounts to an equitable assignment of the fund.²¹ It has been held that an order drawn either on a general or a particular fund, for a part only, does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied, from the custom of trade, or the course of business between the parties, as a part of their contract.²²

or charges." *Fourth St. Bank v. Yardley*, 165 U. S. 634, 644, 41 L. Ed. 854.

The Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former \$25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing house which it could not meet "because its funds were in the city of New York," and exhibited a memorandum showing the amount to its credit with the Tradesmen's Bank to be in the neighborhood of \$27,000. In reliance upon such representations and the statements made supported by the memorandum exhibited, the Fourth Street Bank delivered to the Keystone Bank the certificates requested, and there was delivered a check for \$25,000 upon the Tradesmen's National Bank of New York. The draft in question was at once forwarded to the city of New York, and was presented for payment at the Tradesmen's Bank on the following morning, when payment was refused. At the time of presentment the Tradesmen's Bank had to the credit of the Keystone Bank \$19,725.62 in cash and collection items amounting to \$7,181.70, in all \$26,907.32. Of this amount \$18,056.21 had been remitted by the Keystone Bank on the day previous. It was held that as the Fourth Street Bank contracted and parted with its money on the faith of the representations of the Keystone Bank that there was to its credit, in the Tradesmen's Bank, a specific sum, and the fund which came into the hands of its voluntary assignee was the fund as to which the representations were made, the Keystone Bank and its assignee were in equity estopped from asserting, to the prejudice of the Fourth Street Bank, that the character and condition of the fund was otherwise than it was represented to be. *Fourth St. Bank v. Yardley*, 165 U. S. 634, 635, 41 L. Ed. 854.

21. *Order drawn for whole amount*.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166; *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032.

"If the county of Pontotoc, according to the requirements of the law, voted a

subscription to the stock of the railroad; the board of police levied a tax to pay for it; the tax was collected; and the president of the board instructed Bell, who was the sheriff, and had the money, to pay it to the agent of the company, who also demanded payment, then the liability of Bell is fixed, and he cannot be allowed to interpose collateral matters by way of defense. The money in the hands of Bell vested in the railroad corporation so soon as the president of the board of police drew the order, and, on presentation, he was obliged to pay." *Bell v. Mobile, etc., R. Co.*, 4 Wall. 598, 602, 18 L. Ed. 338.

22. *Order for part of fund*.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87, cited in *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166.

Until the parties receiving a consignment or a remittance, under such circumstances as those in this case, had done some act recognizing the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a privity between them, the property and its proceeds remained at the risk, and on the account of the remitter or owner. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234.

"The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract, that he shall be obliged to pay in fractions to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But in the present case, there is no proof of any presentment of the bills, much less of any acceptance by the defendant, to establish even a partial assignment of the debt. And if there were, it would still be necessary to show, that there was an assignment of the articles, as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the

The foregoing case, *Mandeville v. Welch*, was a common-law action,²³ and although approved in several cases, it cannot be considered a sound doctrine in equity, the rule being that an order to pay out of a specified fund operates as a valid assignment in equity and fulfills all the requirements of the law.²⁴ A draft drawn on a particular fund for a valuable consideration, amounts in equity to a valid assignment of so much of the funds.²⁵ Where the order is drawn and accepted by the drawee, there can be no question but what a valid partial assignment is created.²⁶ An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment pro tanto unless accompanied with such a relinquishment of control over the sum designated that the fund holder can safely pay it, and be compelled to do so, though forbidden by the drawer.²⁷

e. *Delivery of Certificate of Deposit*.—See ante, "By Delivery," II, A, 2.

f. *Power of Attorney*.—A power of attorney coupled with an interest may operate as an equitable assignment of the debt or fund.²⁸ In order to constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power.²⁹

4. **EXECUTORY AGREEMENT TO ASSIGN**.—Where the transferee is bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the property may have been actually delivered in to the posses-

sioner, the plaintiff undertakes to establish an assignment of the whole debt due by the articles; and if he fails in this, there is an end to his recovery." *Mandeville v. Welch*, 5 Wheat. 277, 288, 5 L. Ed. 87.

23. The suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor, and it was, therefore, unnecessary to consider, whether the remedy, if any, for the assignee, was at law or in equity. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234, speaking with reference to *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 89.

24. **Doctrine in equity**.—*Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 854. See post, "Partial Assignments," II, D, 8.

An order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *Trist v. Child*, 21 Wall. 441, 447, 22 L. Ed. 623.

25. **Draft on particular fund**.—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619.

26. **Order drawn and accepted**.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87, cited in *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166.

A employed B to collect a claim against the United States. Before its allowance, or the issue of a warrant for its payment, he drew, in favor of C, an order on B, payable out of any moneys coming into his hands on account of said claim. B accepted it, and D became the holder of it in good faith and for value. A refused

to recognize its validity after the warrant in his favor had been issued, or to indorse the latter. D thereupon filed his bill against A and B to enforce payment of the order. Held, that the order became, upon its acceptance, and in the absence of any statutory prohibition, an equitable assignment pro tanto of the claim. *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032.

27. **Relinquishment of control of sum assigned**.—*Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424. See ante, "Necessity for Actual Appropriation," II, A, 3, b.

28. **Power coupled with interest**.—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215.

29. **Interest must be in the subject matter**.—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See the titles **POWERS; PRINCIPAL AND AGENT**.

The following paper, viz: "The president or cashier of the Planters and Merchants' Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge, upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit"—imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title or interest in them. The circumstances of the case favor this construction. Lindsey had become personally responsible for a sum of money, which these debts were intended in part to meet. As an honest transaction, it would answer all purposes, if he had only a power to collect the debts. *Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215.

sion of the transferee. Such transaction is only an executory agreement to assign.³⁰

B. Necessary Elements—1. **ASSENT AND ACCEPTANCE BY ASSIGNOR AND ASSIGNEE.**—It is essential to an assignment that both the assignor and assignee should consent to it.³¹ The assent of an assignee is presumed unless his dissent be expressed.³²

2. **ASSENT AND ACCEPTANCE BY DEBTOR.**—The necessity for the consent of the party liable on the obligation or contract assigned has been treated elsewhere in this article.³³

3. **PROMISE OF DEBTOR TO PAY.**—At common law choses in action not being assignable, no action could be brought against the debtor by the assignee unless the debtor had promised to pay him the debt.³⁴ But if the debtor promise to pay

30. Executory agreement to assign.—*Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928; *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863; *French v. Hay*, 22 Wall. 231, 22 L. Ed. 799. See, also, the titles **SALES; VENDOR AND PURCHASER.**

In 1859 A lent to B, who was largely interested in an embarrassed railroad, \$5,000 to buy certain judgments against the road, and B having bought, in 1859 and the early part of 1860, judgments to the amount of \$31,000, assigned the whole of them to A, absolutely. Subsequently, that is to say, in August, 1860, A made a transfer (so called) of them to B, "upon B's payment of \$5,000, with interest from this date;" and gave to B a power of attorney of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. Held, that the so-called transfer was executory, amounting only to an offer that if B would pay the \$5,000, B should become owner of the judgments; and that B having, in May, 1861, gone South and joined the rebels there, and not come back till 1865, could not in 1868 file a bill, and on an allegation that A had collected the judgments, claim the proceeds, less the \$5,000 and interest. *French v. Hay*, 22 Wall. 231, 22 L. Ed. 799.

The case of *Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928, distinguishes this case and the transaction there is held to be a sale with reservation of security. The court say: "Tested by this rule, this instrument must be adjudged not a contract to sell, but a sale with reservation of security. Note the language of the instrument: 'which is sold.' Again 'which, though standing in my name, belongs to him.' These words imply nothing executory, but something executed. It is not that the vendor will sell, but has sold. Not that the title remains in the vendor, yet to be transferred, but that it already has been transferred. The ownership, equitable if not legal, is in the vendee. It is not that the stock belongs to the vendee, upon payment, as appeared in the case of *French v. Hay*, 22 Wall. 231, 22 L. Ed. 799, but that it is now his, subject to a lien. Its meaning is, therefore, that

of a sale, with retention of the legal title as security for purchase money. It is an equitable mortgage, and the rights created and assumed by it are like those created and assumed when the owner of real estate conveys by deed to a purchaser, and takes back a mortgage as security for the unpaid purchase money."

31. Assent of assignee and assignor.—*Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

The consent of the former owner need not be expressly given, but may be inferred from the circumstances of the transaction. *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

32. Assent presumed.—"In the absence of all evidence to the contrary, in the case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it. This principle was recognized and applied by this court in the case of *Thompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903, and had been before in *Brooks v. Marbury*, 11 Wheat. 78, 96, 6 L. Ed. 423. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him." *Grove v. Brien*, 8 How. 429, 439, 12 L. Ed. 1142.

In this case the manufacturer acted bona fide, in the transfer of the goods, for the purpose of securing a pre-existing debt of Gilmer. This being so, there was no necessity for Gilmer's expressing his assent to the transfer, in order to the vesting the title. The manufacturer was a competent witness. *Grove v. Brien*, 8 How. 429, 12 L. Ed. 1142. See the title **ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

33. Assent of debtor.—See ante, "Bill of Exchange or Check," II. A. 3, c; "Order or Draft," II. A. 3, d; post, "Contracts," II. D. 2, c, (3), (a).

34. Necessity for promise.—*Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234. See post, "Action in Name of Assignee," IV. C.

the debt to the assignee, the latter may maintain action against the debtor, as for money received to his use.³⁵

4. **CONSIDERATION.**—Assignments are subject to the same rules in reference to consideration as other contracts dealing with rights and interests in and title to property.³⁶

35. **Effect of promise to pay.**—"In *Tiernan v. Jackson*, 5 Pet. 580, 597, 8 L. Ed. 234, Mr. Justice Story, speaking for the court, said that 'the general principle of law is that choses in action are not at law assignable. But, if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independently of such promise, there is no pretence that an action can be sustained.' After referring to some adjudged cases, which he said were distinguishable from the one then before the court, he proceeded: 'They are either cases where there was an express promise to hold the money subject to the order of the principal, or there was an implied promise to pay it over as it was received to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defense for want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person.'" *Glenn v. Marbury*, 145 U. S. 499, 508, 36 L. Ed. 790.

"But it is said, that if a party agrees to hold money or goods, subject to the order of the owner, it raises an implied promise to the holder of the order, upon which he may maintain an action at law. The case of *Weston v. Barker*, 12 Johns. 276, has been relied on for this purpose. But in that case, the party receiving the money under the assignment, made an express promise to hold the same, subject, in the first place, to the demands of certain specified creditors, and next, the balance, subject to the order of the assignor. The court held, that in such case, the holder of the order subsequently drawn had a right to the money, as money had and received to his use; notwithstanding, there was a counterclaim, or set-off, of the assignee, accruing before the assignment." *Tiernan v. Jackson*, 5 Pet. 580, 596, 8 L. Ed. 234.

A shipment of tobacco was made at New Orleans, by the agent of the owner, consigned to a house in Baltimore, the shipment being for the account and risk of the owner, he being at the time indebted to the consignees for a balance of account; the owner of the shipment drew two bills on the consignees, and on the same day, made an assignment on the back of a duplicate invoice of the tobacco, in the following words: "I assign to James Jackson (the drawee of the bills)

so much of the proceeds of the tobacco alluded to in the within invoice, as will amount to \$2,400 (the amount of the two bills), to I & L \$600, etc., and Messrs. Tiernan & Sons (the consignees), will hold the net proceeds of the within invoice subject to the order of the persons above named as directed above;" the bills were dishonored. This assignment, by its terms, was not intended to pass the legal title in the tobacco, or its proceeds, to the parties; but to create an equitable title or interest only in the proceeds of the sale, for the benefit of the assignees; and they cannot maintain an action against the consignees, in their own name, for the same; the receipt of the consignment, by the consignees, did not create a contract, express or implied, on the part of the consignees, with the assignees, to hold the proceeds for their use, so as to authorize them to sue for the same. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234.

36. **Consideration.**—See *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203; *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619. See the titles **CONTRACTS; FRAUDULENT AND VOLUNTARY CONVEYANCES; GIFTS; SALES.**

Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203.

As to legality of consideration, see post, "Illegality of Consideration," II. F. 4. And see the title **ILLEGAL CONTRACTS.**

"The amount of the consideration is under some circumstances important in determining, whether within the rule on the subject, the purchaser paid value, for the amount paid may be so disproportionate to the real value of the security purchased that the claim to have paid value will be treated as a pretence and the security as having been obtained without paying anything for it; and if is also, and more commonly, important as bearing upon the question of notice and good faith. *King v. Doane* (139 U. S. 166, 35 L. Ed. 81). Here the judgment was for \$16,054, with interest at ten per cent. from November 12, 1883, and the amount paid was \$2,500. While there was evidence tending to show that the judgment was not worth its face, nevertheless the disproportion is so great as to form a signifi-

5. DELIVERY.—Actual delivery of the thing assigned is not always essential to the validity of assignment.³⁷ It seems that symbolical delivery is sufficient, even as against creditors and purchasers, where actual possession cannot be delivered.³⁸

6. NOTICE OF ASSIGNMENT—*a. Notice to Debtor*—(1) *Necessity for*.—If the obligee of a bond assigns it, notice ought to be given to the obligor, in order to prevent his paying the money to the person who has thus parted with his interest.³⁹ In order to perfect his title against the debtor, it is indispensable that the assignee of a chose in action should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.⁴⁰

cant element in the transaction. Moreover, it must be remembered that Hulburt was Baker's attorney, and had recovered the judgment in question as such. When, therefore, the attorney of record entertained, as his client's assignee, the offer of such a sum, the law imposed upon the proposed purchasers the burden of inquiry, and their conduct is to be tested accordingly." *Baker v. Wood*, 157 U. S. 212, 217, 39 L. Ed. 677.

As to stipulation for additional consideration on happening of certain contingencies, see *Cassell v. Carroll*, 11 Wheat. 138, 6 L. Ed. 438.

37. Necessity for delivery.—An assignment of a chose in action need not be accompanied by an actual delivery thereof. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

Strictly speaking, no person but the consignee can, by any indorsement on the bill of lading, pass the legal title to the goods; but if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 387, 7 L. Ed. 189.

The failure of George De Wolf to deliver to the assignee the copies of the bills of lading which were in his possession, did not leave the property subject to the attachment of creditors, who had no notice of the deed. *Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811.

In the case of *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189, it was decided, that the nondelivery of a vessel assigned to secure or pay a bona fide debt, did not make the assignment absolutely void: this court is

well satisfied with that opinion. *Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811.

"It has been suggested, that there could have been no delivery of the bonds to the obligees, and hence none of them to the plaintiff, so as to bind the defendant. But the obvious answer is, that all the parties, except Craig, were competent to make delivery, and as he joined in the assignment, it is not for him to set up the objection for the purpose of invalidating his own act. The inchoate or imperfect delivery as to him in the first instance, rising out of his double relation to the instruments, became complete by his joining in the assignment and delivery to the plaintiff." *Bradford v. Williams*, 4 How. 576, 587, 11 L. Ed. 1109.

38. Sufficiency of delivery.—*Harris v. DeWolfe*, 4 Pet. 147, 7 L. Ed. 811; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

"In the case of *Spain v. Hamilton*, 1 Wall. 604, 624, 17 L. Ed. 619, this court says: * * * 'The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity.' * * * The same principle is also laid down in *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Story's Eq. Jur.*, §§ 1047, 1057, 1035a." *Laclede Bank v. Schuler*, 120 U. S. 511, 516, 30 L. Ed. 704.

39. Notice of assignment of bond.—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282. See the title BONDS.

40. Assignment of chose in action.—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704. See, also, *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231. See *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

When the transfer is of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor, the fund holder is bound from the time of notice. *Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762.

A check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise. Checks drawn afterwards may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice.⁴¹

(2) *By Whom Given*.—The assignee of chose in action should immediately give notice to the debtor of the assignment.⁴²

b. *Notice to Subsequent Assignee*.—There is no positive law that requires a first assignee to notify a subsequent one.⁴³

7. **FILING AND RECORDING**.—The necessity for filing and recording assignments depend altogether upon statutory provision.⁴⁴ Third parties are not bound by notice of instruments recorded in a public office of the state, where the statute makes no provision for the recording of such instruments in that office.⁴⁵

8. **NECESSITY FOR SEAL—ASSIGNMENT BY CORPORATION**.—The absence of the corporate seal from a contract of assignment does not render it invalid or void.⁴⁶

41. **Notice by presentation**.—*Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704. See ante, "Bill of Exchange or Check," II, A, 3, c; "Order or Draft," II, A, 3, d.

42. **By whom given**.—*Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 764; Note to Withers v. Green, 9 How. 213, 13 L. Ed. 109; *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234.

43. **Notice to subsequent assignee**.—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282.

44. **Filing and recording**.—"There must be a law which provides for their record, either in express terms or by plain and necessary implication from the words stated. Where the statute does not so provide, it is not necessary nor is it the duty of the assignee to record or file his assignment. There must be some legal duty imposed upon the assignee before the necessity arises for the recording of the assignment." *National Live Stock Bank v. First Nat. Bank*, 203 U. S. 296, 310, 51 L. Ed. 192.

"There are statutory provisions for recording assignments of real estate mortgages to be found in the Kansas statutes. See paragraph 19, § 4234, and paragraph 26, § 4241, General Statutes of Kansas for 1901, by Dassler. Paragraph 19, above, provides for the acknowledgment of assignments of real estate mortgages by the assignor, and paragraph 26 provides that on presentation of such assignment for record it shall be entered upon the margin of the record of the mortgage by the register of deeds, who is to attest the same, as therein provided. Now, in relation to chattel mortgages and the assignment thereof, there is no such provision or anything similar to it. Provision is made for the satisfaction of a chattel mortgage when paid by the mortgagee, assignee, etc., but that does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee." *National Live*

Stock Bank v. First Nat. Bank, 203 U. S. 296, 307, 51 L. Ed. 192.

"In many cases the question has arisen in regard to the recording of assignments of mortgages upon real estate, where the states had provided for the recording of such assignments, and where, in the absence of such recording, the assignee has failed in obtaining priority of rights under his mortgage, which he would have had if the assignment had been recorded. But as the owner of the cattle mentioned herein resided in Kansas at the time the mortgages were given, and the cattle were then in that state, and the mortgages were filed there, the transactions are to be judged of with reference to the law of that state, and we decide this question with reference to such law. Under that law the assignee of the first mortgage of June, 1900, has a superior lien to the assignee of the second mortgage of April, 1901, although such assignee of the first mortgage did not have his assignment recorded." *National Live Stock Bank v. First Nat. Bank*, 203 U. S. 296, 310, 51 L. Ed. 192. See, generally, the title **RECORDING ACTS**.

Recording assignment of patents.—See the title **PATENTS**.

45. **Third parties not bound**.—"And when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contractor before the substitution." *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578. See the title **RECORDING ACTS**.

46. **Seal**.—"A corporation may bind itself by a contract not under its corporate seal, when the law does not require the contract to be evidenced by a sealed instrument. *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Fleckner v. Bank*, 8 Wheat. 338, 5 L. Ed. 631; *Andover, etc., Turnpike Corporation v. Hay*, 7 Mass. 102; *Dunn v. The Rector, etc., of St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Kenedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.)

C. Parties to Assignment.—An assignment being a contract, the general rules as to parties to contracts necessarily apply.⁴⁷ An assignee is "one to whom an assignment has been made."⁴⁸ Assignees are of two classes, depending upon the manner of their creation; first, voluntary assignees; and, second, assignees created by operation of law.⁴⁹ The government may be the assignee of instruments negotiable or otherwise.⁵⁰ An assignor is "one who makes an assignment; one who transfers property to another."⁵¹ Assignments may be made by administrators, executors,⁵² distributees,⁵³ and partners,⁵⁴ and equitable interests

367; *Stanley v. Hotel Corporation*, 13 Me. 51. Even the parol contracts of a corporation made by its duly authorized agent are binding. *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043; *Fleckner v. Bank*, 8 Wheat. 338, 5 L. Ed. 631." *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851. See the titles CORPORATIONS; SEALS AND SEALED INSTRUMENTS.

47. Parties to assignment.—See the title CONTRACTS.

48. Assignee or assigns.—*Bouvier's Law Dict.*, vol. 1, p. 179.

"Whatever difficulties may be suggested, on the technical meaning of the term 'assignment,' it is very clear, that he who acquires a chose in action, by mere delivery, has been recognized in the laws of the United States as an assignee." *Bank v. Planters' Bank*, 9 Wheat. 904, 913, 6 L. Ed. 244.

As to who are assignees within the meaning of the section of the judiciary act, which restrains the circuit court from taking cognizance of any suit on any promissory note, or other chose in action in favor of an assignee, only as the suit might have been brought in such court when such assignment had not been made, except in cases of foreign bills of exchange, see the title COURTS.

Assignee of patent.—"An assignee is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest, throughout the United States." *Moore v. Marsh*, 7 Wall. 515, 520, 19 L. Ed. 37. See the title PATENTS.

49. Classified.—"Whether in a given case an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a bona fide purchaser with respect thereto. Upon the other

hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale. *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174." *Hoffeld v. United States*, 186 U. S. 273, 276, 46 L. Ed. 1160. See, also, *Corbin v. Black Hawk County*, 105 U. S. 659, 666, 26 L. Ed. 1136. See ante, "Definitions, Distinctions and General Considerations," I.

50. The government as assignee.—*United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585.

51. Assignor.—*Bouvier's Law Dict.*, vol. 1, p. 182.

52. Executors and administrators.—"The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another state, if the debts are negotiable promissory notes, or if the law of the state in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper v. Butler*, 2 Pet. 239, 7 L. Ed. 419; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. 252, 258, 260; *Peterson v. Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state. *Barrett v. Barrett*, 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425." *Wilkins v. Ellett*, 108 U. S. 236, 259, 27 L. Ed. 718.

An assignment of an interest in a patent may be made by an executor de son tort, in Texas, which will convey a valid title to the assignee, if not repudiated by the executor or administrator of the inventor when duly appointed, or by his children. *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138. See the title EXECUTORS AND ADMINISTRATORS.

53. The distributees of the payee of a note who dies, may, where there are no creditors, and no administration is granted on his estate, transfer the note to an assignee, so as to vest in him the equitable title. *Wood v. Weimar*, 104 U. S. 786, 787, 26 L. Ed. 779.

54. An assignment by one partner, in

may be assigned by foreign residents.⁵⁵ Corporations may make assignments as other individuals.⁵⁶ A husband may assign choses in action belonging to his wife.⁵⁷

Assignment of Goods in Shipment.—See ante, "Delivery," II, B, 5.

D. Subject Matter of Assignment.—1. IN GENERAL.—The rule at common law has been much relaxed or almost disregarded, by the courts of equity, which, from a very early period, have held that assignments for valuable consideration, of a mere possibility, are valid, and will be carried into effect upon the same principle as they enforce the performance of an agreement, when not contrary to their own rules or to public policy.⁵⁸ Mere equitable interests,⁵⁹ expectancies,⁶⁰ and contingent claims, however remote the possibility of realizing upon them, may be assigned.⁶¹ The debt or fund as to which such an equitable assignment can

the name of the copartnership, of the partnership effects and credits, is valid. *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 104. See the title PARTNERSHIP.

55. Foreign residents.—The laws of Louisiana do not prohibit the assignment of equitable interests in the state by residents of other states. *Black v. Zacharie Co.*, 3 How. 483, 11 L. Ed. 690.

56. Corporations.—*Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

The national currency act of 1864, authorizing the banks created under it to buy and sell coin, a bank having coin in pledge may sell and assign its special property; in which case the assignee will become vested with the legal rights of the assignor. *Merchants' Nat. Bank v. State Bank*, 10 Wall. 604, 605, 19 L. Ed. 1008.

"The assignment under consideration purports on its face to be the contract of the Barrel Pitching Machine Company. It declares that the consideration has been received by the company; that it is executed in pursuance of a resolution passed by the company; and it purports to be signed by Smith, president of the company, who declares that he signs it as the act of the company. It would be an absurdity to hold that this instrument is the individual contract of Smith, and not of the Barrel Pitching Machine Company." *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

57. Husband.—*Cassell v. Carroll*, 11 Wheat. 135, 134, 6 L. Ed. 438. See the title HUSBAND AND WIFE.

58. In general.—*Hinkle v. Wanzer*, 17 How. 353, 367, 15 L. Ed. 173.

59. Equitable interests.—Where a debtor pledged certain notes as security, his equitable interest in a judgment recovered upon one of them may be validly assigned. *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173.

The laws of Louisiana do not prohibit the assignment of equitable interests in the state by residents of other states. *Black v. Zacharie Co.*, 3 How. 483, 11 L. Ed. 690. See post, "Equitable Title," II, D, 3, a.

60. Expectancies.—*Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173.

"It has been expressly ruled, that a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment or in personal estate, as presumptive next of kin, is assignable in equity. *Hobson v. Trevor*, 2 P. Wms. 191; *Wethered v. Wethered*, 2 Sim. 183; *Smith v. Baker*, 1 Younge & Coll. C. C. 223; *Carleton v. Leighton*, 3 Meriv. 671; *Hinde v. Blake*, 3 Beav. 235. The numerous authorities upon this point are collated in the second volume of *White & T. Lead. Cas. in Eq.*, in the note of the editors upon the cases of *Row v. Lawson*, and *Ryall v. Rowles*, p. 204, et seq. A decision which bears very directly upon the case before us is that by Sir James Wigram, vice chancellor, of *Kirwin v. Daniel*, 5 Hare 500, in which it was ruled: 'That where a creditor, in whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and debtor to, the creditor.'" *Hinkle v. Wanzer*, 17 How. 353, 368, 15 L. Ed. 173.

61. Contingent claims.—The claim of a surety for reimbursement out of the assets of an insolvent principal, which consists chiefly of a claim under a treaty with a foreign nation, though contingent, is an assignable interest, however remote the probability of realizing upon it. *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86.

Where a claimant upon a foreign government assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203.

"As respects the validity of assignments of claims like the one here presented, no question can be raised at this day, as such assignments have been recognized by the various boards of commissioners and the courts of justice for many years. The case of *Comegys v.*

be made, must be some recognized or definite fund or debt, in the hands of a person who admits the obligation to pay the assignor; or, at least, it must be some liquidated demand, capable of being enforced in a court of justice.⁶²

2. *CHOSSES IN ACTION*.—a. *Common and Civil Law*.—The general principle both of the common and civil law is that choses in action are not assignable,⁶³ except at common law an assignment of choses in action might be made to the king.⁶⁴ And a fee farm rent, being an estate of inheritance, is an exception from the general rule, that choses in action cannot be transferred, and stands upon the ground of being, not a mere personal debt, but a perdurable inheritance.⁶⁵ The transfer of a mere right to recover was forbidden as violating the rule against champerty and maintenance.⁶⁶

But under the civil law, by the invention of a fiction, the assignment of choses in action was attained.⁶⁷

b. *In Equity*.—The common-law rule has been much relaxed, or almost disregarded, by the courts of equity, which, from a very early period, have held that assignments for valuable consideration, of a mere possibility, are valid and will be carried into effect upon the same principle as they enforce the performance of an agreement, when not contrary to their own rules or to public policy.^{67a}

Vasse (1 Pet. 193, 7 L. Ed. 108), also adjudged this point." *Judson v. Corcoran*, 17 How. 612, 614, 15 L. Ed. 231. See, also, *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

62. *Debt or fund assignable*.—*Kendall v. United States*, 7 Wall. 113, 116, 19 L. Ed. 85.

A claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, cannot be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them. *Kendall v. United States*, 7 Wall. 133, 19 L. Ed. 85.

At common and civil law.—*Mandeville v. Welsh*, 1 Wheat. 233, 4 L. Ed. 79; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *United States v. Loughrey*, 172 U. S. 206, 43 L. Ed. 420; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Lewis v. Harwood*, 6 Cranch 82, 3 L. Ed. 160; *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Martin v. Ihmsen*, 21 How. 394, 395, 16 L. Ed. 134.

63. *Choses in action not commercial instruments*, are not generally assignable at common law. *United States v. Gillis*, 95 U. S. 407, 412, 24 L. Ed. 503.

"A chose in action is not assignable so as to authorize the assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia." *Glenn v. Marbury*, 145 U. S. 499, 509, 36 L. Ed. 790.

"To choses in action, it can scarcely be necessary here to remark, assignability is imparted by statutory enactment only,

or by commercial usage." Dissenting opinion, *Daniel, J. Gayler v. Wilder*, 10 How. 477, 504, 13 L. Ed. 504.

64. *Assignment to king*.—In England, any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name; no valid objection is perceived against giving the same effect to an assignment to the government of this country. *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585.

65. *Fee from rent*.—*Scott v. Lunt*, 7 Pet. 596, 8 L. Ed. 797.

66. *Mere right to recover*.—*Hager v. Swayne*, 149 U. S. 242, 37 L. Ed. 719. See the title CHAMPERTY AND MAINTENANCE.

67. *Under the civil laws*, a creditor who wished to transfer his right of action to another person, constituted the other person his attorney, and stipulated, that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person. *Mandeville v. Welsh*, 1 Wheat. 233, 4 L. Ed. 79.

67a. *In equity*.—*Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Mandeville v. Welsh*, 1 Wheat. 233, 4 L. Ed. 79; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 854; *Graham v. La Crosse R. Co.*, 102 U. S. 148, 26 L. Ed. 106; *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 104; *Hinkle v. Wanzler*, 17 How. 353, 367, 15 L. Ed. 173.

An assignment for good consideration of claims to be established against a foreign government is valid in equity, although made before the establishment of the claim, and creation of the fund, to the

c. *Modern Doctrine*—(1) *In General*.—Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law.⁶⁸ Although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy.⁶⁹ A great many choses in action are now made assignable by statute.⁷⁰

extent of the assignment. *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

68. *Modern doctrine*.—*Mandeville v. Welsh*, 1 Wheat. 233, 4 L. Ed. 79. See *Bank v. Tyler*, 4 Pet. 366, 7 L. Ed. 888; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 597, 29 L. Ed. 997.

Courts of common law now consider an assignment of a chose in action as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee. *Mandeville v. Welsh*, 1 Wheat. 233, 237, 4 L. Ed. 79.

Courts of law will not give effect to a release procured by the defendant, under a covinous combination with the assignor, in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. *Mandeville v. Welsh*, 1 Wheat. 233, 236, 4 L. Ed. 79.

69. *Assignment opposed to law or public policy*.—*Hager v. Swayne*, 149 U. S. 242, 37 L. Ed. 719.

"An assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void as contrary to public policy and savoring of maintenance. But when property is conveyed, the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void." *Traer v. Clews*, 115 U. S. 528, 539, 29 L. Ed. 467. See the title CHAMPERTY AND MAINTENANCE.

"There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against champerty and maintenance (see 2 Story Eq. 1049, 1054); nor will the want of a full money consideration, as between father and son, and brother and brother, subject the transaction to such imputation, without further proof." *Lewis v. Bell*, 17 How. 616, 617, 15 L. Ed. 203.

Where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good consideration, the assignee was en-

titled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights. *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203.

A sale by a stockholder of his claims against the dissolved corporation, on account of his stock is not void, because the vendee may be compelled to bring suit to enforce his rights. *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

These considerations are opposite in arriving at the true construction of §§ 2931 and 3011 (Rev. Stat.) and we are clear that the action provided for (to recover back an excess of duties paid) cannot be maintained by a stranger, suing solely in virtue of a purchase of claims from those who did not see fit to prosecute them themselves. *Hager v. Swayne*, 149 U. S. 242, 37 L. Ed. 719.

"That a stranger, suing solely on an assignment of a claim from those who did not see fit to prosecute it themselves, cannot recover duties averred to have been illegally assessed, is settled by *Hager v. Swayne*, 149 U. S. 242, 37 L. Ed. 719. That case, however, has no application to the present one because the facts of the two are different. Indeed, in *Hager v. Swayne*, reference was made to this case as then reported, 40 Fed. Rep. 531, and we said: 'Castro had purchased the merchandise of the importer while it was in bond, and pending an appeal, and after the decision of the appeal paid the duties assessed in order to obtain possession of the property, and thereupon brought the suit. * * * the purchaser obtained an interest in the thing itself' thus plainly distinguishing between the case of an assignment of a claim, as exemplified in *Hager v. Swayne*, and the case of an assignment of the thing, such as is here involved." *Seeberger v. Castro*, 153 U. S. 32, 34, 38 L. Ed. 624.

70. *Bonds*.—The statute of Florida provides that bonds may be assigned. *Bradford v. Williams*, 4 How. 576, 11 L. Ed. 1109.

The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit

(2) *Test of Assignability*.—In general it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment;⁷¹ and that vested rights *ad rem* and in re, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment.⁷²

(3) *Particular Choses in Action*—(a) *Contracts*.—A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests an intention of the parties to it that it shall not be assignable,⁷³ whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.⁷⁴ Certain classes of contracts

of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment. *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a bona fide holder. *Bradford v. Williams*, 4 How. 576, 11 L. Ed. 1109.

A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia. Bonds which require particular breaches to be assigned, damages on which were to be estimated or liquidated by a jury, do not appear to have been contemplated. *Lewis v. Harwood*, 6 Cranch 82, 3 L. Ed. 160. See the title BONDS.

Rights of action for trespasses upon land or infringements of patent.—"Neither a deed of land nor an assignment of a patent for an invention carries with it a right of action for prior trespasses or infringements. Such rights of action are, it is true, now assignable by the statutes of most of the states, but they only pass with a conveyance of the property itself where the language is clear and explicit to that effect. 1 *Chitty on Pleading*, 68; *Gardner v. Adams*, 12 Wend. 297, 299; *Clark v. Wilson*, 103 Mass. 219, 223; *Moore v. Marsh*, 7 Wall. 515, 9 L. Ed. 37; *Dibble v. Augur*, 7 Blatchf. 86; *Merriam v. Smith*, 11 Fed. Rep. 588; *May v. Juneau County*, 30 Fed. Rep. 241; *Kaolatype Engraving Company v. Hoke*, 30 Fed. Rep. 444." *United States v. Loughrey*, 172 U. S. 206, 211, 43 L. Ed. 420.

71. Test of assignability.—*Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

72. Vested rights.—*Comegys v. Vasse*, 1 Pet. 193, 213, 7 L. Ed. 108; *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed.

1065; *Williams v. Heard*, 140 U. S. 529, 543, 35 L. Ed. 550.

"In *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065, Mr. Justice Field, who delivered the opinion of the court, said: 'Claims for compensation for the possession, use, or appropriation of tangible property constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation or the doubtful result of an appeal to the legislature,' p. 396. And see *McMahon v. Allen*, 35 N. Y. 403, decided in the state where the assignment in question was made; *Weire v. The City of Davenport*, 11 Iowa 49; and *Gray v. McCallister*, 50 Iowa 498, decided in the state where the suit was brought. See, also, a discussion of the subject in *Graham v. La Crosse R. Co.*, 102 U. S. 148, 26 L. Ed. 106." *Traer v. Clews*, 115 U. S. 528, 540, 29 L. Ed. 467.

The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes, by cession, to the use of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

73. Contracts in general.—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246; *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674; *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578.

74. Intention of parties.—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246.

"Upon this the defendant invokes the rule laid down in *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246, and insists that the contract was of such a nature that it could not be assigned by the Gas Illuminating Company to plaintiff without the consent of defendant, which consent was positively refused. But that doctrine has no application under the circumstances of this

are from their nature not susceptible of assignment.⁷⁵ For example, an agreement on the part of the contracting parties that one shall not assign the contract in whole or in part without the consent of the other in writing, is binding, not only on the parties to the contract, but upon all parties seeking to acquire rights thereunder.⁷⁶ So when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract.⁷⁷ And the fact that that party is or represents a municipal corporation may have a bearing upon the question whether the contract is assign-

case. Defendant could not accept these goods from the plaintiff, and then refuse to pay for them. It is immaterial whether there was an assignment from the Gas Illuminating Company to the plaintiff or not, or whether, if there was one, it was ever assented to by the defendant or not. When the defendant ordered the goods from the Gas Illuminating Company, and the plaintiff forwarded the goods upon that order, the defendant might have returned them, and declined to have any dealings with the plaintiff; but it could not accept the goods and use them, and then say it never ordered the goods from the plaintiff, never had any contract with it, and never assented to any assignment to the plaintiff of its contract with the Illuminating Company." *Cincinnati, etc., Gas Co. v. Western Siemens, etc., Co.*, 152 U. S. 200, 202, 38 L. Ed. 411.

75. *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246; *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674; *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578.

76. **Contracts stipulating against assignment.**—*Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578, citing *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

77. **Contracts involving personal trust.**—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246; *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674; *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578.

"The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pollock on Contracts* (4th Ed.) 425." *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 388, 32 L. Ed. 246.

"But everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. In the familiar

phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' *Humble v. Hunter*, 12 Q. B. 310, 317." *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 387, 32 L. Ed. 246.

"The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted. The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract

able, in whole or in part, without its assent.⁷⁸ Of course where one party to a contract consents to its assignment by the other, he is estopped to assert that it was nonassignable.⁷⁹

Implied contracts are not, by law, assignable.⁸⁰

(b) *Judgments and Decrees*.—See the title JUDGMENTS AND DECREES.

(c) *Claims against United States*.—See the title UNITED STATES.

(d) *Claims against Foreign Governments*.—A claim against a foreign government may be assigned,⁸¹ even before the establishment of the claim and creation of the fund for the settlement thereof.⁸²

(e) *Insurance Policies*.—As to the assignment of insurance policies, see the insurance titles throughout this work.

(f) *Liens*.—See the titles MECHANICS' LIENS; VENDOR'S LIEN.

(g) *Bonds*.—See the title BONDS. And see ante, "In General," II, D, 2, c, (1).

(h) *Bills of Lading*.—See the title BILL OF LADING.

3. **INTERESTS IN LANDS**—a. *Equitable Title*.—The equitable title to land, being distinct from the legal title, may be assigned.⁸³

b. *Right to Enter or Purchase Public Land*.—At common law a right of entry was clearly not assignable,⁸⁴ but the right to purchase and acquire title to a part of the public domain is assignable.⁸⁵

to a stranger. The technical rule of law, recognized in *Murray v. Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case." *Arkansas Val. Smelting Co. v. Belden*, Min. Co., 127 U. S. 379, 388, 32 L. Ed. 246.

78. **Municipal corporations**.—*Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674. See post, "Partial Assignment," II, D, 8.

79. See post, "Estoppel or Waiver," II, F, 7.

80. "This right is founded on an implied contract, which is not, by law, assignable. Yet, if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived, why such an interest should not, as well as an interest in any other chose in action, be transferable in equity. And if it be so transferable, equity will, of course, afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder, as effectually as he could defend himself against his immediate assignee in a suit at law." *Riddle v. Mandeville*, 5 Cranch 322, 331, 3 L. Ed. 114. See, generally, the title IMPLIED CONTRACTS.

81. *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

82. *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86; *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231. See, also, *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

83. **Equitable title**.—"H's equitable ti-

tle being distinct from the legal title in controversy between O and K, no reason existed why it should not be the subject of a bona fide sale, and transfer by deed, in like manner that a mortgagor's equity may be sold and conveyed. After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. And that is substantially the case the bill makes; for after Hubbard satisfied Schram's bond made for title by Knab and Butler, Knab held the naked legal title, with an undoubted right in Hubbard to call for its surrender. And his assignee stands on the same footing. (4 Kent's Com., 157.) And so the statutes of Wisconsin in effect provide. (Revised Statutes of 1849, ch. 59, § 7; ch. 77, §§ 6, and 7.)" *Smith v. Orton*, 21 How. 241, 244, 16 L. Ed. 104.

84. **Right of entry**.—"At the common law, a right of entry is clearly not grantable or assignable. The party has, in the sense of the common law, no estate in lands of which he is disseised; but his estate is said to be turned to a right, and can be recoverable only by an entry or an action. In the meantime, he has not any estate in the lands, but he has merely the right to the estate. For this doctrine, it is necessary to do no more than to refer to Littleton, § 347; Co. Litt. 214, 345 a, b; Preston on Estates 20, and Com. Dig. Assignment, C, 1-3; and Grant, D. (a) Unless it shall appear, that the common law has been differently construed in New York, or altered by some local statute, the same rule must be presumed to prevail there; for, by the constitution of that state, the common law forms the basis of its jurisprudence." *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 176, 7 L. Ed. 617, dissenting opinion by Story, J. See the title PUBLIC LANDS.

85. **Right to purchase**.—"It would seem

c. *Land Warrants*.—See the title PUBLIC LANDS.

4. *PATENTS AND TRADEMARKS*.—See the titles PATENTS; TRADEMARKS, TRADE-NAMES AND UNFAIR COMPETITION.

5. *LICENSES*.—A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensee, and is not transferable by him to another.⁸⁶

6. *INTEREST OF PLEDGEE*.—See the title PLEDGE AND COLLATERAL SECURITY.

7. *STATUTORY RIGHTS*.—The assignability of rights conferred by statute depends in each case upon the nature of the right and the context of the statute.⁸⁷

that if a right to purchase land for however short a period is vested in one, it is a valuable right, and is, in that sense, property, and in the absence of express prohibition would be therefore assignable. Such is apparently the import of language used by the supreme court of the state in some of its decisions. *White v. Martin*, 66 Texas 340; *Jumbo Cattle Co. v. Bacon*, 79 Texas 5." *Telfener v. Russ*, 145 U. S. 522, 533, 36 L. Ed. 800. See the title PUBLIC LANDS.

86. *License*.—*Troy Iron, etc., Factory v. Corning*, 14 How. 193, 14 L. Ed. 383; *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 27 L. Ed. 862; *Haggood v. Hewitt*, 119 U. S. 226, 234, 30 L. Ed. 369; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 195, 37 L. Ed. 1049. See *Hammond v. Mason, etc., Co.*, 92 U. S. 724, 23 L. Ed. 767.

"It (a license) is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it." *De Haro v. United States*, 5 Wall. 599, 627, 18 L. Ed. 681. See the title LICENSE (REAL PROPERTY).

87. *Statutory rights*.—"The exemption from taxation, created by the 18th section of the internal improvement act of 1855, is, in every respect, similar to that which was declared in *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860, to be not assignable. No words of assignability are used by the legislature of the state in the language creating it, and, from its nature and context, it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and employees, and that all alike were privileges personal to the corporation or to individuals connected with it, entitled to them by the terms of the law." *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 250, 27 L. Ed. 922.

Franchises.—"The ground upon which this view of the defendant is based is that the franchises of a railroad corporation are inalienable in Louisiana. In passing upon this question it is necessary to bear in mind the distinction between the differ-

ent classes of railroad franchises. This was stated by Mr. Justice Curtis in the case of *Hall v. Sullivan Railroad Co.*, 21 Law Reporter 138; S. C., 2 Redfield Am. Railway Cas. 621; 1 Brunner 613, where he said: 'The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable.' " *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 507, 29 L. Ed. 244.

"The same subject was considered by this court in the case of *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860, where it was held that exemption from taxation was a right personal to the railroad corporation to which it was granted, and did not pass upon a sale of its property and franchises. Mr. Justice Field, who delivered the opinion of the court, distinguished such an immunity from taxation from those rights, privileges and immunities which, accurately speaking, are the franchises of a railroad company. He said: 'The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value. * * * They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of these. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction.' " *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 508, 29 L. Ed. 244.

"The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held, that when a mortgage on a railroad and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the

8. **PARTIAL ASSIGNMENTS.**—That a partial assignment of a chose is of no effect so far as the debtor is concerned, unless it receive the consent or ratification of the debtor, it seems, is a well-established rule in courts of law;⁸⁸ but the owner of a chose in action or of property in the custody of another may assign a part of such rights, and an assignment of this nature, if made, will be enforced in equity.⁸⁹ A partial assignment of a contract with a municipal corporation to build a public building is not binding on the municipal corporation unless assented to by it.⁹⁰ The reason is that a creditor will not be permitted to split up a single cause of action into many actions, where the debtor does not assent.⁹¹

9. **TORTS.**—See ante, "Test of Assignability," II, D, 2, c, (2).

E. Tender of Assignment.—The tender of assignment of a contract, in the performance of a contract to assign, is not vitiated by a recital in the assignment of a release of all demands by the assignee to the assignor, where such release would not impair the rights of the assignee.⁹²

main value of the property by the destruction of its franchises." *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 509, 29 L. Ed. 244. See, generally, the title **CORPORATIONS**.

88. Partial assignments.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234.

The purchaser of tickets in a lottery, authorized by an act of congress, has a right to sell any portion of such ticket, less than the whole; the party to whom the sale has been made would thus become the joint owner of the ticket thus divided, but not a joint owner by virtue of a contract with the corporation of Washington, but with the purchaser in his own right, and on his own account; the corporation promise to pay the whole prize to the possessor of the whole ticket, but there is no promise on the face of the whole ticket, that the corporation will pay any portion of a prize to any subholder of a share; and it is not in the power of a party, merely by his own acts, to split up a contract into fragments, and to make the promisor liable to every holder of a fragment for a share. *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166.

The plaintiff was the owner of a half ticket in "the fifth class of the National Lottery," authorized by the charter granted by congress to the city of Washington; the number of the original ticket was 5591, which drew a prize of \$25,000; the whole ticket was in the hands of Gillespie, to whom all the tickets in the lottery had been sold by the corporation of Washington; and his agent issued the half ticket, which was signed by him, as the agent of Gillespie, the purchaser of all the tickets in the lottery; after the drawing of the prize, and before notice of the interest of any other person in the ticket No. 5591, Gillespie returned the original ticket to the managers or commissioners of the lottery, and the agents of the corporations, and received back from the corporation an equivalent to the value of the prize drawn by it, in securities de-

posited by him with the corporation for the payment of the prizes in the lottery: Held, that the corporation of Washington were not liable for the payment of half of the prize drawn by ticket No. 5591, to the owner of the half ticket. *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166.

89. In equity.—*Trist v. Child*, 21 Wall. 441, 447, 22 L. Ed. 623; *Peugh v. Porter*, 112 U. S. 737, 742, 28 L. Ed. 859; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 644, 41 L. Ed. 854. See ante, "Order or Draft," II, A, 3, d.

90. Municipal contracts.—It is against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons, to which they have never assented. *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674.

Where a party who had contracted with a county to build a jail building assigned to a third person the obligation to do the iron work upon the jail, and the right to recover therefor from the commissioners \$7,700 according to the terms of the original contract, and the assignee did the work to the satisfaction of the commissioners, but not within the time stipulated in the original contract, it was held that the assignment, if not assented to by them, did not render them liable to the assignee although the county officers knew of the assignment. *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674. See ante, "Contracts," II, D, 2, c, (3), (a).

91. Splitting cause of action.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Kendall v. United States*, 7 Wall. 113, 19 L. Ed. 85; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166. See, also, *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762.

92. Hepburn v. Auld, 5 Branch 262, 274, 3 L. Ed. 96. See, also, *Hepburn v. Dunlop*, 1 Wheat. 184, 4 L. Ed. 63. See, generally, the titles **CONTRACTS**; **TENDER**.

F. Validity—1. ASSIGNOR MUST HAVE INTEREST IN SUBJECT MATTER.—An assignment of property in which the assignor has no interest is void.⁹³

2. CHAMPERTY AND MAINTENANCE.—See ante, "Choses in Action," II, D, 2.

3. LEGALITY OF OBJECT ASSIGNED.—A valid assignment may be made of an interest arising out of an illegal contract.⁹⁴

4. LEGALITY OF CONSIDERATION.—See the title ILLEGAL CONTRACTS.

5. INTENT OR MOTIVE.—The motive of the assignor cannot affect the validity of the conveyance.⁹⁵

6. FRAUD OR MISTAKE.—Fraud or mistake in connection with an assignment vitiates as it does all other transactions.⁹⁶

93. Assignor without interest.—See *Stockton v. Ford*, 18 How. 418, 15 L. Ed. 395; *S. C.*, 11 How. 232, 13 L. Ed. 676.

In 1816, an association called the Baltimore Company, was organized in Baltimore, for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See *Gill v. Oliver*, 11 How. 529, 13 L. Ed. 799, and *Williams v. Oliver*, 12 How. 111, 13 L. Ed. 915. One of the shareholders having become insolvent, in 1819, his trustee sold the share in 1825. The original transaction being illegal, the share could not be considered, by the laws of Maryland, as property passing by the insolvency to the trustee. Consequently, the sale by the trustee passed nothing to the assignee. The court of appeals of Maryland so decided, and this court adopts their construction of their own laws. *Williams v. Gibbs*, 17 How. 239, 15 L. Ed. 135; *Gooding v. Oliver*, 17 How. 274, 15 L. Ed. 148.

94. Illegal contract.—*McBlair v. Gibbs*, 17 How. 232, 15 L. Ed. 132. See, also, *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; *Gridley v. Westbrook*, 23 How. 503, 16 L. Ed. 412; *Planter's Bank v. Union Bank*, 16 Wall. 483, 500, 21 L. Ed. 473. See *Kinsman v. Parkhurst*, 18 How. 289, 294, 15 L. Ed. 385; *McMicken v. Perin*, 18 How. 507, 510, 15 L. Ed. 504; *Brooks v. Martin*, 2 Wall. 70, 81, 17 L. Ed. 732; *Armstrong v. American Nat. Bank*, 133 U. S. 433, 469, 33 L. Ed. 747. See the title ILLEGAL CONTRACTS.

In 1816 an association, called the Baltimore Company, was organized in Baltimore for the purpose of furnishing advances and supplies in fitting out a military expedition under General Mina, against Mexico, then a part of the dominions of the King of Spain. See *Gill v. Oliver*, 11 How. 529, 13 L. Ed. 799, and *Williams v. Oliver*, 12 How. 111, 13 L. Ed. 915; *Deacon v. Oliver*, 14 How. 610, 14 L. Ed. 563. An assignment of a share in this company, made in 1829 to a bona fide purchaser for a valuable consideration, was valid. Although the transaction was illegal in 1816, and had not changed its character in 1829, yet the assignment was not tainted with any ille-

gality. The claim against Mexico, as being one of the efforts to establish her independence of Spain, rested entirely upon her sense of honor in acknowledging the obligation after her independence was achieved; but after the debt was admitted, the bona fide assignee became substituted to all the rights of the original shareholder. *McBlair v. Gibbs*, 17 How. 232, 15 L. Ed. 132.

An assignment of bonds issued to a railroad company by a municipal corporation, under a statute which was judicially declared by the court to be repugnant to the constitution, passes to the assignee such rights as the railroad company had against the municipal corporation by reason of their contract. *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024.

95. Intent or motive.—"The assignment of the mortgage, having been properly executed and founded upon a valuable consideration, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287." *Smith v. Kernochen*, 7 How. 198, 216, 11 L. Ed. 666. See *Jones v. League*, 18 How. 76, 15 L. Ed. 263.

Assignment to enable assignor to qualify as witness.—See *Lewis v. Bell*, 17 How. 616, 15 L. Ed. 203.

96. Fraud or mistake.—*Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215. See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUD AND DECEIT; FRAUDULENT AND VOLUNTARY CONVEYANCES.

Where a party, knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an opinion, however erroneous expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

"The parties were engaged in endeavoring to ascertain what this was, and the whole subject was equally open to both for examination and inquiry. Under such circumstances, neither party is presumed

7. **ESTOPPEL OR WAIVER.**—The law of waiver and estoppel applies to assignments. A party may by his acts be estopped to deny the validity of an assignment.⁹⁷

III. Construction, Operation and Effect.

A. Construction.—The intention is to rule in the construction and interpretation of assignments.⁹⁸

B. Assignment Absolute or Qualified.—An assignment absolute on its face

to trust the other, but to rely upon his own judgment. *Smith v. Richards*, 13 Pet. 26, 37, 10 L. Ed. 42." *Blease v. Garlington*, 92 U. S. 1, 9, 23 L. Ed. 521.

An insolvent debtor has a right to prefer one creditor to another in payment, by an assignment bona fide made, and no subsequent attachment, or subsequently-acquired lien, will avoid the assignment. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

A question of fact, upon a bill filed to set aside the sale and assignment of a land warrant, on the ground, that it was obtained by fraudulent misrepresentation, and taking undue advantage of the party's imbecility of body and mind. Evidence deemed insufficient, and bill dismissed. *Connor v. Featherstone*, 12 Wheat. 199, 6 L. Ed. 601.

Without undertaking to suggest, whether in any case, the want of possession of the thing sold, constitutes, per se, a badge of fraud, or is only prima facie a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 387, 7 L. Ed. 189.

In cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and a fortiori, if flowing directly from them, has never been held to be, per se, a badge of fraud. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 387, 7 L. Ed. 189.

Mistake.—*Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

97. Estoppel or waiver.—Where by contract in writing a mining company agrees to deliver ore to a partnership, to be paid for after a subsequent assay of the ore and ascertainment of the price, the ore to become the property of the partnership upon delivery, the mining company, by continuing to deliver ore to one of the partners after the partnership has been dissolved, who was the assignee of the partnership, is not estopped to deny the validity of a subsequent assignment by him to a stranger. The court say: "The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party

cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray v. Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case." *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 388, 32 L. Ed. 246.

"When the defendant ordered the goods from the Gas Illuminating Company, and the plaintiff forwarded the goods upon that order, the defendant might have returned them, and declined to have any dealings with the plaintiff; but it could not accept the goods and use them, and then say it never ordered the goods from the plaintiff, never had any contract with it, and never assented to any assignment to the plaintiff of its contract with the Illuminating Company." *Cincinnati, etc., Gas Co. v. Western Siemens, etc., Co.*, 152 U. S. 200, 202, 38 L. Ed. 411, distinguishing the case cited above.

Where a party who had a contract with the United States, agreed with a third party that the latter should perform it, and that the profits should be equally divided between them, it was held, that as the assignment was recognized as valid by the government, the parties to the agreement and those claiming under them are precluded from setting up that the contract was not assignable. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

Where the successor of one party to a contract has been treated by the other party thereto, as the legal assignee of the contract, a court of equity will so treat him. *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596, 36 L. Ed. 277.

Where a contract illegal in its origin is assigned, if the party entitled to set up the illegality chooses to waive it, the assignee's claim will be enforced. *McBlair v. Gibbs*, 17 How. 232, 236, 15 L. Ed. 132.

98. Intention must control.—Whatever may be the inaccuracy of expression, or the inaptness of the words, used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268. See post, "Property Passing by Assignment," III, D.

may be shown to be a qualified assignment,⁹⁹ and where such is fairly shown to have been the intent, it will be so held.¹

C. Restrictions and Conditions in Contract of Assignment.—An assignment absolute in form may be made to depend on conditions subsequent.²

99. Qualified assignment.—Page *v.* Burnstine, 102 U. S. 664, 26 L. Ed. 268.

1. Intent prevails.—An assignment of a policy of insurance absolute on its face may be held to be an assignment as a security for money loaned, where such is fairly shown to have been the intent. Page *v.* Burnstine, 102 U. S. 664, 26 L. Ed. 268.

Assignments held to be absolute.—Where goods were shipped in the enemy's country, in pursuance of orders from this country, received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers, to secure advances made by them, with a request to the consignees to remit the amount to them (the bankers), and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers, it was held, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees. *The Mary and Susan*, 1 Wheat. 46, 4 L. Ed. 32; *The Mary and Susan*, 1 Wheat. 25, 4 L. Ed. 27.

"It is contended, also, that the assignment of Lewis to Bell, senior, is not absolute, but a security only, of some debt which has been satisfied; and that it is voluntary, and imports a trust between the parties. The deed of assignment, after a recital of the capture of the brig Caspian, and the claim preferred by the American minister at Brazil, on behalf of Lewis, for indemnity, proceeds as follows: 'Now, know all men by these presents, that the said Stephen J. Lewis, for and in consideration of the sum of one dollar, lawful money of the United States, to him in hand paid by Isaac Bell, of the city of New York, merchant, the receipt whereof is hereby acknowledged, and also for divers other good considerations him thereunto moving, hath granted, bargained, and sold, assigned, transferred, and set over, and by these presents doth grant, bargain, and sell, assign, transfer, and set over, unto the said Isaac Bell, his executors, administrators, and assigns, all and singular, the said claim, and all the sum and sums of money that may be received or received, of and from the said Brazilian government, or of and from whomsoever it may concern, for or by reason of the said illegal capture, or which may arise from the proceeds of the said brig

Caspian and cargo: to have and to hold the same and every part and parcel thereof, unto him, the said Isaac Bell, his executors, administrators, and assigns, forever, etc., etc. This is an absolute assignment of the whole claim of Lewis against the Brazilian government." *Lewis v. Bell*, 17 How. 616, 617, 15 L. Ed. 906.

"The instrument in its words of transfer is amply full and expressive to convey to them his entire interest in and title to not only the patents then issued, but also any renewals or extensions thereof. His language is: 'I, the said Hiram Moore, do hereby assign, sell and set over unto the said Charles W. West and John W. Westcott the entire right, title and interest in and to the letters patent aforesaid, and in and to the intention and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott, and their legal representatives, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made, to the full end of any term or terms for which the letters patent aforesaid, or either of them, have been, or hereafter may be, granted, reissued, renewed, or extended.' Nothing could add to the force of this language. The concluding provision, that the net profits arising from sales, royalties, or settlements, or other source, are to be divided between the parties to the assignment so as to give the patentee one fourth thereof, does not, in any respect, modify or limit the absolute transfer of title. It is a provision by which the consideration for the transfer is to be paid to the grantor out of the net profits made; it reserves to him no control over the patents or their use or disposal, or any power to interfere with the management of the business growing out of their ownership. The clause appointing the assignees attorneys of the grantor, with authority to use his name whenever they deem proper in such management, does not restrict in any way the power of the assignees after the transfer of the property." *Rude v. Westcott*, 130 U. S. 152, 162, 32 L. Ed. 888, citing *Tilghman v. Proctor*, 125 U. S. 146, 147, 31 L. Ed. 664. See the title PATENTS.

2. Condition subsequent.—Where an assigner by an absolute assignment and for an expressed consideration, assigned an interest in letters patent, and by a writing subsequently executed, made a further agreement with the assignee as to the payments, and that if the assignee failed to carry out his part of the agreements,

D. Property Passing by Assignment—1. IN GENERAL.—Such rights, interest and property as are included within the terms used in the assignment pass to the assignee. By a complete assignment, absolute in form, the whole interest of the assignor passes to the assignee.³

that the title was to revert to the assignor, it was held to be an absolute assignment subject to be defeated by failure to perform the condition subsequent. *Boesch v. Graff*, 133 U. S. 697, 33 L. Ed. 787.

"It is contended by the appellant that the contract whereby Ames agreed to sell his judgment for \$8,000, was a synallagmatic contract, which he had a right to rescind if the agreement of the other party as to the payment of the purchase money was not performed. This is undoubtedly the law of Louisiana; but that law also requires that, if a party to a contract wishes to rescind it for such a cause, he must return to the other party what he has received, so as to put him in the same situation he was in before. In the present case, it is not to be supposed that it was Ames' duty to return the \$3,000 which he received, because it was really received from Aymar, the debtor. But he was at least bound to credit that amount on the judgment, which would have been a substantial return; and in that case he would have a right to maintain his judgment for the whole balance, and Gay, his vendee, would have had the same right." *Gay v. Alter*, 102 U. S. 79, 80, 26 L. Ed. 48. See the titles CONTRACTS; RESCISSION, CANCELLATION AND REFORMATION.

As to stipulations for additional consideration, on happening of certain contingencies, see *Cassell v. Carroll*, 11 Wheat. 135, 6 L. Ed. 438.

Patents.—See the title PATENTS.

3. Property passing by assignment.—

"The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. This conveyance of all right, title and interest 'in and to' the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself." *Shoe-craft v. Bloxham*, 124 U. S. 730, 735, 31 L. Ed. 574.

The plaintiff in replevin, James De Wolf, claimed the merchandise under an assignment executed by George De Wolf and John Smith to him, in consideration of a large sum of money due by them to James De Wolf, and in consideration of advances to be made to them by him; the assignment transferred four vessels and

their cargoes, three of which vessels were then at sea, and one in New York, ready to sail, the property of the assignors; the assignment was to be void on the payment to James De Wolf of the money due to him; and if it should not be paid, the assignee to enforce the pledge by process and arrest, in all countries or places whatsoever, and to sell the same for the payment of the amount due by them, the assignors, to George De Wolf; the merchandise for which this action of replevin was instituted, was part of the return cargo of one of the vessels. The defendant, Harris, pleaded that the merchandise was not the property of the plaintiff, but of George De Wolf and John Smith, and justified the taking of the goods of the plaintiff, as marshal of the district of Massachusetts, by virtue of a writ of attachment sued out in the district court of the United States for the district of Massachusetts, in which suit, judgment was obtained against George De Wolf. On the trial, the plaintiff in the replevin proved the assignment, that large sums of money were due to him by George De Wolf and John Smith, that the goods were part of the property assigned, that he had used all proper means to take possession of the goods, but was prevented by the attachment issued by the United States the defendant proved, that the goods were imported into the United States by De Wolf & Smith, and that at the time of the importation, they were indebted to the United States for duties which were due and unpaid, to an amount exceeding the value of the merchandise attached, and that the Octavia, one of the vessels assigned, with a cargo on board, ready for sea, was at New York at the time of the assignment; which ship was not delivered to James De Wolf, the assignee, nor were the bills of lading assigned, the cargoes on board the vessels being consigned to the masters for sales and returns. The deed of assignment conveyed to the assignee a right to the proceeds of the outward bound cargoes on board the vessels assigned to James De Wolf. *Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811.

"The counsel for the defendant also prayed the court to instruct the jury, that although the deed of assignment might be valid, it could not transfer a right to the proceeds of the outward bound cargoes; which instruction the court refused to give. This question also is decided in the case of *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189. The counsel for the plaintiff also moved the court to instruct the jury, that the failure of George De Wolf and John

2. RIGHTS PASSING AS INCIDENT.—An assignment of a debt or other chose in action carries with it, as incident thereto, every security and remedy available to the assignor,⁴ and if a part only of a debt is assigned, a pro tanto portion of the

Smith to deliver to James De Wolf the copies of the bills of lading which were in their possession, severally, when the bills of lading were executed, leaves the property subject to the attachment of creditors who had no notice of the deed. This instruction the court refused to give. In the case of *Conard v. Atlantic Insurance Company*, the court determined, that a deed of assignment, such as was executed in this case, was capable of transferring the right to the proceeds of the outward cargo, as between the parties; of consequence, such transfer gives the assignee a right to take those proceeds and hold them against any person but the consignee of the cargo, or person who is a purchaser from the consignee, without notices." *Harris v. De Wolf*, 4 Pet. 147, 149, 7 L. Ed. 811.

Where a lessee, after letting to another; reserving a rent, has assigned all his "right, title, and interest" in the lease, and "authorized the assignee to sue for, collect, and recover the lease, and the rights to the rent reserved under the same," declaring "it to be distinctly understood" that it is the object and purpose to put the assignee in his "place and stead, so far as concerns his rights under the lease"—the lessee, on a claim against him by the subtenant, cannot set up a claim for arrears of rent due to him at the time when he assigned the lease. The transfer has carried them to the assignee. *United States v. Hickey*, 17 Wall. 9, 21 L. Ed. 559.

An assignment of "all my undivided ninth part, right, title, and interest, of every kind whatever, in the claim," carried with it an assignment of a claim to commissions as well as the share itself. *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132.

Transfer of compensation for services.—A transfer by a party of his "right and claim for any commission or compensation for services rendered, or to be rendered to any body corporate," in a class of claims mentioned generally in the transfer, is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees (without notice) of portions of a fund designated and appropriated to answer this claim; the case being one where, on the one hand, the older transferee did not make inquiries as to what body corporate the claim for commissions was against, and did not give notice of the paper executed in his favor, to such body corporate, not to a third party to whom this body, subsequently to the older transfer, but prior to the junior ones, devoted a fund to

answer these commissions; and where, on the other hand, the junior transferees did make exact inquiries and obtain precise evidences and accurate information as to the fund from which the commissions were to be derived, and did immediately notify to the party then holding the fund, the nature and extent of their claims, and did generally take measures to prevent all other persons being misled by the supposition that the fund still remained in the power of the party who had transferred this claim for commissions upon it. Such an assignment as the one first above mentioned, is a blind assignment, and the party claiming under it cannot come into equity for priority against even junior assignees in a case where the claims of these last are on a fund specifically; and are moreover precise, well understood, and have been vigilantly protected. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231.

Assignment of patents.—See the title **PATENTS**.

Assignment of judgment.—See the title **JUDGMENTS AND DECREES**.

A bond given by the defendant, with surety, whereby he secured the release of his property which had been seized under an attachment issued in the suit, passes to the assignee of the judgment and all bonds and instruments taken in connection with the suit. *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232.

The assignment of pledged stock conveys only an equitable interest to the transferee. *Black v. Zacharie Co.*, 3 How. 483, 511, 11 L. Ed. 690. See the titles **PLEDGE AND COLLATERAL SECURITY; STOCK AND STOCKHOLDERS**.

Assignment of insurance policy.—See the title **INSURANCE**.

The assignment of a bill of lading passes the legal title to the goods. *Hooper v. Robinson*, 98 U. S. 528, 538, 25 L. Ed. 219.

"The assignment being absolute in form, conveyed the legal title." *Boesch v. Graff*, 133 U. S. 697, 701, 33 L. Ed. 787.

Assignor's entire interest passes to assignee.—*Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231. See post, "Of Assignee," III. E. 1.

4. Rights passing as incident.—*Hooper v. Robinson*, 98 U. S. 528, 538, 25 L. Ed. 219; *Primer v. Kuhn*, 1 Dall. 452, 453, 1 L. Ed. 219; *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. Ed. 490; *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. Ed. 596; *National Live Stock Bank v. First Nat. Bank*, 203 U. S. 296, 51 L. Ed. 192. See

post, "Assignee Entitled to Remedies of Assignor," III, E, 1, b.

"If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights ad rem and in re—possibilities coupled with an interest and claims growing out of property—pass to the assignee." *Phelps v. McDonald*, 99 U. S. 298, 303, 25 L. Ed. 473. To the same effect are *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Backman v. Lawson*, 109 U. S. 659, 27 L. Ed. 1067." *Williams v. Heard*, 140 U. S. 529, 544, 35 L. Ed. 550.

The assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured, if a part only of the debt is assigned. *Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775.

"The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 16 Wall. 271, 274, 21 L. Ed. 313.

"The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien." *Carpenter v. Longan*, 16 Wall. 271, 275, 21 L. Ed. 313.

"All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*" *Carpenter v. Longan*, 16 Wall. 271, 275, 21 L. Ed. 313.

"As was said in *Fosdick v. Schall*, 99 U. S. 235, 253, 25 L. Ed. 339, these cred-

itors are paid not because they have in law a lien on the mortgaged property or the income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances, it is a matter of no importance that the original creditor has parted with the claim. The right is one that attaches to the debt and not to the person of the original creditor. Consequently the right passes with an assignment of the debt." *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. Ed. 490.

"The note executed by Grimes for eleven thousand and some odd dollars was negotiable, and the chattel mortgage was given at that time to secure the payment of the note. The indorsement of the note and its delivery before maturity to the defendant by the payee of the note transferred its ownership to the defendant bank. This transfer also transferred, by operation of law, the ownership of the mortgage which was collateral to the note. Such a mortgage has no separate existence, and when the note is paid the mortgage expires, as it cannot survive the debt which the note represents. *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313." *National Live Stock Bank v. First Nat. Bank*, 203 U. S. 296, 306, 51 L. Ed. 192.

An equitable mortgage passes by an assignment of the debt it secures. *Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775; *Ober v. Gallagher*, 93 U. S. 199, 207, 23 L. Ed. 829.

Vendor's lien.—"In many of the states, the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase money does not pass by an assignment of the debt." *Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. Ed. 829.

"We are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase money expressly reserved would not pass by an assignment of the debt. Such being the case, the circuit court was right in following our decision in *Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775, especially as its decision was not made after the doubts expressed in *Campbell v. Rankin*, 28 Ark. 401, as to the correctness of the rulings in the previous cases." *Ober v. Gallagher*, 93 U. S. 199, 207, 23 L. Ed. 829.

By the laws of Texas (which in a matter connected with real estate was respected by this court in a suit coming from Texas) an assignment of a note given for the purchase money of real estate carries the vendor's lien. *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587.

Infringement of patent.—An assignment of a patent for an invention does not carry with it a right of action for prior

security follows it.⁵ Where the original transaction in which the bonds assigned were taken was void, *malum prohibitum*, an assignee of the bonds takes as incident to the assignment the rights of his assignor to have the contract rescinded and an accounting.⁶

E. Rights and Liabilities of Parties—1. OF ASSIGNEE—*a. In General.*—An assignee stands in the place of his assignor, and takes simply the assignor's rights.⁷ The assignee of an ordinary contract can only stand in the place of the

infringements. "Such rights of action are, it is true, now assignable by the statutes of most of the states, but they only pass with a conveyance of the property itself where the language is clear and explicit to that effect. 1 Chitty on Pleading, 68; Gardner v. Adams, 12 Wend. 297, 299; Clark v. Wilson, 103 Mass. 219, 223; Moore v. Marsh, 7 Wall. 515, 19 L. Ed. 37; Dibble v. Augur, 7 Blatch. 86; Merriam v. Smith, 11 Fed. Rep. 588; May v. Juneau County, 30 Fed. Rep. 241; Kaolatype Engraving Company v. Hoke, 30 Fed. Rep. 444." United States v. Loughrey, 172 U. S. 206, 211, 43 L. Ed. 420.

Statutory priority of wage earner.—"Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerate classes of debts as 'the debts to have priority.'" Shropshire, etc., Co. v. Bush, 204 U. S. 186, 188, 51 L. Ed. 436.

5. Part of debts assigned.—Batesville Institution v. Kaufman, 18 Wall. 151, 21 L. Ed. 775.

6. Original transaction void.—Chapman v. Douglas County, 107 U. S. 348, 27 L. Ed. 378; Parkersburg v. Brown, 106 U. S. 487, 27 L. Ed. 238.

"But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmation of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case

the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. White v. Franklin Bank, 22 Pick. (Mass.) 181; Morville v. American Tract Society, 123 Mass. 129; Davis v. Old Colony Railroad, 131 Mass. 258, 275; and cases there cited. The O'Briens having indorsed and sold the bonds, the holders of the bonds succeeded to such right of the O'Briens, as an incident to the ownership of the bonds." Parkersburg v. Brown, 106 U. S. 487, 503, 27 L. Ed. 238.

7. Rights in general.—Risher v. Smith, 131 U. S., appx. clvi, 24 L. Ed. 808, 809; Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231; Bradford v. Williams, 4 How. 576, 11 L. Ed. 1109; Wheeler v. Hughes, 1 Dall. 23, 1 L. Ed. 20; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 38 L. Ed. 914; Pearce v. Rice, 142 U. S. 28, 35 L. Ed. 925; Williams v. Heard, 140 U. S. 529, 542, 35 L. Ed. 550; Runkle v. Burham, 153 U. S. 216, 38 L. Ed. 694; Backman v. Lawson, 169 U. S. 659, 27 L. Ed. 1067; Erwin v. United States, 97 U. S. 392, 24 L. Ed. 1065; Phelps v. McDonald, 99 U. S. 298, 303, 25 L. Ed. 473; Prairie State Bank v. United States, 164 U. S. 227, 240, 41 L. Ed. 412; Trust Co. v. Nat. Bank, 101 U. S. 68, 25 L. Ed. 876; Bradford v. Williams, 4 How. 576, 11 L. Ed. 1109; Primer v. Kuhn, 1 Dall. 452, 455, 1 L. Ed. 219; Moore v. Marsh, 7 Wall. 515, 522, 19 L. Ed. 37; Bank v. Carrollton Railroad, 11 Wall. 624, 629, 20 L. Ed. 82; Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596.

"So in this case, we practically have a fulfillment of the mortgagor's covenant to insure, because its voluntary assignee, standing in its shoes, did himself insure the premises, and such insurance enures to the benefit of the mortgagee, because the assignee is a voluntary one, and is but carrying out an obligation imposed originally upon his assignor. The peculiar language of the mortgage upon the subject of insurance takes it out of the general rule governing such covenants." American Ice Co. v. Eastern Trust, etc., Co., 188 U. S. 626, 631, 47 L. Ed. 623.

On November 6th, 1836, W. F. Hamilton, William V. Robinson, and wife, by deed, conveyed to the United States "the right and privilege to use, divert and carry away from the fountain spring, by which the woolen factory of the said Hamilton

party with whom the contract was made.⁸ The purchasers of nonnegotiable demands, from others than the original owner of them, can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim.⁹ The assignment to the government of a claim can give the

and Robinson is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, etc., etc. The distance to which the United States wished to carry their share of the water being much greater than that of the other party, it was necessary, according to the principles of hydraulics, to lay down pipes of a larger bore than those of the other party, in order to obtain one-half of the water. The grantors were present when the pipes were laid down in this way, and made no objection. It will not do for an assignee, whose deed recognizes the title of the United States to one half of the water, now to disturb the arrangement." *Irwin v. United States*, 16 How. 513, 14 L. Ed. 1038.

A party coming into the right of a partner, whether by purchase from such partner (no matter how broad the language of the conveyance may be) or as his personal representative, or under an execution or commission of bankruptcy, comes into nothing more than an interest in the partnership, which cannot be tangible, made available, or be delivered but under an account between the partnership and the partner. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

The national currency act of 1864, authorizing the banks created under it to buy and sell coin, a bank having coin in pledge may sell and assign its special property; in which case the assignee will become vested with the legal rights of the assignor. *Merchants' Nat. Bank v. State Bank*, 10 Wall. 604, 605, 19 L. Ed. 1008.

"A mere transfer or assignment does not import a guaranty. At most, it warrants title, not solvency of the debtor, or collectibility of the chose assigned. A transfer or assignment of a claim, or part of a claim, secured by a mortgage given to protect that claim, in common with other claims contemporaneously originating, would seem to refer the transferee to the common security, and measure his rights and equities by that. It is in vain to urge that as between the person transferring and the transferee there is an equity, or even moral obligation, if it was the intention of the parties to participate, 'pari passu,' in the proceeds of the property pledged as a security. And

such an intention may well be inferred from an assignment or transfer without guaranty. The meaning of such a transfer without more is that the transferee takes precisely the rights of the person from whom he obtains his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgage. *Dunham v. Cincinnati, etc.*, 1 R. Co., 1 Wall. 254, 17 L. Ed. 584; *Gordillo v. Wiquetin*, L. R. 5 Ch. 287; *Ketchum v. Duncan*, 96 U. S. 659, 671, 24 L. Ed. 868.

An assignment of a policy by the assured only covers such interest in the premises as he may have had at the time of the insurance, and at the time of the loss; if a loss takes place after the policy has been assigned, the assignee alone is entitled to recover; the rights of the assignee under the policy cannot be more extensive than the rights of the assignor. *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507, 512, 9 L. Ed. 512; *S. C.*, 2 Pet. 25, 49, 7 L. Ed. 335, cited in *Carpenter v. Providence, etc.*, *Ins. Co.*, 16 Pet. 495, 496, 10 L. Ed. 1044.

8. Ordinary contract.—*Fidelity Mut. Life Ins. Co. v. Clark*, 203 U. S. 64, 51 L. Ed. 91.

9. Purchaser of nonnegotiable demand.—*Judson v. Corcoran*, 17 How. 612, 615, 15 L. Ed. 231. *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677.

Except where the original owner of a nonnegotiable demand which he has indorsed in blank is estopped from asserting his original claim thereto, the purchaser thereof from any party other than such owner takes only such rights as the latter has parted with. Semble, that if the pledgee of such a demand writes a formal assignment to himself over the blank indorsement made by the pledgor, and in that form sells it to a third party for value, the pledgor is, as against such third party, estopped from asserting ownership thereto. *Cowdrey v. Vandenberg*, 101 U. S. 572, 25 L. Ed. 923.

"The certificate was not a negotiable instrument which could pass by indorsement and delivery. It was not a promise to pay any sum, nor was it an order upon any one or upon any fund for the payment of money, or for the delivery of any thing of value. It was simply a statement that the account of the complainants for work done by them upon one of the streets of Washington had been audited and allowed by an officer of the city, whose duty it was to ascertain and certify as to the amount and price of the work done by a contractor. Whoever takes such a certificate, whether with or without notice,

claim no greater validity than it possessed in the hands of the assignor.¹⁰ The purchaser of a claim from a fraudulent assignee, with full knowledge of the fraud, can claim no better title than his vendor held at the time of the transfer,¹¹ and where a person holding an interest in a judgment fraudulently assigns it to another who reassigns it to him, the original party to the fraud and purchasers with notice from him cannot claim the benefits of the bona fide purchaser's title.¹² For rights and liabilities of assignees of particular rights and interests, see the particular titles throughout this work. And see references in note.¹³

b. *Assignee Entitled to Remedies of Assignor*.—Generally, the assignee is entitled to all the remedies of the assignor.¹⁴ Although it is true, as a general

takes it subject to all the rights and equities of the actual owner, as much so as if it were tangible property in the streets." *Cowdrey v. Vandeburgh*, 101 U. S. 572, 574, 25 L. Ed. 923.

Moreover, the original holder, or his representatives, would be estopped from claiming the proceeds, after they had been received by his bona fide assignee. *McBlair v. Gibbs*, 17 How. 232, 15 L. Ed. 132.

"It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and thought by ordinary diligence he could have ascertained those facts. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934. He can lose his right only by actual notice or bad faith. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be bona fide. *Fowler v. Brantley*, 14 Pet. 318, 10 L. Ed. 473." *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193, 194.

Consideration paid important fact.—Where the question was whether the real owner of the judgment, the plaintiff therein, must fail of relief as against an assignee thereof, to whose assignor plaintiff had in form assigned it and thereby furnishing him with indicia of title, because estopped to assert his ownership as against such second assignee, on the ground that the second assignee occupies the position of a purchaser for the value in good faith and without notice and in reliance on the apparent ownership, the court held that the amount of the consideration paid by the assignee was an important fact. If greatly disproportioned to the real value of the judgment, the claim to have paid value will be treated as a pretense; the amount paid is commonly important, as bearing on the questions of notice and of good faith and that

the interest of the second assignee of the judgment, if recognized, should be limited to the amount he actually paid and the measure of the estoppel also limited accordingly. *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677.

10. Assignment to government.—*United States v. Burford*, 3 Pet. 12, 30, 7 L. Ed. 585.

11. Successive assignees.—*Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215. See, also, *Pearce v. Rice*, 142 U. S. 28, 35 L. Ed. 925.

12. Reassignment and subsequent purchasers.—*Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215.

13. Assignee of patent.—See the title PATENTS.

Assignee of bill of lading.—See the title BILL OF LADING.

Assignee of judgment.—See the title JUDGMENTS AND DECREES.

Assignee of corporate stocks.—See the title STOCK AND STOCKHOLDERS.

Assignee of mortgages.—See the titles CHATTEL MORTGAGES AND CONDITIONAL SALES; MORTGAGES AND DEEDS OF TRUST.

14. Remedies of assignee.—*Spain v. Hamilton*, 1 Wall. 604, 624, 17 L. Ed. 619; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Laclede Bank v. Schuler*, 120 U. S. 511, 516, 30 L. Ed. 704; *Pearce v. Rice*, 142 U. S. 28, 35 L. Ed. 925; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *Bendey v. Townsend*, 109 U. S. 665, 27 L. Ed. 1065.

Thus where a railroad is in the hands of the receiver, and a debt is contracted for current expenses, such debt in the hands of an assignee is entitled to payment out of the current income. *Burnham v. Bowen*, 111 U. S. 776, 28 L. Ed. 596.

"It was decided in *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. Ed. 490, that the assignment of a claim of this kind carried with it the right to the original holder to claim payment out of the fund upon which it is charged." *Burnham v. Bowen*, 111 U. S. 776, 28 L. Ed. 596.

"The purchaser at an execution sale would only take the actual title of the owner to the land itself, unaccompanied by any collateral claims or rights incident to the acquisition of the land. In this

rule, that the assignee of a chose in action or of an equitable title is entitled only to the remedies of the assignor,¹⁵ yet there are cases in which an assignee of a chose in action may, by sustaining the position of bona fide assignee, be in a better situation than the person from whom he bought.¹⁶

c. *Assignee Takes Subject to Equities*.—The assignee of a chose in action stands in the place of the assignor, subject to all equities between the original parties.¹⁷ Where, however, equities between the original assignor and a subse-

respect he stands much as an assignee under the limited liability act, who, as above stated, takes the interest of the owner in the vessel and freight, but not his interest in a collateral contract of insurance." *Hoffeld v. United States*, 186 U. S. 273, 278, 46 L. Ed. 1160.

"The case of the City of Norwich Place v. Norwich, etc., Trans. Co., 118 U. S. 468, 30 L. Ed. 134, though arising under the maritime law, is pertinent in this connection." This was a petition under the limited liability act, Rev. Stat., § 4285, which declares that if the owner of a vessel elect to take the benefit of the act, it shall be a sufficient compliance with the law 'if he shall transfer his interest in such vessel and freight, for the benefit of the claimants, to a trustee,' who becomes in reality an assignee for the benefit of creditors under the act. It was held, that the word 'interest' was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and that whatever the extent or character of his ownership might be, the amount or value of that interest was to be the measure of his liability. It was also held that his transfer of such interest under the law did not operate as an assignment of his insurance upon the vessel, which was a collateral contract, personal to the insured, but not conferring upon him any interest in the property; in other words, the contract of insurance does not attach itself to the thing insured or go with it when it is transferred. See cases cited, 118 U. S. 468, 494." *Hoffeld v. United States*, 186 U. S. 273, 276, 46 L. Ed. 1160.

15. *Remedies limited to assignor's*.—*Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231; *Episcopal City Mission v. Brown*, 158 U. S. 222, 39 L. Ed. 960; *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Willard v. Wood*, 135 U. S. 309, 34 L. Ed. 210.

16. *Bona fide assignee*.—*Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231. See post, "Successive Assignees," III, E. 4. b. "As, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy. The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 1, 60, established the doctrine to the foregoing effect in

England; they were followed in the case of *Mangles v. Dixon*, *McNaught. & G.*, 437." *Judson v. Corcoran*, 17 How. 612, 615, 15 L. Ed. 231.

"And the same principle of protecting subsequent bona fide purchasers of choses in action, etc., against latent outstanding equities, of which they had no notice, was maintained in this court in the case of *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendees' creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal title, still it must be postponed to a subsequent equal equity connected with such advantage. The rule was distinctly asserted by Chancellor Kent, in 1817, in *Murray v. Lylburn*, 2 Johns. (N. Y.) Ch. 442, before the question was settled in England, and before this court discussed it, which was in 1822. And the same principle was applied by the court of appeals of Virginia, in the case of *Moore v. Holcombe*, 3 Leigh (Va.) 597, in 1832." *Judson v. Corcoran*, 17 How. 612, 615, 15 L. Ed. 231.

17. *Takes subject to equities*.—*Bradford v. Williams*, 4 How. 576, 587, 11 L. Ed. 1109; *Carpenter v. Logan*, 16 Wall. 271, 21 L. Ed. 313; *Winchester v. Hackley*, 2 Cranch 342, 2 L. Ed. 299; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *United States v. New Orleans Railroad*, 12 Wall. 362, 20 L. Ed. 434; *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677; *First Nat. Bank v. Texas*, 20 Wall. 72, 89, 22 L. Ed. 295; *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231; *Fidelity Mut. Life Ins. Co. v. Clark*, 203 U. S. 64, 74, 51 L. Ed. 91; *United States v. Detroit, etc., Lumber Co.*, 200 U. S. 321, 333, 50 L. Ed. 499; *United States v. Clark*, 200 U. S. 601, 607, 608, 50 L. Ed. 613; *Episcopal City Mission v. Brown*, 158 U. S. 222, 39 L. Ed. 960; *Wheeler v. Hughes*, 1 Dall. 23, 1 L. Ed. 20; *North Chicago, etc., Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 620, 38 L. Ed. 565; *Risher v. Smith*, 131 U. S. appx., clvi, 24 L. Ed. 808;

quent assignee, or equities entirely in favor of third person, are involved, and the unconditional power of disposition has been entrusted by such assignor to

McBlair v. Gibbes, 17 How. 232, 235, 15 L. Ed. 132; *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677; *Selz v. Unna*, 6 Wall. 327, 336, 18 L. Ed. 799; *Smith v. Orton*, 131 U. S., appx., lxxv, 18 L. Ed. 62; *Sully v. Dremar*, 113 U. S. 287, 28 L. Ed. 1007.

The assignee takes subject to the equities between the debtor and the original creditor subsisting at the time of the assignment, or when notice is received thereof. *Judson v. Corcoran*, 17 How. 612, 615, 15 L. Ed. 231; *Baker v. Wood*, 157 U. S. 212, 216, 39 L. Ed. 677.

"The transferee of overdue negotiable paper takes it liable to all the equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise from any collateral transaction. A debt due to the maker from the payee at the time of the transfer cannot be set off in a suit by the indorsee of the payee, although it might have been enforced if the suit had been brought by the latter. The result is the same whether the transfer be made by indorsement or delivery. But the protection of this principle is confined to the maker or obligor. It does not apply as between successive takers. Actual notice is necessary to affect them. There is no adverse presumption. Each one takes the legal title, and his equity is equal to that of his predecessors. 'The equities being equal, the law must prevail.' The position of the transferee must be at least as favorable as that of the assignee of a chose in action. There the assignee takes subject to the equity residing in the debtor, but not to an equity residing in a third person against the assignor." *First Nat. Bank v. Texas*, 20 Wall. 72, 88, 22 L. Ed. 295.

Chancellor Kent, speaking of this rule in this class of cases, says: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the assignee, without notice, of a chose in action, was preferred in the late case of *Redfearn v. Ferrier et al.*, 1 Dow. 50, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if this were not so no assignment could ever be taken with safety." (*Murray v. Lilburn*, 2 Johnson's Chancery 443.) This reasoning is strikingly applicable in the case before us." *First Nat. Bank v. Texas*, 20 Wall. 72, 89, 22 L. Ed. 295.

Where an assignee of a contract to perform work, brought suit in his own name for extra work, it was held, that he was bound by the terms of the contract in that respect, and by receipts given in accordance therewith. *Campbell v. District of Columbia*, 117 U. S. 615, 29 L. Ed. 1007.

The assignee of bonds given for indemnity of the obligee, as indorsee of notes drawn by the obligor, the consideration having failed, takes them subject to all equities existing between the original parties. *Scott v. Shreeve*, 12 Wheat. 605, 5 L. Ed. 744.

An assignee of a bond takes it at his own peril and stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of the assignment. *Wheeler v. Hughes*, 1 Dall. 23, 27, 1 L. Ed. 20.

If the assignee transfers his contract, the person to whom he transfers it is bound by the same equities which existed between the original parties to the contract, having purchased with a full knowledge of the state of things. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

"And when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contract or before the substitution." *Burck v. Taylor*, 152 U. S. 634, 653, 38 L. Ed. 578.

"That a chose in action is assignable in equity is not controverted. Equity will protect and enforce the assignment. If, subsequent to its being made, and before notice of it, any counterclaims be acquired by the debtor, these claims may unquestionably be sustained; but if they be acquired after notice, equity will not sustain them. If it were even true, that they might have been offered in evidence in a suit at law, brought in the name of the assignor, he who has neglected to avail himself of that advantage, cannot, after the judgment, avail himself of such discounts, as plaintiff in equity. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them; the party complaining must show that he has more equity than the party in whose favor the law has decided. This cannot be done in a case like the present, unless the equity of the debtor accrued before notice of the assignment. The right to these discounts, then, depends on the fact of notice." *Brashear v. West*, 7 Pet. 608, 616, 8 L. Ed. 801.

his assignee, the principle of estoppel applies in favor of purchasers in good faith and without notice.¹⁸

d. *Liability to Perform Contract Assigned*.—The assignee of a contract is bound to carry out the provisions of the contract according to the terms of assignment. And it is not necessary to a breach to show that the assignor may have paid out any money, but only that there is an existing liability to pay.¹⁹

e. *Assignment Adjudged Invalid*.—Where an assignment of a claim is adjudged invalid, the assignee who had previously prosecuted the claim successfully, and was subjected to cost and expenses in the protection and preservation thereof, should be reimbursed of these costs and expenses, upon settlement with the true owner.²⁰ The assignee ought also to have been allowed a compensation for his trouble and personal exertions in the prosecution of the claim.²¹

2. *ON ASSIGNOR*.—a. *Effects of Assignment*.—(1) *As against Assignee*.—See ante. "Restrictions and Conditions in Contract of Assignment," III, C; "Liability to Perform Contract Assigned," III, E, 1, d.

(2) *As against Debtor*.—A creditor cannot sue his debtor on the original debt, where he has received the debtor's negotiable note for the amount of the debt and assigned it, for its market value,²² nor can he sue the debtor, where he has received from the debtor a nonnegotiable certificate for the amount of his debt, and sold the certificate to a third person for value less than its nominal amount, thereby authorizing the purchaser to receive the amount from the debtor, after the debtor has paid it to the purchaser.²³ But a creditor who has assigned, with

18. Estoppel in favor of bona fide purchaser.—*Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231; *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677.

Although the assignee of a judgment takes it subject to all defenses that existed against it in the hands of the assignor, yet such an agreement as that above mentioned constitutes no defense as against an assignee in good faith, and without knowledge of the secret agreement, the verdict and judgment having been regularly entered against all the defendants. *Selz v. Unna*, 6 Wall. 327, 18 L. Ed. 799.

19. Liability to perform contract.—*Mills v. Dow*, 133 U. S. 423, 33 L. Ed. 717.

The agreement is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability. The agreement was an absolute personal one on the part of the defendant. *Mills v. Dow*, 133 U. S. 423, 33 L. Ed. 717.

A person who, upon receiving an assignment of a share of property, as security for a debt, agrees to comply with the contract of the assignor with a joint owner of the property, is bound to fulfill that contract, although it exceed in amount the value of the share of the property transferred to him. *Clark v. Carrington*, 7 Cranch 308, 3 L. Ed. 354.

20. Assignment invalid—Cost and expenses.—*Williams v. Gibbs*, 20 How. 535, 17 L. Ed. 1013.

Being placed in the position of a trustee, it was his duty to defend the title, and the expenses for so doing were properly chargeable to the estate. *Williams v. Gibbs*, 20 How. 535, 15 L. Ed. 1013.

21. Amount of compensation.—Under the special circumstances of this case, the circuit court having allowed thirty-five per cent. of the sum realized, this court are not prepared to say it is too much. *Williams v. Gibbs*, 20 How. 535, 15 L. Ed. 1013.

22. Right of creditor to sue.—*Donnelly v. District of Columbia*, 119 U. S. 339, 30 L. Ed. 465; *Looney v. District of Columbia*, 113 U. S. 258, 28 L. Ed. 974.

23. Looney v. District of Columbia, 113 U. S. 258, 28 L. Ed. 974.

"But the facts found show that he has so dealt with these certificates as to prevent him from maintaining this suit. The amount of some of the certificate he has been paid by the district in money. Others of the certificates he has sold and assigned for value, and thereby transferred the equitable title in them to the assignee, and authorized him to receive payment of their amount from the district; and the payment of that amount in full by the district to the assignee is a discharge of so much of its debt to the claimant. *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. Ed. 923; *Foss v. Lowell Savings Bank*, 111 Mass. 285. The remaining certificates he has exchanged with the district for an equal amount of its negotiable securities, payable on time with interest, and he has since sold those securities for their value in the market. The district is liable to the purchaser, either upon those securities themselves, or upon the other bonds since taken by him instead of some of them, and cannot be also held liable to the original creditor for the same amount or any part thereof. *Harris v. Johnston*, 3 Cranch 311, 2 L. Ed. 450; *Emblin v.*

the consent of his debtor, an open account, may maintain an action at law for the use of the assignee.²⁴

b. *Liability to Assignee*.—(1) *In General*.—A mere transfer or assignment does not impart a guaranty. At most, it warrants title, not solvency of the debtor, nor collectibility of the chose assigned.²⁵ The assignor of a bond is not liable to the assignee, on the failure of the obligor to pay, where there is no special covenant for that purpose.²⁶ Where municipal bonds are issued under an act of the legislature, which was passed without authority, the vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this.²⁷

Assignor Receiving Payment.—If the assignor of a chose in action receive payment thereon, he would be answerable over to the assignee thereof.²⁸

Dartnell, 1 D. & L. 591." *Looney v. District of Columbia*, 113 U. S. 258, 260, 261, 28 L. Ed. 974.

24. **Creditor may sue for assignee.**—*Winchester v. Hackley*, 2 Cranch 342, 2 L. Ed. 299.

25. **Liability to assignee.**—*Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

"A transfer or assignment of a claim, or part of a claim, secured by a mortgage given to protect that claim, in common with other claims contemporaneously originating, would seem to refer the transferee to the common security, and measure his rights and equities by that. It is in vain to urge that as between the person transferring and the transferee there is an equity, or even moral obligation, if it was the intention of the parties to participate, '*pari passu*,' in the proceeds of the property pledged as a security. And such an intention may well be inferred from an assignment or transfer without guaranty. The meaning of such a transfer without more is that the transferee takes precisely the rights of the person from whom he obtains his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgage. *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584; *Gordillo v. Wiquetin*, L. R. 5 Ch. 287." *Ketchum v. Duncan*, 96 U. S. 659, 671, 24 L. Ed. 868.

26. *Cummings v. Lynn*, 1 Dall. 441, 1 L. Ed. 215; *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496.

"The complainants purchased a negotiable note which was overdue. The assignors did not indorse it, but simply assigned it by deed. They entered into certain specific covenants concerning the subject matter assigned; and their liability depends exclusively on these covenants. Neither of these covenants appears to have been broken. The only one concerning which any doubt has been raised is the following: 'And we do in like manner covenant, promise, and agree, that the said note of three thousand dollars, hereinbefore assigned, shall be and is entitled to payment out of any sale of the

premises conveyed in and by the deed of trust aforesaid, before the other note therein specified, and shall have a prior lien on the said premises, of the proceeds thereof.' We think the purpose and effect of this covenant was, not to secure payment out of any sale which might be made by any party under any title to the premises, but only to assure the priority of payment of the note assigned, in preference to the other note, out of any sale made under the particular title to the premises described in the deed of assignment." *Richards v. Holmes*, 18 How. 143, 145, 149, 15 L. Ed. 304.

"If it is not going beyond the principles of the common law of England and this country, it is, at least, extending them to their utmost limits, to say that the assignor of a note, without fraud, or a promise to pay, in the event of the insolvency of the maker, should be liable by the mere effect of the assignment; and that there is no difference between his assigning with, or without, an express promise. It is, at least, testing the contract of assignment, by the rules of the *summum jus*. Neither the statute of Anne, nor of any of the states of this Union, making notes assignable (so far as is known), expressly impose on the assignor any obligation which did not attach to the assignment of a chose in action at common law." *Bank v. Tyler*, 4 Pet. 366, 384, 7 L. Ed. 888.

27. *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496.

Under authority of acts of the legislature of Kansas, the city of Topeka issued certain bonds payable to a party named, or bearer. They became the property of a bank, which put them upon the market, and disposed of them. This court having decided that the legislature had no power to pass the acts, and that the bonds were void, the purchasers brought suit on the ground of failure of consideration to recover the amount paid for them. Held, that, as the bank gave no warranty, it cannot be charged with a liability it did not assume. *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496.

28. **Assignor receiving payment.**—The

(2) *When Liability Arises.*—The assignee cannot proceed against the assignor of a note until he has exercised due diligence in the pursuit of the maker. Some states have extended the rule of diligence much farther than others.²⁹

covenant by the word assigned extends only this, that the assignee should receive the money from the obligor to his own use; or, if the obligee received it, that he would be answerable over for it to the assignee. *Cummings v. Lynn*, 1 Dall. 444, 1 L. Ed. 215.

29. When liability arises—Illinois and Colorado.—By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of nulla bona, unless such suit would have been impracticable or unavailing. *Wills v. Claflin*, 92 U. S. 135, 23 L. Ed. 490.

"In *Wills v. Claflin*, 92 U. S. 135, 23 L. Ed. 490, under a statute of Illinois, containing a provision identical with that in the Colorado statute, from which, indeed, the latter is said to have been copied, it was held that if the maker of the note was insolvent, so that a suit against him would be unavailing, the failure to institute it would furnish no defense to the indorser. That, indeed, is the plain language of the law itself." *Martin v. Cole*, 104 U. S. 30, 40, 26 L. Ed. 647.

The statute of Kentucky, authorizing the assignment of notes, is silent as to the duties of the assignee, or the nature of the contract created by the assignment; it only declares such assignments valid, and the assignee capable of suing in his own name; but the courts of that state have clearly defined his rights, duties and obligations resulting from the assignment. The assignee cannot maintain an action on the mere nonpayment of the note, and notice thereof, until the holder of the note has made use of all due and legal diligence to recover the money from the maker; his engagement is held to be, that he will pay the amount, if, after due and diligent pursuit, the maker is found insolvent. *Bank v. Tyler*, 4 Pet. 366, 7 L. Ed. 888.

"The discharge of the dower by the insolvent act, at the suit of a third person, will be no excuse for any relaxation in the diligence required to fix the assignor; who is suable only after the exhaustion of all legal means of obtaining payment. The cases on this subject have been collected in a note in 2 Pet. 338, 340; and were all cited and ably commented on by the counsel on both sides." *Bank v. Tyler*, 4 Pet. 366, 382, 7 L. Ed. 888.

"It is believed that the principles which exact such an unusual degree of vigilance from the assignee are peculiar to the jurisprudence of Kentucky; but they have been established by a long series of cases adjudged in their highest courts for many years; they have long formed the law of

that state as to notes and bonds assigned under their statute; and the legislature has not thought proper to change it. The courts in Virginia have given a very different construction to their statute on the same subject; and there are no decisions in any state which have extended the rule of diligence so far. But this court has always felt itself bound to respect local laws, however peculiar, in all cases where they do not come in collision with laws of higher authority and more imposing obligation. Such a case is not presented in the record now under our consideration. These are the duties imposed by the law of Kentucky on the assignees of promissory notes, before they can commence a suit against the assignor on his promise. These rules are the law of this case; and although, in our opinion, they carry the doctrine of diligence to an extent unknown to the principles of the common law, or the law of other states, were bonds, notes and bills are assignable, we must adopt them as the guide of our judgment." *Bank v. Tyler*, 4 Pet. 366, 382, 7 L. Ed. 888.

The court finds no express decision of the courts of Kentucky enjoining a plaintiff who has sued the maker of a promissory note, and intends to charge the indorser, to proceed against a jailer and his sureties, when the defendant has been suffered to escape; yet, by the spirit of all the decisions, he is bound to do so. The general principle of all the cases is, that a plaintiff must pursue, with legal diligence, all his means and remedies, direct, immediate or collateral, to recover the amount of his debt, from the maker of the note, or of any one else who has put himself, or has, by operation of law, been put, in his place. *Bank v. Tyler*, 4 Pet. 366, 367, 7 L. Ed. 888.

After judgment obtained in the circuit court of the United States against the maker of a note, *capias ad satisfaciendum* was issued against him, by the holder, and he was put in prison, two justices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors; and the jailer permitted him to leave the prison; the jailer made himself and his sureties liable for an escape, by permitting the prisoner to leave the prison. Held, that the neglect of the holder of the note to proceed against the jailer and his sureties prevented his making the indorser liable for the amount of the note. *Bank v. Tyler*, 4 Pet. 366, 7 L. Ed. 888.

A judgment does not bind lands, in the state of Kentucky; the lien attaches only from the delivery of the execution to the sheriff; it then binds real and personal

3. OF DEBTOR—*a. In General.*—The debtor may deal with the chose or other property assigned as if no assignment had been made, until he have notice of the assignment;³⁰ he may pay the assignor,³¹ a subsequent assignee,³² or any person vested with apparent authority for their collection without notice of want of actual authority.³³

b. To Set Up Defenses, Equities, etc.—Choses in action, contracts, etc., in the hands of an assignee may be subjected, by the debtor, to all defenses existing between the debtor and assignor at the time of the assignment, and arising thereafter until he receive notice of the assignment.³⁴ Contracts for the payment of money in the hands of an assignee are subject to all payments, discounts and set-offs, made or had prior to notice to the debtor of the assignment.³⁵ Under

property, held by legal title; an execution returned, is no lien on any property not levied on; and no new lien can be acquired, until a new execution is put into the hands of the sheriff; and none can issue while a former levy is in force. Any delay, then, by the assignee, enables the debtor to alien his property, in the interval between judgment and the execution reaching the sheriff, as well as between the return of one and the lien acquired by a new execution. *Bank v. Tyler*, 4 Pet. 366, 7 L. Ed. 888.

By the law of Kentucky, no equitable interest in real or personal property, unless it is held by mortgage, deed of trust, or other encumbrance, can be taken in execution; a *capias ad satisfaciendum* is the only mode by which the equitable estate of a debtor or his choses in action can be, in any way, reached, by any legal process; it may be the means of coercing the payment of the debt, and it must, therefore, be used. The return of *nulla bona* to an execution, is, in that state, the only evidence of there being no property of the debtor on which a levy can be made; it is not evidence of there being no equitable interest which is beyond the reach of such process; nor of his not having that kind of property, on which no levy can be made. *Bank v. Tyler*, 4 Pet. 366, 7 L. Ed. 888.

30. *Rights of debtor.*—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282; *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704. See ante, "Notice to Debtor," II, B, 6, a.

31. *May pay assignor.*—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282; *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

32. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619.

33. "It has been settled in this court, that if the owner of certificates of the auditor of the board of public works, like those now in question, places them in the hands of a third person, indorsed in blank, so as to give him apparent authority for their collection, payment by the district to the person so invested with apparent authority, without notice of a want of actual authority, will discharge the debt. *Cowdrey v. Vandenburg*, 101 U. S. 572,

25 L. Ed. 923; *Looney v. District of Columbia*, 113 U. S. 258, 28 L. Ed. 974. The court of claims so held in *Adams v. District of Columbia*, 17 Ct. Cl. 351, decided at the December term, 1881, which was but a little more than a year after the act giving that court jurisdiction in this class of cases was passed." *Laughlin v. District of Columbia*, 116 U. S. 485, 189, 29 L. Ed. 701. See *Donnelly v. District of Columbia*, 119 U. S. 339, 30 L. Ed. 465.

34. *Defenses of debtor.*—*Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

35. *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109. See the title SET-OFF, RECOURSEMENT AND COUNTERCLAIM.

Where the obligor in a bond obtain a demand against the obligee, after notice of assignment of the bond, such demand is not a matter of set-off, in a suit by the assignee against the obligor. *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232.

The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment. *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

Where a creditor upon open account assigned his claim to a third person, with the assent of the debtor, the debtor is allowed to set off his claims against the assignee. *Winchester v. Hackley*, 2 Cranch 342, 2 L. Ed. 299.

"In the case of *Norton v. Rose*, 1796, reported in 2 Wash. (Va.), the law (on page 248) is thus expounded by Roane, Justice, with the concurrence of the whole court: 'It was not intended to abridge the rights of the obligor, or to enlarge those of the assignee beyond that of suing in his own name; and since it is clear that, prior to this law, an original equity attached to the bond followed it into the hands of the assignee, this law does not expressly, nor by implication, destroy that principle.' The same doctrine was

the law of Alabama where an assignee sues, the defendant is not limited to showing payments or set-offs made before notice of the assignment, but may also prove a total or partial failure of the consideration for which the writing was executed.³⁶

c. *Payment Over under Confiscation Proceedings.*—A payment over by a debtor under a confiscation proceeding constitutes no defense to an action by an assignee for valuable consideration who became such before the proceedings, where it appears that the court had no jurisdiction and that there never was an actual condemnation of the debt or an order on the debtor to pay it over.³⁷

d. *Obtaining Release from Assigned Litigious Right.*—According to the law of Louisiana, "He against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, together with the interest from date."³⁸

4. PRIORITIES.—a. *In General—Date of Assignment.*—Where the right of priority between assignments and between assignments and other rights is in

ruled in Pennsylvania, as early as the year 1776, in the case of *Wheeler v. Hughes*, reported in 1 Dall. 23, 27, 1 L. Ed. 20. In Pennsylvania, bonds, bills, and promissory notes were by act of Assembly made assignable, as promissory notes in England under the 3d and 4th of Anne, but as the statute of Pennsylvania omitted to declare that those writings 'should be placed upon the footing of bills of exchange, it was therefore decided that the assignee of such writing stood in the same place as his obligee or payee, so as to let in every defalcation which the obligor had against him before notice of the assignment, and that the only intent of the act of assembly was to enable the assignee to sue in his own name, and to prevent the obligee from releasing after notice of assignment. This doctrine has been frequently reaffirmed in the same state, as will be seen in 2 Dall. 45; 6 Serg. & R. 175, and 16 Id. 20." *Withers v. Greene*, 9 How. 213, 224, 13 L. Ed. 169.

"That a chose in action is assignable in equity, is not controverted. Equity will protect and enforce the assignment. If, subsequent to its being made, and before notice of it, any counterclaims be acquired by the debtor, these claims may unquestionably be sustained; but if they be acquired after notice, equity will not sustain them. If it were even true, that they might have been offered in evidence in a suit at law, brought in the name of the assignor, he who has neglected to avail himself of that advantage, cannot, after the judgment, avail himself of such discounts, as plaintiff in equity. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them; the party complaining must show that he has more equity than the party in whose favor the law has decided. This cannot be done in a case like the present, unless the equity of the debtor accrued before notice of the assignment. The right to these discounts, then, depends on the fact of notice."

Brashear v. West, 7 P. t. 608, 616, 8 L. Ed. 801.

36. *Want or failure of consideration.*—*Withers v. Greene*, 9 How. 213, 13 L. Ed. 169.

37. *Payment over under confiscation proceedings.*—*Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. Ed. 374. See the title WAR.

Where notice as provided by the 37th Admiralty Rule is not given, the district court had no jurisdiction over the debt, and could make no such condemnation of it as would constitute a defense to an action by an assignee of the debt for a valuable consideration, who became such before the confiscation proceedings. *Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. Ed. 374.

38. *Release of debtor.*—*Cucullu v. Hernandez*, 103 U. S. 105, 26 L. Ed. 322.

"This claim cannot be sustained, for two reasons: First, Hernandez did not purchase the Villavaso notes until after the judgment in the supreme court thereon. The right ceases to be litigious when judgment has been rendered. *Marshall v. McCrea*, 2 La. Ann. 79. Secondly, it has been repeatedly decided by the supreme court of Louisiana that the purpose of article 2652 was to prevent litigation, and therefore a defendant who, instead of paying the price of the transfer, contests the suit and prolongs the litigation, defeats the very object of the article, and cannot exercise the privilege it gives. The complainant should have paid or tendered to Hernandez the real price of the transfer with interest from date. He would then have been in a position to claim the benefit of article 2652. He cannot, after contesting the claim inch by inch and up to the court of last resort, cancel it by paying what it cost his adversary. *Leftwich v. Brown*, 4 Id. 104; *Pearson v. Grice*, 6 Id. 233; *Rhodes v. Hooper*, Id. 356; *Evans v. De L'Isle*, 24 Id. 248." *Cucullu v. Hernandez*, 103 U. S. 105, 117, 26 L. Ed. 322.

question, the date of the assignments is important, in the absence of fraud, actual or constructive.³⁹

b. *Successive Assignees*.—(1) *In General*.—*Notice*.—Where the assignee prior in time has not given notice of the assignment to the debtor, a subsequent assignee may obtain a priority of right.⁴⁰ The assignee in a blind assignment cannot claim priority over subsequent assignees who have no notice of such assignment.⁴¹ Where the equities of assignees are equal, the legal title will

39. Priority—Date of assignment.—See *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193.

"The assignment being prior in time, in the absence of fraud, actual or constructive, the title passed to the assignees, and was out of Bates when the attachment was levied." *Green v. Buskirk*, 5 Wall. 307, 313, 18 L. Ed. 599 (dissenting opinion).

In the case of *Stockton v. Ford*, reported in 11 How. 232, 13 L. Ed. 676, this court decided the following propositions, namely: "Where there was a judgment which had been recorded under the laws of Louisiana and thus made equivalent to a mortgage upon the property of the debtor, and the plaintiff assigned this judgment, and was then himself sued and had an execution issued against him, his rights under this recorded judgment could not be sold under this execution, because he had previously transferred all those rights." *Stockton v. Ford*, 18 How. 418, 15 L. Ed. 395.

40. Successive assignees.—*Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578; *Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282; *Marine Bank v. Fulton Bank*, 2 Wall. 272, 17 L. Ed. 785; *Bank of Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *First Nat. Bank v. Whittman*, 94 U. S. 313, 24 L. Ed. 229.

As a check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise, other checks drawn afterwards may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice. *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704.

"Apart from this matter, it is not easy to see any valid reason why the assignment of an insolvent debtor, for the equal benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker. The holder of this check comes into the distribution of the funds in the hands of the assignee for his share of those funds with other creditors. The mere fact that he had received a check, a few days before the making of the assignment, on the bank, which had not been presented until after the general assignment was made

and notified to the bank, does not seem, in and of itself, to give any such superiority of right. The assignment was complete and perfect, and vested in the assignee the right to all the property of the assignor immediately upon its execution and delivery, with due formalities, to the assignee, and the check of this assignee, like the check of *Israel & Co.*, could have been paid by the bank with safety, if first presented. The check given by the same assignor a few days before was only an acknowledgment of a debt by that assignor, and became no valid claim upon the funds against which it was drawn until the holder of those funds was notified of its existence. This, we think, is the fair result of the authorities on that subject." *Laclede Bank v. Schuler*, 120 U. S. 511, 515, 516, 30 L. Ed. 704.

41. Blind assignment—Notice.—A transfer by a party of his "right and claim for any commission or compensation for services rendered, or to be rendered to any body corporate," in a class of claims mentioned generally in the transfer, is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees (without notice) of portions of a fund designated and appropriated to answer this claim; the case being one where, on the one hand, the older transferee did not make inquiries as to what body corporate the claim for commissions was against, and did not give notice of the paper executed in his favor, to such body corporate, nor to a third party to whom this body, subsequently to the older transfer, but prior to the junior ones, devoted a fund to answer these commissions; and where, on the other hand, the junior transferees did make exact inquiries and obtain precise evidences and accurate information as to the fund from which the commissions were to be derived, and did immediately notify to the party then holding the fund, the nature and extent of their claims, and did generally take measures to prevent all other persons being misled by the supposition that the fund still remained in the power of the party who had transferred this claim for commissions upon it. Such an assignment as the one first above mentioned, is a blind assignment, and the party claiming under it cannot come into equity for priority against even junior assignees in a case where the claims of these last are on a fund specifically; and are moreover pre-

prevail.⁴²

(2) *Under Recording Acts.*—The right of priority as dependent upon the recording of the assignment must be determined with reference to the law of the state in which it was made.⁴³

c. *Subsequent Formal Assignment over Promise to Assign.*—The mere promise of a party not made upon an existing consideration, to make an assignment of property to one to whom he was indebted, will not have priority over a subsequent formal assignment of the same property.⁴⁴

d. *Assignees of Same Property from Different Assignors.*—The respective rights of assignees of the same property, receiving their assignment from different assignors, must depend upon the rights of the respective assignors—neither having taken any greater rights than his assignor had.⁴⁵

e. *As between Assignee and Assignor's Creditors.*—As to the right of priority between the assignee and the assignor's creditors, as dependent on the rules applicable to fraudulent and voluntary conveyances, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

f. *As between Assignee and Lien Holder.*—A chose in action passes into the hands of the assignee subject to all valid liens existing at the time of the assignment.⁴⁶ Where the lien holder parts with the possession of the chose in action, his lien is as a general rule lost to him; in some instances, however, the lien is revived, if the chose in action afterwards come in the possession of the lien holder again.⁴⁷

cise, well understood, and have been vigilantly protected. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231.

"No creditor has a right to take a blind assignment from his debtor upon the latter's anticipation of becoming interested in a particular fund to be realized thereafter, without making such inquiries as the occasion may require, and then to ask in equity for a priority in the payment of his debt merely from the precedency in date of his assignment over those who became subsequently assignees for part of the same fund for actual value given to the cestui que trust of the fund." *Spain v. Hamilton*, 1 Wall. 604, 623, 17 L. Ed. 619.

42. *Where equities equal.*—Where a prior assignee of a claim against Mexico gave no information of the assignee until a subsequent assignee had prosecuted the claim before the commissioners, and obtained an award in his favor, the equities of these parties were equal, and the possessor of the legal title ought to retain the fund. *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 231. See *First Nat. Bank v. Texas*, 20 Wall. 72, 89, 22 L. Ed. 295; *Spain v. Hamilton*, 1 Wall. 604, 623, 17 L. Ed. 619.

43. *Under recording acts.*—"In many cases the question has arisen in regard to the recording of assignments of mortgages upon real estate, where the states had provided for the recording of such assignments, and where, in the absence of such recording, the assignee has failed in obtaining priority of rights under his mortgage, which he would have had if the assignment had been recorded. But as the owner of the cattle mentioned herein resided in Kansas at the time the

mortgages were given, and the cattle were then in that state, and the mortgages were filed there, the transactions are to be judged of with reference to the law of that state, and we decide this question with reference to such law. Under that law the assignee of the first mortgage of June, 1900, has a superior lien to the assignee of the second mortgage of April, 1901, although such assignee of the first mortgage did not have his assignment recorded." *National Live Stock Bank v. First Nat. Bank*, 203 U. S. 296, 310, 51 L. Ed. 192.

44. *Subsequent formal assignment.*—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282.

45. *Different assignees from same assignor.*—*Pearce v. Rice*, 142 U. S. 28, 35 L. Ed. 925. See ante, "Of Assignee," III, E, 1.

46. *Rights of lienholder.*—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

47. *Lienholder who parts with possession.*—If an insurance broker, entitled to a lien on the policy, for premiums paid by him on account of his principal, parts with possession of the policy and afterwards regains possession thereof, his lien is revived, unless the manner of his parting with it manifests an intention to abandoned the lien. In such a case, an intermediate assignee takes cum onere. But in the case of other liens acquired on the policy, if it be assigned, bona fide, for a valuable consideration, while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

"If, while a policy is out of the hands

g. *Assignee of Claims for Wages—Under Bankruptcy Act.*—See the title BANKRUPTCY.

h. *Assignee of Consigned Cargo.*—Where the owner of a cargo in transit transfers it, the assignee has a right to hold the proceeds against any person other than the consignee or a bona fide purchaser from the consignee.⁴⁸

IV. Procedure.

A. *Rights of Assignee in Courts of Law*—1. *IN GENERAL.*—At common law choses in action and property rights not capable of delivery not being assignable, the rights of the assignee were not recognizable by law courts.⁴⁹ But courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law.⁵⁰

2. *ACTION IN ASSIGNOR'S NAME.*—The assignee of a chose in action acquires by the assignment the right to proceed in the name of his assignor, to enforce the chose in action for his own benefit.⁵¹

of the insurance broker, as was the case here, it is assigned for valuable consideration and bona fide, it would be unjust, on its returning to his possession, to revive encumbrances, of which the assignee could have had no notice, nor no certain means of finding out; for he could not reasonably suspect, that such liens had ever existed in favor of one who had parted with the possession of the only thing by which they could have been enforced. Nor can it make any difference, whether the policy have been actually delivered to the assignee, provided the transfer were bona fide made, while out of the possession and power of the insurance broker. Upon the same principle it is, that a consignor loses his right to stop goods in transitu, although the consignee have become insolvent, after such consignee, having power to sell, has disposed of them, before their arrival, to a third person, unacquainted with any circumstance to taint the fairness of the transaction." *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 287, 5 L. Ed. 614.

48. *Assignor of consigned cargo.*—*Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811.

That the consignees of the merchandise were indebted to the United States on duty bonds remaining due and unpaid at the time of the importation, did not, under the 62d section of the act of March 2d, 1799, make the merchandise, as to the United States, the property of the consignees, notwithstanding the assignment; and make the attachment of the United States for the debt due to them sufficient to bar the action of replevin brought by the assignee. *Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811; *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683.

"The counsel for the defendant also prayed the court to instruct the jury that although the deed of assignment might be valid, it could not transfer a right to

the proceeds of the outward bound cargoes; which instruction the court refused to give. This question also is decided in the case of *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189. The counsel for the plaintiff also moved the court to instruct the jury, that the failure of George De Wolf and John Smith to deliver to James De Wolf the copies of the bills of lading which were in their possession, severally, when the bills of lading were executed, leaves the property subject to the attachment of creditors who had no notice of the deed. This instruction the court refused to give. In the case of *Conard v. Atlantic Insurance Company*, the court determined, that a deed of assignment, such as was executed in this case, was capable of transferring the right to the proceeds of the outward cargo, as between the parties; of consequence, such transfer gives the assignee a right to take those proceeds and hold them against any person but the consignee of the cargo, or person who is a purchaser from the consignee, without notice." *Harris v. De Wolf*, 4 Pet. 147, 149, 7 L. Ed. 811.

49. *Right in court of law.*—See ante, "Choses in Action," II, D, 2.

50. *Modern doctrine.*—*Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79. See *Bradford v. Williams*, 4 How. 576, 11 L. Ed. 1109. See ante, "Choses in Action," II, D, 2; post, "Action in Name of Assignee," IV, C.

51. *Action in assignor's name.*—*Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484; *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271; *Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Wilson v. Speed*, 3 Cranch 283, 292.

3. **CONTROL OF SUIT.**—The right of the assignee to sue in the name of his assignor, conferred upon him by the assignment, cannot be controlled by the assignor;⁵² the right to control the suit passes to the assignee with the assignment.⁵³ Where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee, in the prosecution of a suit brought to enforce those rights.⁵⁴

B. Rights of Assignee in Equity.—Courts of chancery disregarded the strictness of the common law and protected the rights of the assignee of choses in action.⁵⁵ If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a court of chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law;⁵⁶ but when, on the other hand, the equitable title is not involved

2 L. Ed. 441; *Ex parte Railroad Co.*, 95 U. S. 221, 24 L. Ed. 355.

A creditor upon an open account, who has assigned his claim to a third person, with the assent of the debtor, is still competent to maintain an action at law in his own name, against the debtor, for the use of the assignee; but the debtor is allowed to set off his claims against the assignee. *Winchester v. Hackley*, 2 Cranch 342, 2 L. Ed. 299.

52. **Control of suit.**—*Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37.

53. **Control passes to assignee.**—Where the plaintiff in an action assigns his interest therein, the right to control the suit passes to the assignee, and his rights will be protected. *Platt v. Jerome*, 19 How. 384, 15 L. Ed. 623.

54. **Owner cannot interfere.**—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87, cited in *Tiernan v. Jackson*, 5 Pet. 580, 598, 8 L. Ed. 234. See *Stockton v. Ford*, 18 How. 418, 15 L. Ed. 395.

A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action. *Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79.

The nominal plaintiff may dismiss a suit, brought in his name, by a creditor, who has not an assignment of the cause of action. *Welch v. Mandeville*, 7 Cranch 152, 3 L. Ed. 299.

A court of law will not, therefore, give effect to a release procured by the defendant, under a covinous combination with the assignor, in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. *Welch v. Mandeville*, 1 Wheat. 233, 236, 4 L. Ed. 79. See *Wheeler v. Huges*, 1 Dall. 23, 1 L. Ed. 20.

55. **Right in equity.**—*Welch v. Mandeville*, 1 Wheat. 233, 4 L. Ed. 79; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

56. **No remedy at law.**—*Riddle v. Mandeville*, 5 Cranch 322, 3 L. Ed. 114; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801;

Hayward v. Andrews, 106 U. S. 672, 27 L. Ed. 271; *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484; *Smith v. Bourbon County*, 127 U. S. 105, 111, 32 L. Ed. 731. See *Bendey v. Townsend*, 109 U. S. 665, 27 L. Ed. 1065; *Fussell v. Gregg*, 113 U. S. 550, 554, 28 L. Ed. 993.

"This right is founded on an implied contract, which is not, by law, assignable. Yet, if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived, why such an interest should not, as well as an interest in any other chose in action, be transferable in equity. And if it be so transferable, equity will, of course, afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder, as effectually as he could defend himself against his immediate assignee in a suit at law." *Riddle v. Mandeville*, 5 Cranch 322, 331, 3 L. Ed. 114.

"Under the circumstances of this case, a court of equity will treat the assignee in fact as the legal assignee, possessed of the rights and charged with the obligations of the original party to the contract. *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 35 L. Ed. 1055. In short, we find no difficulty in holding that the plaintiff was entitled to file this bill." *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596, 608, 36 L. Ed. 277.

The complainant has no equitable claim to relief, his assignors having no mortgage lien on the property, when the judgments were assigned to the complainant. *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273.

Bill for partnership settlement.—Where a complainant's right is only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, the proper bill is a bill for such a settlement. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

Bill for discovery and account.—An assignee of an assignee of a copartner in a joint purchase and sale of lands, may sustain a bill in equity against the other copartners and the agent of the concern,

in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor, the disputed right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matters in controversy would be purely legal rights.⁵⁷

C. Action in Name of Assignee.—1. *IN GENERAL.*—In general a chose in action is not assignable, so as to authorize the assignee to sue at law, in his own name, unless the right is given by statute,⁵⁸ or by settled law, in the jurisdiction.

to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. *Pendleton v. Wambersie*, 4 Cranch 73, 2 L. Ed. 554.

57. Equitable title not involved.—*Hayward v. Andrews*, 106 U. S. 672, 675, 27 L. Ed. 271; *Smith v. Bourbon County*, 127 U. S. 105, 111, 32 L. Ed. 731.

"And in *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 205, 214, 27 L. Ed. 484, the court, speaking by Mr. Justice Bradley, said: 'We have lately decided, after full consideration of the authorities, that an assignee of a chose in action, in which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of cestui que trust.' *Glenn v. Marbury*, 145 U. S. 499, 508, 36 L. Ed. 790.

"It is admitted that, according to the rule declared and established in *Root v. Lake Shore, etc., R. Co.*, 105 U. S. 189, 26 L. Ed. 975, the patentee could not in his own name and right, maintain the present suit, and the original bill in which he was a co-complainant with the appellant was accordingly dismissed as to him. To permit the appellant to proceed in equity, upon the mere ground of the assignment to him, would be substantially to abrogate that rule. The principle was stated to be that the relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, was 'incidental to some other equity, the right to enforce which secures to the patentee his standing in court;' that 'the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise other than by way of injunction;' and among these, by way of illustration, was mentioned that 'where the title of the complainant is equitable merely;' but it is the obvious meaning of the passage to limit the exception to cases where the purpose and necessity of the resort to

a court of chancery are to enforce the peculiar equity personal to the complainant, and not merely the legal right of which he is the beneficial owner." *Hayward v. Andrews*, 106 U. S. 672, 675, 27 L. Ed. 271.

58. Action in assignee's name.—*Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790. See ante, "In General," IV, A, 1.

"The common law touching this subject governs in the District of Columbia." *Glenn v. Marbury*, 145 U. S. 499, 509, 36 L. Ed. 790.

"In *Pritchard v. Norton*, 106 U. S. 124, 130, 27 L. Ed. 104, Mr. Justice Matthews, delivering judgment, said: 'Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum.' *Glenn v. Marbury*, 145 U. S. 499, 508, 36 L. Ed. 790.

"The effect of the assignment of a judgment at common law was merely to transfer an equitable title, and the assignee was not authorized to bring an action thereon in his own name." *Baker v. Wood*, 157 U. S. 212, 216, 39 L. Ed. 677.

The assignee of a Mexican title was not prohibited from presenting his case to the land commissioners in his own name; and where he was assignee of the whole claim, that was his proper method of proceeding. *United States v. Grimes*, 2 Black 610, 17 L. Ed. 352.

But where the land claimed was portioned out among many vendees, the proper party to the proceeding was the original grantee, who could produce the documents of title, and who best knew how to establish it. *United States v. Grimes*, 2 Black 610, 17 L. Ed. 352.

"The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another state, if the debts are negotiable promissory notes, or if the law of the state in which the

where the suit is brought.⁵⁹ But the assignee of a fee farm rent, which is an estate of inheritance, is, upon the principle of the common law, entitled to sue therefor in his own name.⁶⁰ And if a chose in action is assigned to the king or the government, an action may be brought in the name of the assignee.⁶¹ In many states, the assignee is given by statute the right to sue in his own name,⁶²

action is brought permits the assignee of a chose in action to sue in his own name. *Harper v. Butler*, 2 Pet. 239, 7 L. Ed. 410; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Net. 252, 258, 260; *Petersen v. Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state. *Barrett v. Barrett*, 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425." *Wilkins v. Ellett*, 103 U. S. 256, 257, 259, 27 L. Ed. 718.

59. *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790. See *Scott v. Lunt*, 7 Pet. 596, 8 L. Ed. 797; *Wilson v. Speed*, 3 Cranch 283, 2 L. Ed. 441.

"It is conceived by this court that the statements made in the caveat could only be supported by an assignment, which, on the face of it, purported to be for the use of Wilson. That an assignment made to Dryden, whereby the legal ownership of the survey was conveyed to him, although, in fact, intended for the benefit of Wilson, would not enable Wilson to maintain a caveat in his own name. It would authorize him to use the name of Cowan, but not to prosecute the suit in his own name. If, however, a contrary practice has been firmly established in Kentucky, the court would be very unwilling to shake that practice." *Wilson v. Speed*, 3 Cranch 283, 292, 2 L. Ed. 441.

60. Fee farm rent.—*Scott v. Lunt*, 7 Pet. 596, 8 L. Ed. 797.

61. Chose assigned to king or government.—In England, any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name; no valid objection is perceived against giving the same effect to an assignment to the government of this country. *United States v. Burford*, 3 Pet. 12, 7 L. Ed. 585.

62. Right given by statute.—*Warnock v. Davis*, 104 U. S. 775, 780, 26 L. Ed. 924; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 597, 29 L. Ed. 997.

Pennsylvania.—*Reed v. Ingraham*, 3 Dall. 505, 1 L. Ed. 697; *Wheeler v. Hughes*, 1 Dall. 23, 1 L. Ed. 20.

The assignment of the equitable interest in a bond did not, under the law in 1715, authorize the assignee to maintain an action against the obligor, in his own name. *Cummings v. Lynn*, 1 Dall. 444, 1 L. Ed. 215.

An action cannot be maintained, by the assignee of a simple contract debt, in his own name. *Guthrie v. White*, 1 Dall. 268, 1 L. Ed. 131.

In *Cummings v. Lynn*, 1 Dall. 444, 1 L. Ed. 215, an assignment was held not

to be within the act of assembly of 1715, and that the assignee could not maintain an action, in his own name, against the obligor.

Quære, whether a bond for the performance of conditions is within the provision of the act of the assembly, enabling assignees to sue in their own names. *Sheredine v. Gaul*, 2 Dall. 190, 1 L. Ed. 344.

In Pennsylvania, where a transfer of certain accounts was made, the assignee had only an equitable interest, and could not sue in his own name. But when the suit was brought in Louisiana, where there is no distinction between a legal and equitable title, he could maintain the suit in his own name, and the assignment was good evidence. *Martin v. Ihmsen*, 21 How. 394, 16 L. Ed. 134.

The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment. *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

"Neither did the statute create in the assignee any new right varying the character of the contract itself. It conferred on him merely the rights to take by assignment, and to sue in his own name—in effect, the power to acquire in the mode prescribed an equitable title, and to prosecute that title in a court of law." *Withers v. Greene*, 9 How. 213, 222, 13 L. Ed. 109.

By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name; when, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that state. *Harper v. Butler*, 2 Pet. 239, 7 L. Ed. 410.

Colorado.—See post, "Action by Real Party in Interest," IV, D.

By the law of Indiana, the assignee by a valid assignment of an entire contract, not negotiable at common law, may maintain an action thereon in his own name against the original debtor; and the assignee by valid assignment of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer

and in cases in which it is proper to resort to equity, the assignee may file a bill in his own name.⁶³

2. ACTION UPON DEBTOR'S PROMISE.—If a chose in action is assigned, and the debtor promise to pay to the assignee, the latter may maintain an action against the debtor, as for money received to his use.⁶⁴

or answer to the nonjoinder of the assignor. *Indiana Rev. Stat.*, § 251; *Groves v. Ruby*, 24 *Indiana* 418. These rules govern the practice and pleadings in actions at law in the federal courts held within the state. *Rev. Stat.*, § 914; *Thompson v. Central R. Co.*, 6 *Wall* 134, 18 *L. Ed.* 765; *Albany, etc., Iron Co. v. Lundberg*, 121 *U. S.* 451, 30 *L. Ed.* 982; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 *U. S.* 379, 387, 32 *L. Ed.* 246. The case at bar was therefore rightly treated by the court below as an action at law; and the real question in controversy is not one of the forms of pleadings, but whether the plaintiff has any beneficial interest as against the defendant in the contract sued on." *Delaware County v. Diebold, etc., Co.*, 133 *U. S.* 473, 488, 33 *L. Ed.* 674.

Montana.—Under the mechanic's lien law and civil practice act of Montana, a mechanic who has completed his claim by filing a lien, may assign it to another, who may institute a proceeding on it in his own name. *Davis v. Bilsland*, 18 *Wall* 659, 21 *L. Ed.* 969.

The statute of Florida places bonds, as far as respects negotiability and the right of the assignee to sue in his own name, upon the same footing as bills of exchange and promissory notes. The case, therefore, falls within the principle of a partner drawing a bill upon his house, or making a note in the name of the firm, payable to his own order, both of which are valid in the hands of a bona fide holder. *Bradford v. Williams*, 4 *How.* 576, 11 *L. Ed.* 1109.

By a statute of Florida, where suit is brought upon a bond, the plaintiff need not prove its execution unless the defendant denies it under oath. It also provides that such an instrument may be assigned; that the assignee becomes vested with all the rights of the assignor, and may bring suit in his own name. *Bradford v. Williams*, 4 *How.* 576, 11 *L. Ed.* 1109.

The inability of one of the obligees to sue himself did not impair the vitality of the bond, but amounted only to an objection to a recovery in a court of law. The assignment, and ability of the assignee to sue in his own name, removed this difficulty. *Bradford v. Williams*, 4 *How.* 576, 11 *L. Ed.* 1109. See *Ransom v. Geer*, 12 *Fed. Rep.* 608.

Under this statute, where a joint and several bond was signed by three obligors and made payable to the three obligees, one of whom was also one of the obligors,

and the obligees assigned the bond, the fact that one of the obligors was also an obligee was no valid defense in a suit brought by the assignee against the two other obligors. *Bradford v. Williams*, 4 *How.* 576, 11 *L. Ed.* 1109.

Assignee of patent.—When an assignment is made, under the fourteenth section of the act of 1836, of the exclusive right within a specified part of the country, the assignee may sue in his own name, provided the assignment be of the entire and unqualified monopoly. But any assignment short of this is a mere license, and will not carry with it a right to the assignee to sue in his own name. *Gayler v. Wilder*, 10 *How.* 477, 13 *L. Ed.* 504. See *Tyler v. Tuel*, 6 *Cranch* 324, 3 *L. Ed.* 237.

Therefore, an agreement that the assignee might make and vend the article within certain specified limits, upon paying to the assignor a cent per pound, reserving, however, to the assignor the right to establish a manufactory of the article upon paying to the assignee a cent per pound, was only a license; and a suit for an infringement of the patent right must be conducted in the name of the assignor. *Gayler v. Wilder*, 10 *How.* 477, 13 *L. Ed.* 504. See the title **PATENTS**.

"Assignees and grantees, as well as the patentee, may, under some circumstances, maintain an action on the case for an infringement, in their own name, as appears by the express words of the act of congress." *Moore v. Marsh*, 7 *Wall* 515, 520, 19 *L. Ed.* 37.

63. **In equity.**—*Lenox v. Roberts*, 2 *Wheat.* 373, 4 *L. Ed.* 261.

"The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity in his own name." *North American Transp., etc., Co. v. Morrison*, 178 *U. S.* 262, 268, 44 *L. Ed.* 1061; *Sere v. Pilot*, 6 *Cranch* 332, 3 *L. Ed.* 210.

64. **Action upon debtor's promise.**—"In *Tiernan v. Jackson*, 5 *Pet.* 580, 597, 599, 8 *L. Ed.* 234, Mr. Justice Story, speaking for the court, said that 'the general principle of law is, that choses in action are not at law assignable. But, if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independently of such promise, there is no pretence that an action can be sustained.' After referring to some adjudged cases, which he said were distinguishable from the one then before the court, he

D. Action by Real Party in Interest.—By statute in some state courts, "the real party in interest" must bring the suit.⁶⁵

E. Partial Assignment.—An assignee of a portion only of a chose in action cannot recover thereon in an action at law in his own name, unless the debtor assent to the assignment.⁶³

proceeded: "They are either cases where there was an express promise to hold the money subject to the order of the principal, or there was an implied promise to pay it over as it was received to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defense for want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person." *Glenn v. Marbury*, 145 U. S. 490, 508, 36 L. Ed. 790.

65. Real party in interest.—*Thompson v. Central R. Co.*, 6 Wall. 134, 18 L. Ed. 765; *Delaware County v. Diebold, etc., Co.*, 133 U. S. 473, 486, 33 L. Ed. 674; *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969; *Childress v. Emory*, 8 Wheat. 642, 669, 5 L. Ed. 705; *Chappelaine v. Dechenaux*, 4 Cranch 306, 2 L. Ed. 629.

The assignment though expressly stated to be for a collateral security, gave the assignee the entire legal interest. It enabled him to employ the entire bond, if necessary, for the payment of the assignor's debt to him." Had the assignment been without reference to the purpose for which it was made, it is not doubted that the assignee would have been the real party in interest, and as such entitled to sue without joining the assignor, and this though in fact made as a collateral security. The legal effect of the transfer cannot be different because the purpose of it was expressed. *Chew v. Brumagen*, 13 Wall. 497, 504, 20 L. Ed. 663.

Colorado.—"If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat., § 915; Colorado Code of Civil Procedure, § 3; *Albany, etc., Iron Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982." *Arkansas Valley Smelting Co. v. Belden*, Min. Co., 127 U. S. 379, 387, 32 L. Ed. 246.

"We are aware of no statute of Colorado permitting the assignment of a judgment so as to vest title in the assignee, but there is a provision in the Code of that state (Code Civ. Proc., § 3), that suit should be brought in the name of the real party in interest, and it is contended that the effect of this is to unite the legal title with the equitable ownership in the instance of such an assignment." *Baker v. Wood*, 157 U. S. 212, 39 L. Ed. 677.

"Where the patentee has assigned his whole interest, either before or after the patent is issued, the action must be brought in the name of the assignee, because he alone was interested in the patent at the time the infringement took place; but where the assignment is of an undivided part of the patent, the action should be brought for every infringement committed subsequent to the assignment, in the joint names of the patentee and assignee, as representing the entire interest." *Moore v. Marsh*, 7 Wall. 515, 520, 19 L. Ed. 37. See the title PATENTS.

But as to federal courts, see *Thompson v. Central R. Co.*, 6 Wall. 134, 18 L. Ed. 765; *McNutt v. Bland*, 2 How. 9, 15, 11 L. Ed. 151; *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705.

66. Partial assignments.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234. See ante, "Order or Draft," II, A, 3, d; "Partial Assignments," II, D, 8.

"Where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. But where the order is drawn, either on a general, or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien, as against the drawee, unless he consent to the appropriation, by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract, that he shall be obliged to pay in fractions to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But in the present case, there is no proof of any presentment of the bills, much less of any acceptance by the defendant, to establish even a partial assignment of the debt. And if there were, it would still be necessary to show, that

F. Parties—1. **PROPER AND NECESSARY PARTIES.**—The general rule is that the parties to the contract are the only proper parties to the suit for its performance.⁶⁷ The assignor is not a necessary party plaintiff where the assignee is entitled to sue in his own name.⁶⁸ The assignor is not a necessary party to a suit instituted by the assignee, where the assignment is absolute and unconditional as to the equitable interest, and where no question is raised as to the validity or extent of the assignment.⁶⁹ It seems that an assignor in a partial assignment in those states where the statute provides for an action by the real party in interest, may join with the assignee in an action to enforce the chose in action.⁷⁰ In some instances the assignor is by statute required to be made a party defendant although the assignee is entitled to bring suit in his own name.⁷¹ The heirs of an assignor who has parted with all his equitable interest are not necessary parties to controversies between the assignee and those claiming under him.⁷² Where an assignee of a partner's interest in the firm property files a bill for a settlement of accounts, all the partners are necessary parties defendant.⁷³ To a suit brought to invalidate a tax voted by a township to aid in the

there was an assignment of the articles, as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the pleadings, the plaintiff undertakes to establish an assignment of the whole debt due by the articles; and if he fails in this, there is an end to his recovery." *Mandeville v. Welch*, 5 Wheat. 277, 288, 5 L. Ed. 87.

67. Proper parties.—*Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. Ed. 1136.

"The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern. If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, the case would have been different. In that event, the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance, and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule." *Willard v. Tayloe*, 8 Wall. 557, 571, 19 L. Ed. 501.

Hence the assignment by the complainant, prior to his bill, of a partial interest in the entire contract is no defense to the bill for such performance. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501. See the title **PARTIES**.

68. Assignor.—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

The assignee of a bond and mortgage who by the terms of the assignment holds it as collateral security for the payment of another debt, may under the 111th and 113th sections of the New York Code of Procedure sue, without making his assignor a party plaintiff to the suit. *Chew*

v. Brumagen, 13 Wall. 497, 20 L. Ed. 663.

"By the law of Indiana, the assignee by a valid assignment of an entire contract, not negotiable at common law, may maintain an action thereon in his own name against the original debtor; and the assignee by valid assignment of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. *Indiana Rev. Stat.*, § 251; *Groves v. Ruby*, 24 Indiana 418. These rules govern the practice and pleadings in actions at law in the federal courts held within the state. *Rev. Stat.*, § 914; *Thompson v. Central R. Co.*, 6 Wall. 134, 18 L. Ed. 765; *Albany, etc., Iron Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 387, 32 L. Ed. 246. The case at bar was therefore rightly treated by the court below as an action at law; and the real question in controversy is not one of the forms of pleading, but whether the plaintiff has any beneficial interest as against the defendant in the contract sued on." *Delaware County v. Diebold, etc.*, Co., 133 U. S. 473, 488, 33 L. Ed. 674.

69. Absolute assignment.—*Boon v. Chiles*, 8 Pet. 532, 8 L. Ed. 1034.

Where the assignees of a claim on a third party have parted completely with their interest in it and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21 L. Ed. 775.

70. Partial assignment.—*Delaware County v. Diebold, etc.*, Co., 133 U. S. 473, 33 L. Ed. 674.

71. Assignor party defendant.—*Delaware County v. Diebold, etc.*, Co., 133 U. S. 473, 33 L. Ed. 674.

72. Heirs.—*Boon v. Chiles*, 8 Pet. 532, 8 L. Ed. 1034.

73. Assignor of partner's interest.—*Bank of Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

construction of a railroad, the assignee, where the railroad has assigned its right to the tax, is a necessary party.⁷⁴

2. **EFFECT OF ASSIGNMENT PENDENTE LITE.**—Where an assignment is made by a defendant of his interest in the subject matter of a pending suit, the assignee may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor.⁷⁵

3. **EFFECT OF WANT OF PROPER PARTIES.**—It is a general rule that a bill in chancery will be dismissed for want of proper parties, but the rule is not universally true. The fault may be remedied and the parties supplied.⁷⁶

G. Pleading.—1. **OF PLAINTIFF.**—Every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit.⁷⁷ Where the assignee of an obligation sues his assignor, he must aver a compliance with the law on his part in subjecting the debtor to liability on the obligation.⁷⁸

2. **OF DEFENDANT.**—It is not necessary for the defendant in his answer to reply to immaterial averments in the bill.⁷⁹ The plea of bona fide purchaser must be averred in the plea or answer.⁸⁰

74. Assignee party defendant.—*Sully v. Drennan*, 113 U. S. 287, 28 L. Ed. 1007, citing and distinguishing *Harter v. Kerneohan*, 103 U. S. 562, 26 L. Ed. 411.

75. Assignment pendente lite.—*Ex parte Railroad Co.*, 95 U. S. 221, 24 L. Ed. 355. See, also, *Platt v. Jerome*, 19 How. 384, 15 L. Ed. 623.

"A pendente lite assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this, the plaintiffs in the action cannot complain, because the assignee is bound by all that is done, whether a party by name or not." *Ex parte Railroad Co.*, 95 U. S. 221, 226, 24 L. Ed. 355.

76. Want of proper parties.—*Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82. See the title PARTIES.

Where a complainant's right is thus only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, the proper bill is a bill for such a settlement. Such bill will not lie unless all the partners are made parties defendant. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

77. Facts giving jurisdiction.—*Bushnell v. Kennedy*, 9 Wall. 387, 390, 19 L. Ed. 736; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718.

"That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Mollan v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Bradley v. Rhines*, 8 Wall. 393, 19 L. Ed. 467; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1037; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905." *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377. See the titles COURTS; JURISDICTION; PLEADING.

78. Special averments.—By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of nulla bona, unless such suit would have been impracticable or unavailing. The nonaverment of any special fact or reason why such suit would have been unavailing renders the declaration bad on demurrer; but the defect is cured by verdict. *Wills v. Claffin*, 92 U. S. 135, 23 L. Ed. 490. See ante, "When Liability Arises," III, E, 2, b, (2).

79. Of defendant.—*Hardeman v. Harris*, 7 How. 726, 12 L. Ed. 889; *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676.

It is not necessary for an assignee of this recorded judgment, who was defending himself in chancery, by claiming under the assignment, to notice in his pleading an allegation in the bill that a release of the judgment was improperly entered upon the record. His assignment was not charged as fraudulent. *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676.

80. Plea of innocent purchaser.—"To bring the defense within it, it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seized of the legal title; that all the purchase money was paid and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money has been secured to be paid, yet if it be not, in fact, paid before notice, the plea of purchase for a valuable consideration will be overruled. *Jewett v. Palmer*, 7 Johns. Ch. 65; *Vattier v. Hinde*, 7 Pet. 252, 251, 8 L. Ed. 655; *Boone v. Chiles*, 10 Pet. 177, 211, 9 L. Ed. 388; *Story, Eq. Pl.*, §§ 805, 806." *Smith v. Orton*, 131 U. S. appx. lxxv. See the title VENDOR AND PURCHASER.

II. Necessity for Proving Assignment.—The assignee of a chose in action cannot maintain suit thereon without proving the assignment.⁸¹

I. Evidence—1. **BURDEN OF PROOF.**—Where the defense of payment is interposed by the debtor in an action by an assignee on a nonnegotiable chose in action, the burden of proving that notice of the assignment was given to the debtor prior to the payment is upon the plaintiff.⁸² Where a written assignment which has been acknowledged and proved in such a manner as to admit its recordation is produced in evidence, the burden of proving that it is not the act of the assignor devolves upon the party denying its execution.⁸³

2. **ADMISSIBILITY.**—Where the fact of an assignment is in issue, any facts which tend to prove the assignment are admissible.⁸⁴ A written assignment may be explained but not altered by parol evidence.⁸⁵ Where the assignment was, in

81. Proof of assignment.—"The suit cannot be maintained without proof of the assignment." *Roberts v. Phoenix Life Ins. Co.*, 120 U. S. 86, 88, 30 L. Ed. 613.

Where the assignee by a written assignment of a life insurance policy in favor of the assignor and his assigns, on the life of a debtor of his, brought suit in equity against the life insurance company and the assignor, and it appeared that the assignor after the date of such assignment and before the death of the debtor, delivered the policy to the company, with a written assignment by him to it, indorsed on the policy of "all right and title to the within policy," and expressing a consideration and receipt thereof, the bill was properly dismissed on the ground that the assignment to the plaintiff was not satisfactorily proved to have been made or delivered before the transaction between the assignor and the company. *Roberts v. Phoenix Life Ins. Co.*, 120 U. S. 86, 30 L. Ed. 613.

82. Burden of proving notice of assignment.—*Withers v. Greene*, 9 How. 213, 13 L. Ed. 109. See the title PRESUMPTIONS AND BURDEN OF PROOF.

83. Proof of execution.—"There is another consideration, however, of very great weight in favor of the validity of the assignment. Its execution was proved shortly after the date it bears, before a justice of the peace, in accordance with the laws of the state of New York, where Flaglor then resided. The certificate of this fact, with that of the clerk of the proper court, was such that by the laws of Illinois the assignment was admitted to record in the county of Cook of that state, and is prima facie evidence of its execution by Flaglor. When this assignment and certificate were produced in evidence, the onus of proving that it was not the act and deed of Flaglor devolved on the appellants." *Gay v. Parpart*, 106 U. S. 679, 685, 27 L. Ed. 256. See the title PRESUMPTIONS AND BURDEN OF PROOF.

84. Proof of assignment.—The fact that A, many years ago, did present to a board of commissioners appointed by law to pass upon imperfect titles to land, a "claim" to certain land, describing it as "formerly" of B, an admitted owner; the

fact that the board entered on its minutes that A, "assignee" of B, presented a claim, and that the board granted the land to "the representatives" of B; and the fact that A, with his family, was in possession of the land many years ago, and cultivating it, are facts which tend to prove an assignment; and as such, in an ejectment where the fact of an assignment is in issue, should be submitted as evidence to the jury. *Hogan v. Page*, 2 Wall. 603, 17 L. Ed. 854.

85. Parol evidence.—"A case of explanation implies uncertainty, ambiguity and doubt, upon the face of the writing. But the proposition now, is a plain case of alteration; that is, an offer to prove by witnesses, that the assignor promised something, beyond the plain words and meaning of his written contract. Such evidence is inadmissible; and has been so adjudged by the supreme court, in *Clerk v. Russell*, 3 Dall. 415, 1 L. Ed. 660." *O'Harra v. Hall*, 4 Dall. 340, 1 L. Ed. 858.

Where the assignment of a bond is in writing in general terms, parol evidence is inadmissible to show that the assignor had expressly guaranteed payment. *O'Harra v. Hall*, 4 Dall. 340, 1 L. Ed. 858.

March 1, 1876, A, by way of collateral security for his notes of even date, payable four months thereafter, made an instrument in writing assigning to B, the payee of them, a judgment against C, and authorizing him to sell it, in case they should not be paid at maturity, and apply the proceeds to the payment of them. C, at said date, had sufficient personal property to satisfy the judgment. Execution was issued June 19, but that property had been previously exhausted by the levy of other executions. In a suit by B against A on the notes; held, 1. That B was not bound by the terms of the assignment to take steps for the collection of the judgment before the maturity of the notes, 2. That, in the absence of accident, mistake, or fraud, evidence was not admissible to show his parol agreement, made contemporaneously with the assignment and as part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon. *Bast v. Bank*, 101 U. S. 93, 25 L. Ed. 794. See the title PAROL EVIDENCE.

reality, conditional, although absolute on its face, parol evidence is admissible to rebut or explain an equitable interest where a bill in the nature of a bill to carry the assignment into effect is filed.⁸⁶ Where there is no distinction between a legal and equitable title, the assignment will be properly admitted to prove the title of the assignee.⁸⁷ The record of an adjudication in bankruptcy against the maker of a note is admissible evidence in an action by the assignee of the note against the assignor thereof.⁸⁸ Declarations made by the holder of chose in action of a chattel, while he held it, are not admissible in evidence in a suit upon or in relation to it by a subsequent owner.⁸⁹

3. **WEIGHT AND SUFFICIENCY.**—The record of an adjudication in bankruptcy against the maker of a note is conclusive evidence that a suit by the assignee of the note against the maker would have been impracticable and unavailing.⁹⁰

83. Assignment absolute on face.—*Rhodes v. Farmer*, 17 How. 464, 15 L. Ed. 152. See the title **PAROL EVIDENCE**.

87. Admissibility of assignment.—*Martin v. Ihmsen*, 21 How. 394, 16 L. Ed. 134.

88. Record of adjudication in bankruptcy.—*Wills v. Claflin*, 92 U. S. 135, 23 L. Ed. 490.

89. Declaration by previous owner.—*Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 23 L. Ed. 920. See, generally, the title **DECLARATIONS AND ADMISSIONS**.

"The declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the

state of New York in the case of *Paige v. Cagwin*, 7 Hill 361, and is now admitted to be sound doctrine; and that the party is since deceased makes no difference (*Beach v. Wise*, 1 Hill 612); or that the transfer is made after maturity (*Paige v. Cagwin*, *supra*). The same is true of the declarations of a mortgagee (*Earle v. Clute*, 2 Abb. Ct. App. Dec. 1); or of the assignor of a judgment (16 N. Y. 497); or of an indorser (*Anthon's N. P.* 141); or of a judgment debtor (1 Denio 202)." *Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 382, 23 L. Ed. 920.

90. Weight and sufficiency.—*Wills v. Claflin*, 92 U. S. 135, 23 L. Ed. 490. See the title **FORMER ADJUDICATION OR RES ADJUDICATA**.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

BY S. BLAIR FISHER.

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I. Scope of Title.

In this title it will be attempted only to set out the decisions of the United States supreme court declaring and applying the general principles relating to assignments for the benefit of creditors, at common law and under statutes reg-

ulating such assignments. No attempt will be made to treat the question of the right of debtors to relief, under state insolvency laws, upon proper application and surrender of property, as this will be fully considered under the title *INSOLVENCY*. The validity of assignments for benefit of creditors, as affected by the institution of bankruptcy proceedings, will be treated under the title *BANKRUPTCY*.

II. Definition and Nature.

Voluntary Assignments.—An assignment for the benefit of creditors is "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or apply the property upon their payment."¹

Assignments Arising by Operation of Law.—In a number of the states it is provided by statute that any conveyance, transfer or assignment of property, in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion, in whole or in part, of the others, shall operate as an assignment inuring to the benefit of all creditors.²

III. Nature, Validity and Construction of Statutes Regulating Assignments for Benefit of Creditors.

A. Nature.—State statutes regulating the mode of administering assignments for the benefit of creditors are not necessarily to be considered as bankrupt or insolvent laws, as where they do not provide for the discharge of the insolvent from arrest or imprisonment, and leave after-acquired property liable to his creditors precisely as though no assignment had been made.³

B. Controlling Authority of State Decisions as to Construction and Effect.—The matter of assignments for benefit of creditors is one of local law,⁴ and the principle has been fully established that the construction and effect of a state statute regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest courts of the state are a controlling authority in the federal courts.⁵ They are treated as establishing a rule of property applicable within their several jurisdictions.⁶

1. Definition.—Black L. Dict., tit., Assignment for Benefit of Creditors.

An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment. *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341. See post, "Appropriation of Property," IV, D, 1; "Operation and Effect of Assignment," VIII.

A general assignment, under the Iowa statutes, "is the disposition of all the property of the insolvent for the benefit of all his creditors." *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

A partial assignment, permissible in some jurisdictions, is one by which the debtor assigns only the property enumerated and described in the schedule annexed to the instrument passing the title. *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314. See, also, *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136. See post, "Schedule or Inventory," IV, E, 2.

As to the necessity for a trust and the intervention of a trustee, as determining whether an instrument is an assignment for the benefit of creditors, see post, "Necessity for Intervention of Trustee," IV, D, 2.

2. See post "As to Preferences in Assignment," V, B, 1.

3. State assignment laws not insolvent laws.—*Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341. See the titles *BANKRUPTCY*; *INSOLVENCY*.

4. Controlled by local laws.—*May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368.

5. Decisions of state courts as controlling.—*Robinson v. Belt*, 187 U. S. 41, 47 L. Ed. 65; *May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Randolph v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200; *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696; *Jaffray v. McGehee*, 107 U. S. 361, 27 L. Ed. 495; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Sumner v. Hicks*, 2 Black 532, 17 L. Ed. 355; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. Ed. 374.

6. Robinson v. Belt. 187 U. S. 41, 47 L. Ed. 65. And see cases cited in preceding note.

"As to the construction of a state statute, we generally follow the rulings of the highest court of the state, *Bacon v. Northwestern Life Ins. Co.*, 171 U. S. 278, 33 L. Ed. 128, and cases cited in opinion; and

IV. Creation and Essentials of Assignments.

A. Right to Make.—In General.—That a general assignment of all a man's property is per se fraudulent has never been alleged in this country; the right to make it results from the absolute ownership which every man claims over that which is his own.⁷ Such general assignment for the benefit of creditors, made within a prescribed period before the filing of a petition in bankruptcy, is, however, under the present bankruptcy law, void as against the trustee in bankruptcy, so far as it interferes with his administering the property assigned, and making such assignment is declared an act of bankruptcy.⁸ Even in such case, however, a general assignment permitted by the law of the state cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings are instituted or not, but is voidable only in case bankruptcy proceedings should be begun.⁹

Right to Make Second Assignment Where First Void.—If a debtor makes an assignment, which is void, and afterwards—but before any creditor has acquired a lien—makes another which is free from objection, the latter assignment is valid.¹⁰

B. By Whom Made.—As to the legal right to make an assignment, see ante, "Right to Make," IV, A.

as to other matters, we lean towards an agreement of views with the state courts, *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. Ed. 359. So, when the highest court of a state affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that state, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many states, and in others a different ruling had obtained." *Randolph v. Quidnick Co.*, 135 U. S. 457, 463, 34 L. Ed. 290.

7. Right to make.—*Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. And see *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

"It is also objected that the assignment is in general terms, and that no schedule of the property is annexed. That a general assignment of all a man's property is per se fraudulent has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own; that it is a circumstance entitled to consideration, and in many cases to weighty consideration, is not to be controverted. If a man were to convey his whole estate, and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit; the transaction would be closely inspected, and a sweeping conveyance of his whole property would, undoubtedly, form an important item in the testimony to establish fraud. So, in many other cases which might be adduced. But a conveyance of all his property, for the payment of his debts, is not of this description; it is not, of itself, calculated to excite suspicion. Creditors having no eq-

uitable claim on all the property of their debtor; and it being his duty, as well as his right, to devote the whole of it to the satisfaction of their claims; the exercise of this right, by the honest performance of this duty, cannot be deemed a fraud. If transferring every part of his property, separately, to individual creditors, in payment of their several debts, would be not only fair but laudable; it cannot be fraudulent, to transfer the whole to trustee for the benefit of all. In England, such an assignment could not be supported, because it is, by law, an act of bankruptcy, and the law takes possession of a bankrupt's estate and disposes of it. But in the United States, where no bankrupt law exists for setting aside a deed honestly made for transferring the whole of a debtor's estate, for the payment of his debts, the preference given in this deed to favored creditors, though liable to abuse, and perhaps, to serious objection, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained; it cannot be treated as a fraud." *Brashear v. West*, 7 Pet. 608, 613, 614, 8 L. Ed. 801.

8. Invalidity of assignment within four months of petition in bankruptcy.—*Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1099; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760. For a full treatment of this question, see the title BANKRUPTCY.

9. Voidable only in case bankruptcy proceedings instituted.—*Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165. And see *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

10. Second assignment where first void.—*Sumner v. Hicks*, 2 Black 532, 17 L. Ed. 355.

Corporations.—A corporation, through its proper officers, may make an assignment for the benefit of creditors.¹¹

Partnerships.—A partnership, whether general or limited,¹² may, through its proper officers, make an assignment for the benefit of creditors.¹³

11. Corporations.—Potts v. Wallace, 146 U. S. 689, 36 L. Ed. 1135. See the title CORPORATIONS.

12. Limited partnership.—Tracy v. Tuffly, 134 U. S. 206, 33 L. Ed. 879.

Assignment by general partner.—In Tracy v. Tuffly, 134 U. S. 206, 33 L. Ed. 879, it was held that the general partner in a limited partnership consisting of a general and a special partner might execute an assignment for the benefit of creditors.

"While there is some conflict in the adjudged cases as to the circumstances under which one partner may assign the entire effects of his firm for the benefit of creditors, the supreme court of Texas, in Graves v. Hall, 32 Texas 665, sustained the authority of one partner to make, in good faith, in the name of his firm, an assignment of the partnership property for the benefit of creditors. Besides, under the law of that state, in the case of limited partnerships, the general partners only are authorized to transact business and sign for the partnership, and bind the same, and suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. Rev. Stats. Texas, §§ 3444, 3445." Tracy v. Tuffly, 134 U. S. 206, 224, 33 L. Ed. 879.

13. Partnerships.—Emerson v. Senter, 118 U. S. 3, 30 L. Ed. 49; Kennedy v. McKee, 142 U. S. 606, 35 L. Ed. 1131; Tracy v. Tuffly, 134 U. S. 206, 33 L. Ed. 879; Paul v. Cullum, 132 U. S. 539, 33 L. Ed. 430. See the title PARTNERSHIP.

In Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696, an assignment was made for the benefit of their creditors by individual members of a private bank, who were also directors in a national bank.

As to statutes prohibiting preferences by insolvent corporations or limited partnerships, see post. "Prohibition of Preferences by Insolvent Corporations and Limited Partnerships," V. B. 3.

Assignment by sole surviving partner.—In Emerson v. Senter, 118 U. S. 3, 30 L. Ed. 49, the court in holding that it could not concur in the view of the court below that a sole surviving partner of an insolvent firm, who is himself insolvent, cannot make a valid assignment of partnership assets for the benefit of the joint creditors, with preference to some of them, said: "Some of the cases hold that one partner cannot, either during the continuance of the partnership, or after its dissolution by agreement, make such an assignment. It cannot, however, be doubted that, in the absence of a statute

prohibiting it, such an assignment, whether during the continuance of the partnership or after its dissolution by agreement, would be valid where the partners all unite in executing it, or where one of them executes it by the direction or with the consent of the others. Partnership creditors have no specific lien upon the joint funds for their debts. 3 Kent Com. 65; Story Partnership, § 358."

"While the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon the joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate, had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partner—there being no statute forbidding it—could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner." Emerson v. Senter, 118 U. S. 3, 8, 9, 30 L. Ed. 49.

Assignment by one partner under power of attorney from another partner.

—In Paul v. Cullum, 132 U. S. 539, 33 L. Ed. 430, it was held, that the power of attorney given by L., a member of the firm of L. & W. Company, to H., another partner of the same firm, having by another written agreement, to which L. was a party, the entire direction and supervision of the property and business of the L. & W. Co., gave H. ample authority to represent L. in any general assignment, made in good faith, of the property of the L. & W. Co., for the benefit of its creditors.

"Thus far we have assumed that the deed of assignment in question was executed by Lord. But the appellant contends that it was void, as against Thompson, the plaintiff in the attachment, be-

Trustees.—In accordance with the rule that trustees must unite to pass any title to property jointly held by them, where there are two or more trustees of the property of insolvents, all should join therein.¹⁴

cause not so executed as to become a valid assignment of the property described in it. The deed was signed by Williams and Harlow and by the Lord & Williams Company. It was executed for Lord by Harlow, as his attorney in fact. Harlow acted for him under a written authority, dated April 6, 1881, which, among other things, constituted Harlow attorney in fact for Lord, with power 'to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.' The argument of the appellant upon this branch of the case is, that the authority of one partner to make a general assignment of the partnership effects to a trustee for the benefit of creditors cannot be implied from the partnership relation merely; that Lord's general power of attorney did not authorize Harlow to act for him in a general assignment either of the property of the Lord & Williams Company or that of Lord & Williams; and that a special authorization was necessary to enable him to represent Lord in such a matter; further, that while Lord might subsequently ratify, as he did, the act of Harlow, such ratification occurred after the levy of Thompson's attachment, and could not relate back so as to invalidate that intervening attachment. It is not necessary to consider all of these propositions; for we are of opinion that the above power of attorney, interpreted in the light of the relations in business of the parties to it, gave Harlow ample authority to represent Lord in any general assignment, made in good faith, of the property of the Lord & Williams Company for the benefit of its creditors. In respect to goods, wares, merchandise, choses in action and other property in possession or in action, and in respect to all business of whatever nature and kind, Harlow, for Lord, and in his name, was expressly authorized to bargain, agree for, buy, sell, mortgage and hypothecate the same, and in any and every way and manner to deal in and with such property and rights. And this au-

thority was conferred, while Harlow had, by another written agreement, to which Lord was a party, the entire direction and supervision of the property and business of the Lord & Williams Company. It would be extraordinary if a partner to whom was committed such direction and supervision of partnership property, could not, in the matter of a general assignment of the partnership effects for the benefit of firm creditors, represent an absent partner who had given him the broad authority expressed in the above power of attorney." *Paul v. Cullum*, 132 U. S. 539, 33 L. Ed. 430.

Effect of assignment of partnership property only.—"In *Coffin v. Douglas*, 61 Texas 406, 407, the supreme court of Texas said: 'In the case of *Donoho v. Fish Bros. & Co.*, 58 Texas 164, it was held that an assignment made by partners, which did not purport to pass title to all the property owned by the partnership, and by the members thereof in their separate rights, and not exempted from forced sale, could not be sustained as a valid assignment under the act of March 24, 1879.'" *Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131.

"So in *Still v. Focke*, 66 Texas 715, 723: 'A partnership may make an assignment for the benefit of creditors, but in such case, the property of the partnership, and the property of each member of it, which is subject to forced sale, must pass by the assignment.' See, also, *Turner v. Douglas*, 77 Texas 619, 620, 621." *Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131.

"The supreme court of Texas distinctly holds, in the cases cited, that the statutes in question did not contemplate an assignment by partners for the benefit of creditors of partnership property only, that is, such an assignment is not provided for by, and cannot be administered under, that statute. An assignment of that character may be valid as between the assignors and the creditors who accept its provisions. But no reason is given other than the one above stated—which we deem insufficient—why such an assignment would be an obstacle in the way of creditors who do not accept its provisions, from collecting their debts in the ordinary modes prescribed by law, or why the marshal might not, in the discharge of his duty, have levied the attachments in his hands upon the property in dispute, subject, it may be, to the rights of creditors who accepted the proceeds of the property covered by the deed." *Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131.

14. Assignment by one of two trustees.—Where there were two trustees of the property of insolvents, and one of them

C. To Whom Made.—May Be to One or More Persons.—An assignment for the benefit of creditors may be made to a single individual or to several.¹⁵

Nonresidents.—Independently of a statute on the subject, there would seem to be no reason why, as a mere matter of law, an assignment for the benefit of creditors should be held void because the assignee is not a citizen or resident of the state where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by law.¹⁶

Relatives or Intimate Friends of Assignor.—The fact that the assignee is a relative or intimate friend of the assignor will not render his selection invalid, though a general assignment to a relative as trustee for the benefit of creditors may be open to suspicion as creating a secret trust in favor of the assignor.¹⁷

Right of Assignor to Act as Assignee.—See post, "Necessity for Intervention of Trustee," IV, D, 2.

D. Essential Elements—1. APPROPRIATION OF PROPERTY.—It is essential to a valid assignment for the benefit of creditors, that the debtor make an absolute appropriation of his property as a means for raising a fund to pay his debts.¹⁸

made an assignment, but the other neither joined in it nor assented to it afterwards, the assignment was void. And in the present case, also, the assignee appears to have received an assignment of the property only as security, until its profits should pay a debt due to him by the insolvents. That debt being extinguished, he has no right, as owner, to claim an account of further profits from the holder of the property. *Wilbur v. Almy*, 12 How. 180, 13 L. Ed. 944. See the title TRUSTS AND TRUSTEES.

15. Assignment to one or more.—*Muller v. Norton*, 132 U. S. 501, 33 L. Ed. 397.

16. Nonresidents.—"A citizen, or resident, of another state may, in a particular case, be a very proper assignee. A large part of a debtor's assets may be located in a state other than that in which he resides. If a nonresident assignee should for any reason be deemed an improper person to act as such, the court having jurisdiction of the matter could, according to the laws of Texas, remove him and appoint another in his place." *Bachrack v. Norton*, 132 U. S. 337, 33 L. Ed. 377.

17. Assignment to relative or friend.—"The fact that the assignee or the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the persons making the loan are relatives ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship. *Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 769; *Prewitt v. Wilson*, 103 U. S. 22, 26 L. Ed. 360; *Estes v. Gunter*, 122 U. S. 450, 30 L. Ed. 1228; *Bean v. Patterson*, 122 U. S. 496, 30 L. Ed. 1195; *Garner v. Second Nat. Bank*, 151 U. S.

420, 432, 38 L. Ed. 218; *Aulman v. Aulman*, 71 Iowa 124; *Van Patten v. Thompson* (Iowa), 34 N. W. Rep. 763; *In re Alexander*, 37 Iowa 454; *Doyle v. McGuire*, 38 Iowa 410. A general assignment to a relative as trustee for the benefit of creditors is open to more suspicion, since such are more often selected as instruments for creating a secret trust in favor of the assignor." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

18. Absolute appropriation of property essential.—*Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341. And see *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Bard v. Smith*, 4 Dall. 76, 1 L. Ed. 748.

"In *Robson v. Tomlinson*, 54 Arkansas 229, 233, 234, where the question was whether a certain instrument was to be taken as a mortgage given to secure a debt, or a deed of assignment for the benefit of creditors, the court said: 'The instrument relied upon by Tomlinson, the interpleader, is in form a mortgage, and not an assignment for the benefit of creditors. The presumption, until overcome by proof, is that the parties intended it to have the effect the law gives to a mortgage—that is, that it should stand as security for a debt. The fact that it provides that the mortgagor should surrender immediate possession to the trustee for the mortgagee does not convert it into an assignment. To accomplish that result it must be shown that it was the intention of the parties that the debtor should be divested not only of his control over the property, but also of his title. *Cadwell's Bank v. Crittenden*, 66 Iowa 237. The equity of redemption may be mortgaged or sold, and so be of value to a debtor who has not the pecuniary

There must be a transfer of the entire property of the debtor for the benefit of his creditors.¹⁹ The debtor must be divested not only of his control of the property, but also of his title.²⁰

2. **NECESSITY FOR INTERVENTION OF TRUSTEE**—a. *In General*.—An assignment for the benefit of creditors contemplates the intervention of a trustee.²¹ If the conveyance be made directly to the creditor himself, it is ordinarily treated as a chattel mortgage.²²

b. *Effect of Retention of Possession by Assignor*.—The fact that possession is retained by the assignor, and that no trustee is appointed according to the provisions of the deed will not invalidate the assignment where the object of his continuing in possession is satisfactorily accounted for by the circumstances of the case.²³

ability to redeem; and he has a right to reserve it in dealing with his creditor, regardless of his solvency. * * * Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decision of the court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title and so make an appropriation of the property to raise a fund to pay debts? * * * If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made. In arriving at the intent of the parties, therefore, the question is, not whether the debtor intended to avail himself of the equity of redemption by payment of the debt, but was it the intention to reserve the equity? If so, the instrument is a mortgage and not an assignment.' See, also, *Penzel Co. v. Jett*, 54 Arkansas 428, 430. These cases, as was said in *Appolos v. Brady*, 4 U. S., appx., 209; 49 Fed. Rep. 401, 403; 'declare the test to be: Has the party made an absolute appropriation of property as a means for raising a fund to pay debts, without reserving to himself, in good faith, an equity of redemption in the property conveyed?' *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524.

19. *Cunningham v. Norton*, 125 U. S. 77, 31 L. Ed. 624. See ante, "Form of Instrument," IV, E, 1. And see post, "Reservations and Stipulations," VII; "What Property Passes," VIII, C.

20. *Divestiture of title and control*.—*Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524. And see *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171.

Where there is a reservation of the equity of redemption, the instrument is a mortgage and not an assignment. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524. See the title **MORTGAGES AND DEEDS OF TRUST**.

21. *Necessity for trustee*.—"A voluntary assignment for the benefit of cred-

itors implies a trust and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors.' *Burrill on Assignments*, 5th Ed., § 3. 'The transfer by a creditor of all his property does not of itself make what is termed a general assignment but it must also be conveyed to trustees to be held by them in trust for other creditors.' *Burrill on Assignments*, 5th Ed., § 122." *May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368.

22. *Effect of conveyance directly to creditor*.—*Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289; *May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368. See the title **CHATTEL MORTGAGES AND CONDITIONAL SALES**.

Test as to whether instrument a mortgage or assignment with preferences.—"It is sometimes difficult to determine whether a particular instrument is a mortgage or an assignment with preferences. The test most frequently applied is whether the conveyance is of all the property of the debtor and is made to a trustee for the benefit of certain creditors. In such cases it is usually held to be an assignment, but if the conveyance be made directly to the creditor himself, it is ordinarily treated as a chattel mortgage. *Jones on Chattel Mortgages*, § 352a; *Burrill on Assignments*, p. 11." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

23. *Retention by assignor*.—After the assignment, the creditors for whose benefit the same was made, neglected to appoint an agent or trustee to execute it, and the property assigned remained in the hands of the assignor; the property consisted principally of choses in action, which the assignor went on to collect, and divided the proceeds among the creditors, under the assignment; no one of the creditors was dissatisfied; and at any time, the creditors could have taken the property out of the hands of the assignor. Held, that, leaving the property in the hands of the assignor, under these circumstances, did not affect the assignment; or give a right to a creditor not preferred by it, to set it

3. **ACCEPTANCE BY CREDITORS.—Presumption of Assent Where Assignment Clearly Beneficial.**—As a general rule where the assignment is without conditions and is clearly for the benefit of the creditors, the presumption of law is, that they accepted the same.²⁴ Such assignment is valid, although the assent of cred-

aside. *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903.

"If the fund had remained in the possession of Wheeler, for his own benefit, it might have cast a suspicion upon the fairness of the transaction; but there is no proof of any such object or design, nor of any fact from which an inference of mala fides can be drawn; but on the contrary, the object of his continuing in the possession of the property is satisfactorily accounted for by the circumstances of the case. It consisted principally of unsettled accounts, and choses in action, which he was much more competent to settle than a stranger could have been. It was, therefore, for the benefit of the creditors, that he continued to settle up these accounts and pay over the money to his creditors, as the proofs show that he did. This was by the express consent of some of the creditors, and the presumed consent of all, as no dissent or complaint appears to have been made by any; and no one had any right to complain, but the parties who were to receive the benefit of the assignment. This possession was held at the will and pleasure of the creditors, which they could have withdrawn at any time, if dissatisfied with the management of Wheeler; and this was a substantial compliance with that part of the assignment which relates to the appointment of an agent or trustee, for the purpose of executing and fulfilling the trusts and purposes of the assignment. The creditors were, of course, to be the judges of the fitness and competency of such agent or trustee; and they were the only parties interested in the faithful discharge of his duties. No formal appointment was necessary; an express or implied assent of the creditors to Wheeler's acting as agent or trustee, was all that could be required, according to the fair interpretation of the assignment." *Tompkins v. Wheeler*, 16 Pet. 106, 119, 10 L. Ed. 903.

"It has been also contended by the plaintiff, that if possession did not accompany and follow the deed, it is void as to creditors, under the authority of the case of *Hamilton v. Russell*, 1 Cranch 309, 310, 2 L. Ed. 118. On this point, it may be proper to observe, that in *Hamilton v. Russell*, the deed purported to convey the property to the vendee, for his own immediate use, and the subsequent continued possession of the vendor was incompatible with the instrument. This is a deed of trust, not for the benefit of the person to whom it is made, but for the benefit of certain enumerated creditors. The continuance of the possession

with the donor, until the trust can be executed, may not be so incompatible with the deed, as to render it absolutely void, under all circumstances. The court does not mean to express any opinion on this point, further than to say, that it is not supposed to be decided in *Hamilton v. Russell*." *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

24. **Acceptance presumed.**—*Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423; *Barings v. Dabney*, 19 Wall. 1, 22 L. Ed. 90.

"Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed, on the idea that the deed was complete, when executed by the parties to it." *Brooks v. Marbury*, 11 Wheat. 78, 97, 6 L. Ed. 423.

"The omission of creditors to assent to the deed, or to claim under it, may, under suspicious circumstances, afford some evidence of fraud. But real bona fide creditors are rarely unwilling to receive their debts from any hand that will pay them." *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903.

It is not necessary to the validity of a deed of assignment for the benefit of creditors, that creditors should be consulted; though the propriety of pursuing such a course will generally suggest it, when they can be conveniently assembled; but be this as it may, it cannot be necessary, that the fact should appear on the face of the deed. *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

Notice of execution unnecessary.—It is not necessary to the validity of a deed for the benefit of creditors, that the creditors for whose benefit it is made should have notice of the execution of the deed, provided they afterwards assent to the provisions made for their benefit. *Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522.

The acceptance of a trust by the trustees, and the acquiescence of the creditors, for more than twenty years, afford presumptive evidence in favor of their assent; and that is sufficient, in a case in which it is not made a subject of direct inquiry by the pleadings. *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

itors is not given at the time of its execution, if they subsequently accept in terms, or by actually receiving the benefit of it.²⁵

Necessity for Prompt Challenge on Part of Dissatisfied Creditors.—Generally, where a debtor, having large and scattered properties, and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge.²⁶

Necessity for Affirmative Election.—In some jurisdictions, however, the statutory provisions as to assignments for the benefit of creditors have been construed to require an affirmative election to become a beneficiary thereunder,²⁷ and the interest of each creditor in the assigned estate only vests in him when he signifies his assent to the assignment by filing his claim with the assignee.²⁸ This would seem to be the proper rule, where the assignment is not absolute but imposes conditions.²⁹ And where an assignment shows an intention to postpone the creditors, with their consent, such assignment has been held fraudulent as against all creditors who do not become parties to the deed by filing their claims.³⁰ Under the Texas statutes, while an assignment by partners for the benefit of creditors of partnership property only may be valid as between the assignors and those

25. Subsequent assent or acceptance of benefit.—*Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

26. Right of challenge waived unless promptly exercised.—*Randolph v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200.

27. Affirmative election to recover beneficiary required.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640.

28. Interest vests from filing claim with assignee.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640.

Generally, as to the vesting of the creditor's interest, see post, "When Creditor's Interest Vests," VIII, B.

29. Assignments imposing conditions.—See *Bodley v. Goodrich*, 7 How. 276, 12 L. Ed. 699; *Burd v. Smith*, 4 Dall. 76, 1 L. Ed. 748. And see post, "Reservations and Stipulations," VII.

30. Deed held fraudulent as to creditors not becoming parties by filing claims.—The commercial and railroad bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly, rendered it proper that a general assignment should be made for the benefit of its creditors and completion of the railroad;" it therefore assigned all its property, real, personal, and mixed, to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding \$250,000, to allow claims against the bank of a certain description, and out of the proceeds collected first to pay the principal and interest of the above loan; after the

completion of the said road, dividends were to be made pro rata amongst the creditors of the bank who had filed their claims, should there not be a sufficient amount to pay all the claims; the trustees to receive eight thousand dollars each per annum for their services. This deed was fraudulent and void as to all creditors of the bank who did not become parties to it by filing their claims. *Bodley v. Goodrich*, 7 How. 276, 12 L. Ed. 699.

"It appears from the deed of assignment, that the creditors of the bank were designed to be parties to it on filing their claims, etc. But the creditor who obtained the judgment on which the property was sold never became a party to the deed. The loan authorized was effected, but no dividend has ever been made among the creditors. Upon its face this deed shows an intention by the bank to postpone its creditors, use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects were accomplished. This was proposed to be done with the consent of creditors, and if that consent had been given, there could be no objection to the arrangement. The motive avowed, to complete the railroad, the greater part of which had been made, and by which an income would be secured for the benefit of the creditors and stockholders of the bank, would have been legal, and perhaps wise, had the creditors consented. But the plaintiff in the judgment under which the property claimed by the plaintiffs was sold did not consent; consequently he was not bound by the deed of assignment. It was fraudulent as against him and all other creditors of the bank who did not become parties to the deed." *Bodley v. Goodrich*, 7 How. 276, 278, 12 L. Ed. 699.

who accept its provisions, yet such assignment will not prevent creditors not accepting its provisions from collecting their debts in the ordinary modes prescribed by law, subject, it may be, to the rights of creditors accepting.³¹

Assent as Rendering Assignment Irrevocable.—It would seem that a voluntary assignment for the benefit of creditors, if assented to by the creditors, or a considerable portion of them, becomes irrevocable.³²

E. Form and Requisites of Instrument of Transfer—1. **FORM OF INSTRUMENT.**—**Intention of Parties Rather than Form Controls.**—It may be stated as a general rule that the test as to whether an instrument is an assignment for the benefit of creditors is whether the party intended, at the time of the execution of the instrument to divest himself of the title and make an absolute appropriation of his property as a means to raise a fund to pay debts.³³

Even though the instrument is not in strict conformity with statutory provisions as to assignments for benefit of creditors, yet where the policy of the statute in question is to aid and encourage such assignments, the courts may sustain it as such an assignment, if it contain the main thing—the transfer of the entire property of the debtor for the benefit of his creditors.³⁴

2. **SCHEDULE AND INVENTORY**—a. **Necessity.**—**Duty of Assignor to Make.**—It is a usual statutory provision that the debtor making a general assignment must annex to such assignment an inventory and schedule under oath, of his estate and his creditors and their demands.³⁵

31. *Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131.

32. **Assent as rendering assignment irrevocable.**—*Barings v. Dabney*, 19 Wall. 1, 22 L. Ed. 90.

33. **Intention of parties controls.**—*Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524.

"In *Richmond v. Mississippi Mills*, 52 Arkansas 31, the court said: 'We do not hold that the giving of one or more mortgages, the confession of judgments or other means adopted to give security or preference, constitute necessarily or even ordinarily an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment.' The doctrines of that case were affirmed in *Fecheimer v. Robertson*, 53 Arkansas 101, 104, the court saying: 'The confidence of the mortgagors that no surplus would result to them in this case is apparent from the deeds, as also from the testimony. The purpose was to devote the property to the payment of debts. This may be accomplished by either a mortgage or an assignment. The question is, have the grantors by stipulations in the deeds or by their agreements and acts impressed the character of a trust for creditors upon this transaction?' " *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524.

34. **Assignment sustained though not in strict conformity to statute.**—*Cunning-*

ham v. Norton, 125 U. S. 77, 31 L. Ed. 624.

"The stipulation in the deed is not in conformity with the requirement of the 16th section; the question still remains whether the stipulation only is to be regarded as void, or whether the whole deed is void by reason of the stipulation. And the answer to this question depends upon the general policy of the statute. Is it intended to restrain assignments, or to aid and encourage them? If restraint is the object, the regulations prescribed may, according to a well-settled course of decisions in the state and federal courts, be regarded as conditions precedent, necessary to be observed in order to render an assignment valid. If aid and encouragement are intended to be given to assignments, in the interest of creditors as well as debtors, as a substitute for the bankrupt act, the courts may well disregard incidental variations from the law as void under its operation and sustain the assignment itself if it contains the main thing—the transfer of the entire property of the debtor for the benefit of his creditors—and carry it out in accordance with the law for the purposes intended." *Cunningham v. Norton*, 125 U. S. 77, 84, 31 L. Ed. 624, affirmed in *Müller v. Norton*, 132 U. S. 501, 33 L. Ed. 397.

35. **Necessity for schedule.**—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Tracy v. Tully*, 134 U. S. 206, 33 L. Ed. 879; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Bank v. Horn*, 17 How. 157, 15 L. Ed. 70.

Duty of Assignees to File Inventory.—See post, "Duty to File Inventory or Schedule," IX, C, 2.

b. *Effect of Failure to File.*—The assignment will not, it would seem, be invalidated or rendered void for the want of an inventory.³⁶

c. *Effect of Errors or Omissions.*—**Omission of Creditor's Name.**—If an inventory and list of creditors is filed, a creditor is not to be denied his pro rata part of the proceeds because his name is omitted, either by design or mistake upon the part of the debtor.³⁷

Not Conclusive as to Amount of Estate.—In the case of a general assignment, the inventory is held not to be conclusive as to the amount of the debtor's estate.³⁸ Whatever estate belongs to the debtor, at the time of a general assignment passes, by force of the statute, to the assignee,³⁹ notwithstanding any imperfect or erroneous description in the schedule.⁴⁰ This rule, however, does not apply in case of partial assignments.⁴¹

36. Assignment not invalidated by want of inventory.—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696. And see *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

"No creditor is to be excluded from participation in the proceeds of the assigned property because of the failure of the debtor to make and file the required inventory of his estate and the list of his creditors." *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

37. Omission of creditor's name.—*White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

38. Conclusiveness as to amount of estate.—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

39. Property not included vested in assignee.—Under the Iowa statute relating to assignments for the benefit of creditors it is provided that "the debtor shall annex to such assignment an inventory, under oath, of his estate real and personal, according to the best of his knowledge, and also a list of his creditors and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate; and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment;" etc. *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

40. Effect of imperfect or erroneous description.—*Bank v. Horn*, 17 How. 157, 15 L. Ed. 70.

Effect of erroneous inclusion of debt of special partner.—The fact that the schedule attached to an assignment by a limited partnership includes a debt of the special partner will not render such assignment void. *Tracy v. Tuffy*, 134 U. S. 206, 33 L. Ed. 879.

41. Partial assignments convey only property enumerated in schedule.—Partial assignments for the benefit of creditors are permissible under the statutes of Iowa. *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314. In this case it is held that

the assignment was only a partial one, and that the debtor assigned, and from the terms embodied by him, could have intended to assign, only the property particularly enumerated and described in the schedule annexed to the instrument that passed the title.

Schedule as part of the assignment.—As limiting general granting clause.—In *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314, distinguishing *Bank v. Horn*, 17 How. 157, 15 L. Ed. 70, the assignor in his assignment, expressed the desire to make a fair and equitable distribution of "his property among all his creditors," and the first part of the granting clause embraced "all the lands and all the personal property of every name and nature whatsoever" of the assignor. The property bargained, sold and assigned was, however, stated in the words immediately following, in the second part of the same clause, to be that "more particularly enumerated and described in the schedule hereto annexed, marked schedule A, or intended so to be;" which schedule together with schedule B, was made by express words, part of the assignment. It was held that the schedule which thus particularly enumerated and described the property conveyed was, therefore, as much a part of the assignment as if it were embodied, word for word, and, in that view, the general description in the first part of the granting clause must be held to be limited by the words which immediately following, indicating that the property, real and personal, intended to be conveyed, was enumerated in the schedule annexed. The particular description must control the previous general description in the same clause, although the words "general assignment" are at the head of the instrument. Nor is the result affected by the words "or intended so to be," following the words "schedule A;" for what was intended must be determined by reference to the schedule, which is expressly stated in the instrument of assignment, to contain a description of the property which was assigned.

F. Acknowledgment.—By the statutes of some states every assignment for the benefit of creditors must be duly acknowledged.⁴²

G. Delivery.—The delivery of a deed of assignment for the benefit of creditors, to the clerk, to be recorded, may be considered as a delivery to a stranger for the use of the creditors; there being no condition annexed to the assignment, making it an escrow.⁴³

H. Recordation.—It is an ordinary requirement of statutes relating to assignments for the benefit of creditors that such assignments shall be recorded in the country where the person or persons making the same reside, or where the business in respect of which the same is made has been carried on,⁴⁴ and in case such assignment shall embrace lands or any interest therein, then the same shall be recorded in the county or counties in which said land may be situated.⁴⁵

I. Appraisement of Property.—In some jurisdictions express provision is made by statute for the appraisement of the assigned property.⁴⁶

42. Acknowledgment.—*White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835. See the title ACKNOWLEDGMENTS, vol. 1, p. 75.

43. Delivery to clerk for recordation as delivery for use of creditors.—*Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 90.

"It is not true that the deed remained in the possession of Wheeler; it was sent to the clerk's office to be recorded. It was, of course, placed in the hands of the clerk to be recorded, for the uses and purposes expressed in the deed, and, of course, for the benefit of the creditors named in it. It was put out of the possession and control of the grantor. The grantees in the deed are numerous, and all could not have the actual possession of it. It is laid down in *Sheppard's Touchstone* 58, that if a deed be delivered to a stranger, for the use of the grantee, without any condition annexed, making it an escrow, it is a delivery to the grantee. The delivery to the clerk to be recorded, may well be considered as falling within this rule. This principle is fully recognized in the case of *Garnons v. Knight*, 5 Barn. and Cres. 471, that a delivery of a deed to a third person, for the use of the party in whose favor it is made, where the grantor parts with all control over the deed, is effectual, and operates from the instant of such delivery." *Tompkins v. Wheeler*, 16 Pet. 106, 119, 10 L. Ed. 903.

44. Recordation.—*White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Means v. Dowd*, 128 U. S. 273, 32 L. Ed. 429. See, generally, the title RECORDING ACTS.

"By § 6335 of the Revised Statutes of Ohio of 1880, 'when any person, partnership, association or corporation shall make an assignment to a trustee of any property, money, rights or credits, in trust for the benefit of creditors, it shall be the duty of said assignee' to file the

assignment in the probate court of the county in which he resides, and to give bond, with sureties approved by that court, for the performance of his duties as assignee." *Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346.

The revised act of Pennsylvania, of the 14th of June, 1836, entitled, "An act relating to assignees for the benefit of creditors and other trustees," requires in the first six sections the assignment to be recorded in thirty days, and the assignment being voluntary, "the assignees shall file an inventory or schedule of the estate or effects so assigned, which shall be sworn to." *Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326.

45. *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

46. Appraisement.—*Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326; *Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346.

"The revised act of Pennsylvania, of the 14th of June, 1836, entitled, 'An act relating to assignees for the benefit of creditors and other trustees,' requires in the first six sections the assignment to be recorded in thirty days, and the assignment being voluntary, 'the assignees shall file an inventory or schedule of the estate or effects so assigned, which shall be sworn to,' on which it is made the duty of the court to appoint appraisers, who shall return an inventory and appraisement; on the return of which the assignees are required to give bond to the commonwealth, that they will in all things comply with the provision of the act of assembly, and shall faithfully execute the trust confided to them." *Shelby v. Bacon*, 10 How. 56, 68, 13 L. Ed. 326.

"Now it does not appear from the plea that the assignees ever filed the inventory of the assets in their hands with the prothonotary of the court, as required by the first section and it would seem that not only the inventory must be filed, where the assignment is voluntary, to give jurisdiction to the court, but also that it must be sworn to, an appraise-

V. Preference of Creditors.

A. Common-Law Rule.—At common law a debtor may, in the exercise of the power arising from the ownership of property, if acting conscientiously and without collusion, prefer certain of his creditors to the detriment or exclusion of the others.⁴⁷ It is no objection to such an assignment, that it defeats all other

ment of the trust property made and returned, and bond given by the assignees. This is a proceeding under a statute, and to bring the case within the statute, every material requirement of the act must be complied with. And if the above requisites have not been observed, it is not perceived how the court could take jurisdiction of the case." *Shelby v. Bacon*, 10 How. 68, 69, 13 L. Ed. 326.

47. Common-law rule.—*Burd v. Smith*, 4 Dall. 76, 1 L. Ed. 748; *Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423; *Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709; *Clarke v. White*, 12 Pet. 178, 9 L. Ed. 1046; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903; *Shelby v. Bacon*, 10 How. 53, 13 L. Ed. 326; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Blennerhassett v. Sherman*, 106 U. S. 100, 26 L. Ed. 1080; *Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49; *Estes v. Gunter*, 122 U. S. 450, 30 L. Ed. 1228; *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 548; *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 540; *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289; *Sandford, etc., Co. v. Howe, etc., Co.*, 157 U. S. 312, 39 L. Ed. 713; *United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 45 L. Ed. 938.

"The common law recognizes in every man the right to dispose of his property as he pleases. If he becomes insolvent, he may pay one creditor, and leave another unpaid. He may secure one and not another by a transfer of assets." *United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 45 L. Ed. 938.

"There can be no doubt, likewise, of the right of a debtor (and cases may be easily conceived, in which it would be a duty), independently of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest; and from such a preference alone, the court would not be disposed, hastily, to infer collusion, secret trusts or meditated frauds." *Burd v. Smith*, 4 Dall. 76, 86, 1 L. Ed. 748.

It is entirely well settled both in England and America, that at common law a debtor in failing circumstances has a right to prefer certain creditors to whom he is under special obligations, though by such preference the fund for the payment of the other creditor be lessened or even

absorbed. If, as must be conceded, he has the right to pay one creditor in preference to another, even where he is aware of his inability to pay in full—in other words, where he is insolvent—there is no just reason why, in making provision for all, by way of assignment, he may not make special provision for some. *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 540.

"Where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts. A mortgage which may have the effect of hindering other creditors is not necessarily unlawful, though a mortgage given to defraud them is always so. *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Estes v. Gunter*, 122 U. S. 450, 30 L. Ed. 1228; *Smith v. Craft*, 123 U. S. 436, 31 L. Ed. 267; *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 540; *Southern White Lead Co. v. Haas*, 73 Iowa, 399, and cases cited." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

"The abuses which are possible in such a state of affairs were among the causes that led to the enactment of bankrupt laws forbidding preferences by insolvent debtors. But, in the absence of such laws, as in the present case, if a remedy is sought in a court of equity against fraudulent preferences, it must be on allegation and proof of a design to defraud and delay the complaining creditor. It does not suffice to show a mere case of a preference intended by an insolvent debtor in paying or securing a bona fide creditor, even though the latter was well aware that the natural effect of the preference could work a detriment to other creditors." *United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 448, 449, 45 L. Ed. 938.

Validity of preference in general assignment.—"The laws of Mississippi allow an insolvent debtor to make a general assignment of his property in which one or more of his creditors may be preferred to others. The assignment is not invalid, therefore, because of the preferences given. In *Eldridge v. Phillipson*, 58 Mississippi 270, 280, the supreme court of that state said: 'The right to make a preference results from the dominion which the owner has over his property;

creditors of their legal remedies, even if amounting to a majority in number and value, unless there be some express provision of a bankrupt or other law to invalidate the deed.⁴⁸

B. Effect of Statutes.—1. AS TO PREFERENCES IN ASSIGNMENT ITSELF.—**General Assignments.**—The common-law rule as above stated has been changed in many if not most of the states, by statutes expressly prohibiting preferences in assignments for the benefit of creditors.⁴⁹ As to the effect of attempts to give

it is a part of his proprietorship. The law has not said he shall divide his estate ratably among his creditors. It has left to him the discretion to act as he wills, provided only he acts with the honest intent to pay a valid debt, and does not, under cover of such a disposition, stipulate for a benefit to himself." *Estes v. Gunter*, 122 U. S. 450, 455, 30 L. Ed. 1223.

The language of § 1420 of the Mississippi Code of 1871, describing one of the grounds for which an attachment might issue, was that "the debtor has assigned or disposed of or is about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors or give an unfair preference to some of them." It was said by the supreme court of Mississippi in *Eldridge v. Phillipson*, 58 Miss. 270, that "the right of a debtor, insolvent or in failing circumstances, to give a preference to one or more of his creditors, if it be bona fide and with no intent to secure a benefit to himself, is a firmly established rule in the jurisprudence of this state." It was decided in this case that no preference could be held to be unfair which, tested by the rules of law, is legal; and that as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preference is mere surplusage. This interpretation of the statute was held to be correct and was adopted in *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. Ed. 211, on error to the United States circuit court for the southern district of Mississippi.

An insolvent debtor has a right to prefer one creditor to another in payment, by an assignment bona fide made, and no subsequent attachment or subsequently-acquired lien, will avoid the assignment. Such an assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured, in a case of loss. It is not necessary, that the assignment should be accompanied by an actual delivery of the policy. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

An assignment was made by Francis West, to certain trustees, of all his property, giving a preference to particular creditors, who were to be paid their claims in full, before any portion of the property assigned was to be divided among his other creditors. The prefer-

ence given in this deed to favored creditors, though liable to abuse, and perhaps, to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained; it cannot be treated as a fraud. *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

48. *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

A bill to set aside a deed of assignment, made by an insolvent debtor, for the purpose of securing the payment of his debts to certain enumerated creditors, to the exclusion of the complainant, also a creditor of the assignor, and of others. A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer; and he may elect the time when it is to be done, so as to make it effectual; such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention. *Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 599; *S. C.*, 11 Wheat. 78, 6 L. Ed. 423, cited in *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903.

Preference in favor of wife.—Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference, that the preferred creditor is his own wife. *Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709.

49. **Preferences forbidden.**—*Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289; *Boek v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136; *May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Denny v. Bennett*, 128 U. S. 489, 32 L. Ed. 491; *Reagan v. Aiken*, 138 U. S. 169, 34 L. Ed. 892; *Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346.

The Iowa statute relating to assignments for creditors provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." Iowa Code, § 2115. *Boek v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

"In 1881, there was passed by the leg-

such preferences in the assignment, the rule differs in the various states. In some, it is held that such an assignment shall enture to the benefit of all the creditors *ratably*.⁵⁰ In other jurisdictions, the rule is not that the preference fails and the assignment stands for the benefit of all creditors, but that the assignment itself fails unless it be in terms free from preferences.⁵¹

Partial Assignments.—Statutory prohibitions of preferences in assignments have been held to be limited in their operation to general assignments and not to prevent preferences in partial assignments.⁵²

2. PREFERENCES BY SEPARATE INSTRUMENTS PRIOR TO ASSIGNMENT.—Even where preferences in the assignment itself are forbidden, the debtor may by a separate instrument, prior to the assignment, and made in good faith and for a valid and valuable consideration, give a preference to certain of his creditors.⁵³ The statutes do not prevent sales or mortgages of property in payment of or as security for indebtedness,⁵⁴ unless made in such connection with a general as-

islature of Colorado (Laws, 1881, p. 35), an act to regulate assignments for the benefit of creditors. It consisted of but a single section, which provided that, 'Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors,' the assignee should be required to pay certain specified debts in full; and then followed this clause: 'All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding.' A case under that statute came before the supreme court, *Campbell v. Colorado Coal, etc., Co.*, 9 Colorado 60, 64, and it was held that the word 'estate' meant all the debtor's property, and hence that the statute was designed to cover general assignments. * * * The statute of 1881 was superseded by that of 1885, which was that in force at the time of these transactions. This statute may be found in the Laws of 1885, p. 43, and in the first volume of Mills' Annotated Statutes, p. 453. The only portions of that statute having any bearing on the matters here in controversy are §§ 1 and 3 and the last half of § 18, which are as follows: 'Any person may make a general assignment of all his property, for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or, if a nonresident, where his principal place of business is, in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors.' 'No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims.' * * * But nothing in this act contained shall invalidate any conveyance or mortgage of

property, real or personal, by the debtor before the assignment, made in good faith for a valid and valuable consideration.'" *May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368.

50. Operation as assignment for benefit of all creditors.—*White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 548; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Tracy v. Tuffy*, 134 U. S. 206, 33 L. Ed. 879; *Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346. And see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

51. Assignment fails unless free from preferences.—*May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368.

52. Preferences allowed in partial assignments.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.

53. Validity of preferences by prior conveyances, etc., made in good faith.—*May v. Tenney*, 148 U. S. 60, 37 L. Ed. 368.

54. Bona fide sales or mortgages.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136; *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Smith v. Craft*, 123 U. S. 436, 31 L. Ed. 267; *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. Ed. 374; *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552.

"A sale and delivery of goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them." *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190.

"A debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgages or pledge it as security for debts, or create a lien upon it by means even of a judgment con-

fessed in favor of his creditor." *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

In Iowa, an insolvent debtor may make a mortgage or other conveyance of his property to one or more of his creditors, with intent to give them preference, and, in the absence of fraud, such mortgage or conveyance will not operate as a general assignment for the benefit of creditors, unless intended so to operate. The fact that the property so conveyed was much in excess of the debts secured by the conveyance is not necessarily indicative of fraud; but in such cases the question of good faith is one of fact, and a mere error of judgment will not be imputed as a fraud. *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

"It is also true that, by the law of Iowa respecting assignments for the benefit of creditors, preferences are forbidden; but the authorities in that state hold that a sale or mortgage to pay or secure the payment of pre-existing bona fide debts is not to be considered an assignment within the statute, even when made in contemplation of insolvency, or when the debtor, by the mortgage, intends to hinder other creditors who are about to obtain liens upon his property, unless, at least, the mortgage was intended to operate, not as a security, but as a general assignment for the benefit of creditors, or is made in such connection with a general assignment as to constitute both but one and the same transaction. *Farwell v. Howard*, 26 Iowa 381; *Southern White Lead Co. v. Haas*, 73 Iowa 399; *Gage v. Parry*, 69 Iowa 605; *Kohn v. Clement*, 58 Iowa 589; *Aulman v. Aulman*, 71 Iowa 124. It is sometimes difficult to determine whether a particular instrument is a mortgage or an assignment with preferences. The test most frequently applied is whether the conveyance is of all the property of the debtor, and is made to a trustee for the benefit of certain creditors. In such cases it is usually held to be an assignment, but if the conveyance be made directly to the creditor himself, it is ordinarily treated as a chattel mortgage. *Jones on Chattel Mortgages*, § 352a; *Burrill on Assignments*, p. 11." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

"If there be nothing to impeach the consideration and the good faith of the parties, the fact that the mortgagees intended to obtain a preference over other creditors should not invalidate the mortgages, since the very object of giving such securities is to give a preference to the creditors therein designated. *Hutchinson v. Watkins*, 17 Iowa 475; *Chase v. Walters*, 28 Iowa 460; *Stewart v. Mills County Bank*, 76 Iowa 571." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

"This statute (Iowa Rev. Stat. 569) which, as we have seen, has been in force in the state of Iowa for thirty years, has

been repeatedly before its highest court. In the margin may be found a list of cases decided by that court, in which it has been the subject of construction. These propositions seem to be established. First, this section does not prevent partial assignments with preferences, or sales or mortgages of any or all of the party's property in payment of or security for indebtedness. Its operation is limited to the matter of general assignments, and does not destroy that *jus disponendi* which is an incident to title. *Cowles v. Rickets*, 1 Iowa 582; *Fromme v. Jones*, 13 Iowa 474; *Lampson v. Arnold*, 19 Iowa 479, 486. In this latter case the court enters into a full consideration of the import of the statute, and says: 'This statute, it will be observed, does not limit or affect the right of an insolvent debtor, or one contemplating insolvency, or indeed, any other, to sell or mortgage a part or all of his property to one or more of his many creditors, in payment or security of a particular debt or debts. And this is true, although such sale or mortgage may, practically, defeat all other creditors than the grantee, from collecting their demands. Nor does the statute prohibit or interfere with the right of any debtor, as it existed prior to the statute, to make a partial assignment. In other words, the statute does not expressly, or by implication, extend any further, or apply to any instrument or conveyance, other than to a general assignment. *Bock v. Perkins*, 139 U. S. 628, 641, 35 L. Ed. 314. And, therefore, it is still competent for any debtor to pay a part of his creditors in full; to secure another part by mortgage, or deed of trust upon a part of his property; to make a partial assignment of still other property for the benefit of certain other creditors, with or without preference, and afterwards to make a general assignment. The statute simply provides that such general assignment shall not be valid, unless it is made for the benefit of all the creditors *pro rata*.'" *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

Effect of creditor's knowledge of insolvency.—"A collusive transfer placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, is to be tolerated; yet an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency. The effect of the preference may be to delay his other creditor, but if the transaction is in good faith and made with the intention of paying the preferred debt, and without any secret trust, the conveyance by which the preference is effected is not fraudulent. And the extinguishment of an existing indebtedness is a valuable consideration for a purchase made in good faith. The burden is upon the attacking creditor, but where the fraudulent intent

signature as to constitute both but one and the same transaction.⁵⁵ The giving of judgment notes is recognized as a legitimate method of preference.⁵⁶

3. PROHIBITION OF PREFERENCES BY INSOLVENT CORPORATIONS AND LIMITED PARTNERSHIPS.—In some jurisdictions statutory provisions have been enacted expressly forbidding preference by insolvent trading corporations,⁵⁷ or limited

on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud. These we understand to be the principles applied by the supreme court of Oregon in passing upon the statute of that state. *Kruse v. Prindle*, 8 Oregon 158; *Lyons v. Leahy*, 15 Oregon 8; *Philbrick v. O'Connor*, 15 Oregon 15; *Weber v. Rothchild*, 15 Oregon 385; *Weaver v. Owens*, 16 Oregon 301; *Taylor v. Miles*, 19 Oregon 550. And this court accepts the construction given to such a state statute as controlling. *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696." *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552.

55. Transactions constituting part of general assignment.—*Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289; *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

Several instruments executed by a debtor, at about the same time, may be considered as parts of one transaction, and in law forming but one instrument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute. *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

"When an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statutes, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such we think is the necessary result of the decisions in the highest court of the state." *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677, quoted in *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 547.

Test as to whether instruments create one transaction.—Although several instruments may be executed by the debtor at about the same time, they do not necessarily create one transaction or are to be considered as one instrument; and whether they do or not and whether they come within the denunciation of the statute,

depend upon the character of the instruments, the circumstances of the case and the intent of the parties. *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

"In *Perry v. Vezina*, 63 Iowa 25, it appeared that a chattel mortgage was executed about three hours before a general assignment; but as it was agreed that, when the mortgage was made, the debtor did not contemplate making the assignment, the latter was held valid. The court said: 'But, to justify a court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor, at the time he made the mortgage, had the intention to make an assignment.' Similar expressions are found in others of the cases cited. Obviously, it is a fair inference from these decisions that, as well said by Judge Love in deciding this case, 'the intention of the assignor must be the true and guiding principle of decision.' With what intent did Ott in this case execute the various instruments prior to the general assignment? Was he intending a general assignment, and seeking to evade the statute, and to give preferences by other instruments? or was he, finding himself involved and likely to be closed out by some of his creditors, simply preferring some, uncertain as to what disposition he should make of the balance of his property after they had been secured?" *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

56. Judgment notes.—*United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 45 L. Ed. 938.

57. Insolvent trading corporations.—

"In the recent case of *Rouse v. Merchants' Bank*, 46 Ohio St. 493, that court, upon a similar state of facts, adjudged that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, were invalid and ineffectual against its creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute. That decision, it is true, proceeded in part upon a theory that the property of an insolvent incorporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587,

partnerships.⁵⁸

C. Validity as Dependent on Intent, Nature of Debt, and Consideration for Preference.—1. **INTENT OR MOTIVE**—a. *In General.*—**Transaction Must Be in Good Faith.**—Even where preferences are allowed, such preferences must be in good faith and not be with a fraudulent intent.⁵⁹ The transaction must be made with the intention of paying the preferred debt, and without any secret trust.⁶⁰ Although a mortgage or conveyance which may have the effect of hindering other creditors is not necessarily unlawful, yet such conveyance or mortgage given to defraud creditors is always so.⁶¹

Motive of Debtor.—The private motives of the debtor for preferring one creditor to another cannot affect the exercise of the right if the preferred creditor has done nothing improper to secure it.⁶²

594, 29 L. Ed. 235; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516; *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721; *Peters v. Bain*, 133 U. S. 670, 691, 692, 33 L. Ed. 696. But it also proceeded in large part, as the opinion clearly shows, upon the constitution of Ohio, and the law and policy of that state as declared in previous decisions of its highest court, and should therefore be accepted by this court as decisive of the law of Ohio upon the subject." *Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346. See the title **CORPORATIONS**.

"It is contended by the plaintiff that the transfer of the goods by the company to Graeffe was made in contemplation of insolvency, and therefore was void by virtue of the provision of § 4, title 4, chapter 18, part 1, of the Revised Statutes of New York (1 Rev. Stats. N. Y. 603), which declares that it shall not be lawful for any incorporated company to 'make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever.'" *Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234, 34 L. Ed. 655.

58. Preferences by limited partnerships.—*Tracey v. Tuffly*, 134 U. S. 206, 33 L. Ed. 879. See the title **PARTNERSHIPS**.

As to effect of such statute upon right of limited partnerships to assign for the benefit of such creditors only as will consent to accept their proportional share of the estate and discharge the debtor, see post, "As to Release or Discharge of Debtor," VII, B. 1. b.

59. Effect of fraud.—*Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552; *Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Means v. Dowd*, 128 U. S. 273, 32 L. Ed. 429; *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

"It has been the accepted law ever since *Twyne's Case*, 3 Coke 80, that good faith as well as a valuable consideration is necessary to support a conveyance as against creditors. In that case *Pierce*, being indebted to *Twyne* in 400 pounds, was sued by a third party for 200 pounds. Pending such suit he conveyed all his property to *Twyne* in consideration of his debt, but continued in possession, sold

certain sheep and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made bona fide. Most of the cases illustrative of this doctrine, however, have been like that of *Twyne*, wherein a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by execution. In such cases the fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration. A like principle applies where a mortgage is given and withheld from record in order to give the mortgagor a fictitious credit. *Cadogan v. Kennett, Cowp.* 432; *Blennerhassett v. Sherman*, 105 U. S. 100, 117, 26 L. Ed. 1080; *Sayre v. Fredericks*, 1 C. E. Green (16 N. J. Eq.) 205; *Sweet v. Wright*, 57 Iowa 510, 514; 1 *Story's Eq. Juris.*, § 353; *Klein v. Hoffheimer*, 132 U. S. 367, 33 L. Ed. 373; *Holt v. Creamer*, 34 N. J. Eq. (7 Stewart) 181; *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786; *Wickham v. Miller*, 12 Johns. 320; *Pulliam v. Newberry*, 41 Alabama 168; *Robinson v. Holt*, 39 N. H. 557." *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289.

60. Crawford v. Neal, 144 U. S. 585, 36 L. Ed. 552.

"A collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, would be invalid." *United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 45 L. Ed. 938.

As to retention of interest or control, see post, "Reservation and Stipulations," VII.

61. Conveyance or mortgage to defraud creditors.—*Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

62. Motive of debtor immaterial.—*Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522.

A debtor has a right to prefer one creditor to another in payment; and it is no objection to the validity of an assignment

b. *Presumptions and Burden of Proof as to Fraudulent Intent.*—The burden of proof is upon the creditor attacking a preference as fraudulent,⁶³ but where the fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had no notice of the fraud.⁶⁴

c. *Fraudulent Intent a Question of Fact.*—Whether or not a transaction by way of preference is fraudulent involves a question of fact and not of law.⁶⁵

2. **MUST BE FOR BONA FIDE DEBT.**—**In General.**—In order that a preference may be valid, the one preferred must be a bona fide creditor.⁶⁶

Payment in Excess of Demands.—Even if it be conceded that in the absence of restrictive statutes a failing debtor has the right to prefer certain creditors, even to the entire exclusion of others, yet such debtor cannot, under pretense to prefer certain creditors, pay to them sums largely in excess of their demands, and thus prevent his other creditors from receiving any payment.⁶⁷

3. **EFFECT OF UNLAWFUL CONSIDERATION MOVING FROM PREFERRED CREDITOR**—a. *In General.*—While the motive of the debtor will not affect the validity of a preference, if the preferred creditor has done nothing unlawful to secure it, yet any unlawful consideration moving from such creditor to induce the preference, will avoid the instrument which gives it.⁶⁸

b. *Effect of Creditor's Attempt to Secure Preference upon His Participation in Proceeds.*—The attempt of a creditor to obtain an illegal preference over other creditors will not, it would seem, deprive him, under the operation of state voluntary assignment acts, from participating in the distribution of the proceeds of the debtor's property.⁶⁹

for that purpose, that it was made by the grantor, and received by the grantee, as trustee, in the hope and expectation, and with a view of preventing prosecution for a felony connected with his transactions with his creditors; if the preferred creditors have done nothing to excite that hope, and the assignment was made without their knowledge or concurrence, at the time of its execution, and without a knowledge of the motives which influenced the assignor, or was not afterwards assented to by them, under some engagement, express or implied, to suppress or forbear the prosecution. *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

63. **Eurden on attacking creditor.**—*Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552.

64. *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552.

65. **Intent a question of fact.**—*Jewell v. Knight*, 123 U. S. 426, 31 L. Ed. 190; *Smith v. Craft*, 123 U. S. 436, 31 L. Ed. 267; *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552.

Where an insolvent debtor attempts to make an assignment with preferences, the question of intent is for the jury where there is conflict as to the words used or where the words themselves are ambiguous. *Sonnenheil v. Moerlein Brewing Co.*, 172 U. S. 401, 43 L. Ed. 492.

66. **Must be for bona fide debt.**—*Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552; *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 540.

"It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration." *Blennerhassett v. Sherman*, 105 U. S. 100, 117, 26 L. Ed. 1080.

67. **Payment in excess of demand.**—*Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 548.

68. **Unlawful consideration from creditor.**—*Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522.

69. **Will not bar from participation.**—*White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677.

"The main object of this legislation is manifest. It is to secure equality of right among the creditors of a debtor who makes a voluntary assignment of his property. It annuls every provision in any assignment giving a preference of one creditor over another. No creditor is to be excluded from participation in the proceeds of the assigned property because of the failure of the debtor to make and file the required inventory of his estate and the list of his creditors. Nor, if such a list is filed, is any creditor to be denied his pro rata part of such proceeds because his name is omitted, either by design or mistake upon the part of the debtor." *White v. Cotzhausen*, 129 U. S. 329, 338, 32 L. Ed. 677, cited in *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. Ed. 548.

VI. Effect of Fraud.

A. In General.—An assignment for the benefit of creditors must be made in good faith, and, under the statutes against fraudulent conveyances, such an assignment may be declared void, where given with intent to delay, hinder or defraud creditors, purchasers, etc.⁷⁰ Though, as is held in some jurisdictions, the trustees and beneficiaries in a deed of trust to secure bona fide debts occupy the position of purchasers for a valuable consideration, yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void,⁷¹ and notice to the trustees is notice to the beneficiaries.⁷²

B. What Constitutes Fraud Invalidating Assignment.—**In General.**—In order that an assignment for the benefit of creditors may be avoided for fraud, it must have been made with the object of hindering and delaying creditors. It must be a fraudulent contrivance for that purpose.⁷³ An assignment which has the effect to delay a creditor in the enforcement of his demand by the ordinary process of law is not, for that reason alone, fraudulent and void. Such interference is not regarded as hinderance and delay within the meaning of the statutes against fraudulent conveyances.⁷⁴ Fraud in the creation of an unpreferred debt is not ground for setting aside an assignment for the benefit of creditors which is otherwise valid.⁷⁵ The mere fact that an assignment authorizes the assignee to sell on credit, even if a badge of fraud, will not authorize the court to hold such assignment void upon its face.⁷⁶ A fraudulent disposition of property does not of itself impair a subsequent general assignment. The assignee may sue for its recovery, and, if successful, it will be for the benefit of the creditors precisely as if it had been included in the assignment.⁷⁷ A provision in an assignment appropriating partnership assets to the payment of individual debts, in preference to the debts of the partnership, will not render such an assignment fraudulent and void.⁷⁸

Preferences with Fraudulent Intent.—See ante, "Intent or Motive," V. C. 1.

Necessity for Knowledge of Assignee and Beneficiaries.—According to some decisions, it would seem that the fraud of the assignor will not affect the rights of the assignee and of the beneficiaries who were ignorant of such fraud.⁷⁹

70. Void under statute against fraudulent conveyances.—*Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49; *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696; *Crawford v. Neal*, 144 U. S. 585, 36 L. Ed. 552; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. Ed. 991; *United States Rubber Co. v. American, etc., Co.*, 181 U. S. 434, 45 L. Ed. 938; *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 540; *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758.

For a full treatment of the question of fraudulent conveyances, see the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

71. Effect of notice of fraudulent intent of grantor.—*Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

72. Notice to trustees as notice to beneficiaries.—*Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696 (doctrine applied where assignment was drawn by counsel of insolvent debtor to himself as one of the trustees).

73. Intent to hinder and delay essential.—*Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. And see *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

74. Delay in enforcement of demands by process of law.—*Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377.

75. Fraud in creation of unpreferred debt.—*Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

76. Authority to sell on credit.—*Muller v. Norton*, 132 U. S. 501, 33 L. Ed. 357.

77. Estes v. Gunter, 122 U. S. 450, 30 L. Ed. 1228. See ante, "Title and Right Acquired by Assignee," VIII. A.

78. Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696. See post, "Presentation and Proof of Claims and Distribution of Assets," X.

79. Necessity for knowledge of assignee and beneficiaries.—*Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49; *Means v. Dowd*, 128 U. S. 273, 32 L. Ed. 129. And see *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

Effect of fraudulent omissions from schedule.—In *Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49, it was held that if the intentional omission by the grantor of certain property from his schedule, and his appropriation of it to his own use, was such a fraud as would vitiate the deed where the assignee or the preferred cred-

Effect of Subsequent Acts of Assignor or Assignee.—Where the assignment was valid when executed, it would seem that no subsequent conduct on the part of the assignor or assignee, however fraudulent, will avoid the assignment and deprive the creditors accepting it in good faith, and not participating in the fraud, of their rights under it.⁸⁰

C. Effect as Invalidating Entire Instrument.—Even though the assignment may be partly invalidated by fraud, it would seem that such instrument may be sustained in part where the valid and invalid portions can be separated without defeating the general intent.⁸¹

D. Evidence.—Presumptions and Burden of Proof.—An assignment for the benefit of creditors will not be held void on the ground of a fraudulent intent except where the inference of such intent is so irresistible as to preclude indulgence in any other.⁸²

Fraudulent Intent a Question of Fact.—The question of fraudulent intent is one of fact and not of law.⁸³

itors have previous notice of such omission, that result cannot happen when they were ignorant of the fraud at the time they accepted the benefit of the conveyance.

"It is, however, contended that the assignment in question was void because of the fraudulent omission from the schedule by Moores of certain property which constituted a part of the partnership assets, and was appropriated by him to his own use. But this fraud upon the part of Moores did not affect the rights of the assignee and of the beneficiaries of the trust who were ignorant of the fraud of the grantor. Such seems to be the established doctrine of the supreme court of Arkansas. * * * The rule announced by the supreme court of Arkansas is in harmony with the settled doctrines of this court, and accord with sound reason. *Marbury v. Brooks*, 7 Wheat. 556, 577, 5 L. Ed. 522; *Brooks v. Marbury*, 11 Wheat. 78, 89, 6 L. Ed. 423; *Tompkins v. Wheeler*, 16 Pet. 106, 118, 10 L. Ed. 903." *Emerson v. Senter*, 118 U. S. 3, 10, 30 L. Ed. 49.

80. Subsequent conduct of assignor or assignee.—*Emerson v. Senter*, 118 U. S. 3, 30 L. Ed. 49.

81. Instrument sustained in part.—"We agree with the circuit court that, as respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, 'void in part void in toto'; does not necessarily apply, and that the instrument may be sustained notwithstanding the invalidity of a particular provision. *Denny v. Bennett*, 128 U. S. 489, 496, 32 L. Ed. 491; *Cunningham v. Norton*, 125 U. S. 77, 31 L. Ed. 624; *Muller v. Norton*, 132 U. S. 501, 33 L. Ed. 397; *Darling v. Rogers*, 22 Wend. 483; *Howell v. Edgar*, 3 Scammon, 417, 419." *Peters v. Bain*, 133 U. S. 670, 688, 33 L. Ed. 696.

82. Presumption must be irresistible.—

Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696.

"We understand counsel to contend that the deed contains certain provisions which must so hinder, delay and defraud creditors that fraud in its execution is to be conclusively presumed without regard to the intention of the parties. The doctrine in Virginia, settled by a long and uninterrupted line of decision, is that, while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this cannot be so except where the inference is so absolutely irresistible as to preclude indulgence in any other. Hence provisions postponing the time of the sale and reserving the use of the property to the grantor meanwhile, though perishable and consumable in the use; permitting sales on credit; for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory; and the like, have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed even under such circumstances, and in its absence the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, while the right to prefer one creditor over another is thoroughly established. *Dance v. Seaman*, 11 Grattan 778; *Brockenbrough v. Brockenbrough*, 31 Grattan 580; *Young v. Wilson*, 82 Virginia 291, 293." *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

Such an intent was often conclusively presumed, at common law, if the assignment contained provisions inconsistent with good faith, or so unreasonable and unusual in their character as to justify the conclusion that it was in the language of Lord Mansfield in *Gadogan v. Kennett* (Cowp. 432), a mere "trick or contrivance to defeat creditors." *Read v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171.

83. Question of fact.—*Crawford v. Neal*,

VII. Reservations and Stipulations.

A. Reservations—1. OF INTEREST IN OR CONTROL OVER PROPERTY ASSIGNED.—**In General.**—It may be stated as the general rule that an insolvent debtor making an assignment for the benefit of his creditors, or executing an instrument by way of preference, cannot reserve to himself any beneficial interest in the property assigned.⁸⁴ Any instrument which secures to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as being a fraud upon those creditors.⁸⁵ An assignment is void which contains reservations for the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they have from the effect of a judgment against them.⁸⁶

Provisions Authorizing Retention or Control for Benefit of Creditor.—It has been held, however, that provisions in assignments or conveyances by way of preference, for the retention of possession or control by the debtor, will not invalidate the instrument where such provisions are not intended to reserve a beneficial interest in the debtor but are clearly for the benefit of the creditor.⁸⁷

2. **RESERVATION OF SURPLUS.**—If the reservation be only of any surplus which may chance to remain after the debts are paid, it is difficult to see why it should invalidate the instrument as the creditors obtain all they are entitled to,⁸⁸ and it has been expressly held that a reservation to the assignor of the surplus of the property assigned after the payment of all the debts of the creditors consenting, will not vitiate the entire assignment,⁸⁹ even though it violates a statutory requirement that such surplus shall be paid into court.⁹⁰

B. Stipulations—1. IMPOSITION OF TERMS AND CONDITIONS ON CREDITORS—**a. In General.**—A debtor making an assignment for the benefit of creditors,

144 U. S. 585, 36 L. Ed. 552; Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429; Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758. See ante, "Fraudulent Intent a Question of Fact," V. C. 1, c. And see, generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

84. **Reservation of interest, etc.**—Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429.

Payment on account of commissions, previous to assignment.—Semble, that in Illinois, in the case of a perfectly fair assignment for the benefit of creditors, where the trust will give considerable trouble and property assigned is of a sort that little or no cash will pass into the hands of the assignee, a payment by the debtor previously to the assignment's being made, of a certain sum on account of commissions, need not of necessity vitiate the assignment. Myers v. Fenn, 5 Wall. 205, 18 L. Ed. 604.

85. Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429; Bank v. Hunt, 11 Wall. 391, 20 L. Ed. 190; Huntley v. Kingman, 152 U. S. 527, 38 L. Ed. 540; Lukins v. Aird, 6 Wall. 78, 18 L. Ed. 750. And see Beaupre v. Noyes, 138 U. S. 397, 34 L. Ed. 991. See ante, "Appropriation of Property," IV, D, 1.

86. **Reservation as to continuance in business.**—Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429.

87. **Validity as dependent on intent.**—Etheridge v. Sperry, 139 U. S. 266, 35 L.

Ed. 171; Huntley v. Kingman, 152 U. S. 527, 38 L. Ed. 540.

"Cases in which reservations for the benefit of the assignor have been held to invalidate the assignment have usually been those where the reservation was either secret, or was upon its face detrimental to the interest of the creditors, and a practical fraud upon them." Huntley v. Kingman, 152 U. S. 527, 38 L. Ed. 540.

Provision as to employment of debtor.—As to whether a stipulation in a bill of sale that the purchaser should employ the debtor at a certain salary, as long as such purchaser should carry on or continue the business, is valid or invalid depends on its intention. If its object appears on its face to have been to secure a benefit to the debtor or his family, it will be fraudulent in law. Smith v. Craft, 123 U. S. 436, 31 L. Ed. 267.

If, however, the sole purpose be to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. Smith v. Craft, 123 U. S. 436, 31 L. Ed. 267.

88. **Reservation of surplus.**—Huntley v. Kingman, 152 U. S. 527, 38 L. Ed. 540.

89. Muller v. Norton, 132 U. S. 501, 33 L. Ed. 397, affirming Cunningham v. Norton, 125 U. S. 77, 31 L. Ed. 624.

90. Cunningham v. Norton, 125 U. S. 77, 31 L. Ed. 624, affirmed in Muller v. Norton, 132 U. S. 501, 33 L. Ed. 397.

cannot, generally speaking, interpose any delay, or make provisions which will hinder and delay creditors from their lawful modes of prosecuting their claims.⁹¹

b. *As to Release or Discharge of Debtor.*—**In Absence of Statute Authorizing.**—As to whether or not an assignment for the benefit of creditors will be invalidated by a provision therein that the creditors, as a condition of receiving the benefit of such assignment, shall release and discharge the debtor from their claims, depends upon the law of the state in which the question arises.⁹² In some of the states a provision that the preferred creditors shall accept their dividends in full satisfaction and discharge of their respective claims, and shall execute and deliver to the debtor a release therefor, has been held to avoid the assignment, upon the ground that the debtor has no right to compel his creditors to accept his terms or lose their preference.⁹³ Though such stipulation has been sustained in some instances,⁹⁴ yet this would seem to have been in deference to authority rather than upon conviction of its propriety or wisdom.⁹⁵

Under Statute.—In some states statutes have been enacted requiring a release from the creditors in order to participate in the distribution of his estate, and limiting such distribution to such creditors as shall file releases of their demands.⁹⁶ Such statutes are, it would seem, to all intents and purposes insolvent laws.⁹⁷

2. **STIPULATIONS AS TO SALE OF PROPERTY BY ASSIGNEE.**—**Authorization of Sale in Method Not Permitted by Statute.**—Where provisions of a statute respecting the sale of property assigned for the benefit of creditors are held

91. **Provisions delaying creditors.**—Means v. Dower, 128 U. S. 273, 35 L. Ed. 429.

92. **Question of local law.**—Robinson v. Belt, 187 U. S. 41, 47 L. Ed. 65. See ante, "Controlling Authority of State Decisions as to Construction and Effect," III, B.

93. **Assignment invalidated by stipulation.**—Robinson v. Belt, 187 U. S. 41, 47 L. Ed. 65. And see Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. Ed. 835.

94. **Provision sustained.**—Brashear v. West, 7 Pet. 608, 8 L. Ed. 801. And see Mather v. Pratt, 4 Dall. 224, 1 L. Ed. 810; Burd v. Smith, 4 Dall. 76, 1 L. Ed. 748.

95. Robinson v. Belt, 187 U. S. 41, 47 L. Ed. 65.

"In *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801, an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid." *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835.

"This court has never directly passed upon the validity of this provision, but wherever it has been called in question it has been treated as determinable by the local law of the state from which the question arose. Thus, in *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801, the clause was upheld solely upon the ground that the courts of Pennsylvania had sustained its validity. The assignment in that case was in trust to pay and discharge the debts due from the assignor, first, to certain preferred creditors, and afterward to creditors generally, provided that no creditor should be entitled to receive a dividend, who should not within ninety days execute a full and complete release of all

claims and demands upon the assignor. Mr. Chief Justice Marshall, after summarizing the arguments for and against the validity of this provision, did not commit the court to the expression of an opinion, but held that 'the construction which the courts of that state (Pennsylvania) have put on the Pennsylvania statute of frauds must be received in the courts of the United States,' and decided the case upon the authority of *Lippincott v. Barker*, 2 Binney, 174, in which this question arose, and was decided after an elaborate argument in favor of the deed. He also remarked that the question had been decided the same way in *Pearpoint v. Graham*, 4 Wash. 232. In that case Mr. Justice Washington thought that an assignment in trust for the benefit of such creditors as should release their debts was founded upon a good and valuable consideration, and was valid, the only inquiry being whether it was bona fide. The assignment was supported in favor of such of the creditors as executed a release of their demands within sixty days after the date of the instrument, that being the time limit provided for such acceptance." *Robinson v. Belt*, 187 U. S. 41, 47 L. Ed. 65.

96. **Statutes limiting distribution to creditors releasing claims.**—*Cunningham v. Norton*, 125 U. S. 77, 31 L. Ed. 624; *Muller v. Norton*, 132 U. S. 501, 33 L. Ed. 397; *Tracy v. Tuffly*, 134 U. S. 206, 33 L. Ed. 879; *Livermore v. Jenckes*, 21 How. 126, 16 L. Ed. 55; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835; *Denny v. Bennett*, 128 U. S. 489, 32 L. Ed. 491.

97. **In nature of insolvent law.**—*Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L.

to be mandatory and not directory,⁹⁸ an assignment vesting the assignee with a discretion contrary to the mandates of the statute, and in effect authorizing him to sell the property conveyed thereby in a method not permitted by the statute, will be void.⁹⁹

Authority to Sell on Credit.—According to some decisions a provision in an assignment for the benefit of creditors, authorizing the assignee to sell the assigned property on credit has been held fraudulent and void as against creditors,¹ on the ground that such a provision has the effect of hindering and delaying creditors.² According to other decisions, however, such a provision, even if a badge of fraud, will not authorize the court to hold the instrument void on its face.³

Ed. 835. See the titles BANKRUPTCY; INSOLVENCY.

98. Statutory provisions as to sale mandatory.—Jaffray v. McGehee, 107 U. S. 361, 27 L. Ed. 495.

99. Jaffray v. McGehee, 107 U. S. 361, 27 L. Ed. 495.

"The statute of Arkansas provides that the property assigned for the benefit of creditors shall be sold at public auction within one hundred and twenty days after the execution of the bond required of the assignee. The deed of assignment in effect authorized the assignee to sell at private sale, and at such time and in such manner as he should deem advisable and right. Under this power he could wait an indefinite time, and then sell the property at wholesale, or he could carry on the business of selling off the stock of goods in the ordinary way of retail merchants, and without any limit of the time within which the sale should be completed. The powers conferred by the deed of assignment were, therefore, in direct opposition to the policy of the statute." Jaffray v. McGehee, 107 U. S. 361, 363, 27 L. Ed. 495.

"We think that, under the construction given the assignment law by the supreme court of Arkansas in *Raleigh v. Griffith*, 37 Ark. 150, these positions cannot be maintained. The assignment in that case provided as follows: 'The party of the second part,' the assignee, 'shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either at public or private sale, to such person or persons, for such prices and on such terms and conditions, either for cash or upon credit, as, in his judgment, may appear best and most for the interest of the parties concerned, and convert the same into money.' It will be observed that the terms of the assignment did not prevent the assignee, in the administration of his trust, from following the directions of the statute in all particulars. He was at liberty to sell for cash at public auction, and within one hundred and twenty days after the filing of his bond. But the assignment vested him with a discretion to do otherwise. The court declared the assignment to be void. It said: 'In providing for the sale of the property, the statute is disregarded

in the deed of assignment; the assignee was authorized to sell at a private or public sale, and for cash or credit. Under such provision it was in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. The legislature deemed it expedient, as a matter of public policy, to require assignees, in general deeds of assignment for the benefit of creditors, to sell all property assigned to them, for the payment of debts, at public auction, within one hundred and twenty-five days after the execution of the bond, on thirty days' notice of the time and place of sale.' And the court declared: 'The statute prescribes a mode of sale in this state, and dissenting creditors are not barred by a deed made in direct contravention of a plain provision of the statute.'" Jaffray v. McGehee, 107 U. S. 361, 364, 27 L. Ed. 495.

An assignment by an indebted party for the benefit of creditors in trust that the assignee shall sell the property, "on such terms and conditions, as in his judgment may appear best and most for the interest of the parties concerned," has been held by the supreme court of Wisconsin to be fraudulent and void. *Sumner v. Hicks*, 2 Black 532, 17 L. Ed. 375.

1. Authority to sell on credit.—Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429.

2. Reason for rule.—Means v. Dowd, 128 U. S. 273, 32 L. Ed. 429.

3. Will not render instrument void on its face.—In *Muller v. Norton*, 132 U. S. 501, 33 L. Ed. 397, the court in holding that a positive direction to "convert" the property assigned "into cash as soon and upon the best terms possible for the best interest of our creditors," could hardly be construed into a discretionary authority to sell on credit, said: "But even if we concede that the construction contended for be correct, and that the clause thus construed is in contravention of the statute, it will not, as this court has decided, operate to annul the assignment in which all the creditors may have an interest. In *Kellogg and Co. v. Muller*, 68 Texas 182, 184, this very point we are now considering was presented and decided by this court in the following language: 'The first exception to the deed is that it authorized the assignee to sell the property

VIII. Operation and Effect of Assignment.

A. Title and Right Acquired by Assignee.—In General.—An assignment for the benefit of creditors vests in the assignee the title to the assignor's property,⁴ immediately upon its execution and delivery, with due formalities, to the assignee,⁵ and divests the debtor of all proprietary rights held by him in such property.⁶ He cannot maintain any action either for the personaity or realty.⁷ There does, indeed, remain to him an equitable right to have paid over to him any remainder after the claims of all the creditors are satisfied.⁸

Holds Subject to Equities.—While it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it,⁹ yet this is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class.¹⁰

Considered as Bona Fide Purchaser for Value.—According to some decisions, an assignee for the benefit of creditors is not to be deemed a bona fide purchaser for a valuable consideration.¹¹ Other decisions, however, hold, in accordance with the state practice, that the assignee is to be deemed such a purchaser.¹²

assigned on a credit, and is, therefore, void. The provision to which we are cited in support of the exception is as follows: "That so soon as said inventory is complete, the said Frederick Muller, as such trustee aforesaid, shall thereafter, with all reasonable dispatch, proceed to sell and dispose of said goods, wares and merchandise and furniture, and collect said book accounts and bills receivable, converting the same into cash or its equivalent." It may be doubted if this can be construed to empower the assignee to sell for anything but money. * * * But, however this may be, even if a badge of fraud, it is not sufficient to authorize the court to hold the deed void upon its face; citing *Baldwin v. Peet*, 22 Texas 708."

4. Vests title in assignee.—*Boock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843. And see *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017. See post, "What Property Passes," VIII, C.

5. Laclede Bank v. Schuler, 120 U. S. 511, 30 L. Ed. 704.

6. Divests debtor of all proprietary rights.—*Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377.

7. Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377.

8. Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377.

9. Holds subject to equities.—*Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

Set off against assignee.—The assignment transferred to the assignees a debt due to the assignor by the complainant; the complainant filed a bill against the assignees, claiming to set off against the debt assigned to them the amount of a judgment obtained by him against the

sequent to the assignment being made, and before notice of it, any counterclaims be acquired by a debtor to the assignor, these claims may, unquestionably, be sustained; but if they be acquired after notice, equity will not sustain them. If it were even true, that they might have been offered in evidence, in a suit at law, brought in the name of the assignor, he who neglected to avail himself of that advantage cannot, after judgment, avail himself of such discount, as plaintiff in equity. *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

10. Exceptions to rule.—*Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

Conveyances by insolvent debtors in fraud of their creditors may be attacked by their statutory assignees, though equity would not aid the debtors themselves to recover the property, for the property transferred would, in the eye of the law, remain the debtor's and pass to the assignees who would not be subject to the rule that those who commit iniquity have no standing in equity to reap the fruits thereof. *Hubbard v. Tod*, 171 U. S. 474, 43 L. Ed. 246. And see *Estes v. Gunter*, 122 U. S. 450, 30 L. Ed. 1228.

"Assignees in insolvency under the comprehensive rule by which the assignee is vested with all the rights of property belonging to the bankrupt, acquire the same right as creditors to avoid any transactions of the insolvent debtor which were intended to enable a third party to hold his property trust for his own benefit." *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430.

11. Not a bona fide purchaser.—*Clemen's v. Berry*, 11 How. 398, 13 L. Ed. 745.

12. Assignee deemed purchaser for valuable consideration.—"In Virginia an assignee for the benefit of creditors is deemed a purchaser for a valuable con-

B. When Creditor's Interest Vests.—At Time of Presenting or Proving Claim.—In many jurisdictions where statutory provisions have been held to require an affirmative election to become a beneficiary under an assignment for the benefit of creditors, it has been held that the creditor's interest in the general fund to be distributed vests at the date of presenting or proving his claim.¹³

At Time of Transfer of Assets in Trust.—In other jurisdictions it is held that the interest vests at the time of the transfer of the assets in trust.¹⁴

C. What Property Passes—1. IN GENERAL.—General Assignments.—It may be stated as a general rule that where a general assignment for the benefit of creditors is made by a debtor, all of the property of such debtor owned by him at the time of making the assignment passes to the assignee, except such as may be exempt from forced sale,¹⁵ whether included in the schedule or not.¹⁶ Thus an assignment will include funds of the assignor in bank,¹⁷ choses in ac-

sideration. This it is conceded, has been established by a long line of judicial decisions, and is now a rule of property in that state." *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

13. On presentation of proof of claims.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640.

For instance, the cases in Illinois construing the assignment act of that state, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim to the assignee." *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, citing *Levy v. Chicago National Bank*, 158 Ill. 88; *Furness v. Union National Bank*, 147 Ill. 570.

14. On transfer of assets in trust.—The supreme court of Pennsylvania has often held, in view of the statutes of Pennsylvania regulating the matter, that the interest of the creditor in the assigned estate vests at the time of the transfer of the assets in trust. *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, citing *Miller's Appeal*, 35 Penn. Est. 481. And see *Sharples v. Welsh*, 4 Dall. 279, 1 L. Ed. 833.

15. All property owned by debtor.—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *Geilinger v. Philippi*, 133 U. S. 246, 33 L. Ed. 614; *Spindle v. Shreve*, 111 U. S. 542, 28 L. Ed. 512; *Tracy v. Tuffy*, 134 U. S. 206, 33 L. Ed. 879. See the title **HOMESTEAD EXEMPTIONS**.

"In cases unaffected with fraud, the assignee stands in the situation of the insolvent debtor, and succeeds to all his property and rights of property, whether legal or equitable." *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430.

General description held sufficient to convey all debtor's property.—"It is objected that the deed does not convey all the debtor's estate, not exempt from forced sale, for the benefit of his creditors. It is a sufficient answer to say that it does, in terms, convey 'all his lands, tenements, hereditaments, goods, chattels, property and choses in action of every

name, nature and description, wheresoever the same may be, except such property as may be by the constitution and laws of the state exempt from forced sale.' According to the decisions of the supreme court of Texas, this general description is sufficient, under the statute of 1879, to convey all the debtor's property. *Blum and Blum v. Welborne et al.*, 58 Texas 157, 161. The first section of the act declares that the assignment, however expressed, shall be construed to pass all the debtor's real and personal estate, whether specified therein or not." *Cunningham v. Norton*, 125 U. S. 77, 89, 90, 31 L. Ed. 624.

Power of court to examine debtor as to estate and compel delivery to assignee.—Under the Iowa statute relating to assignments for the benefit of creditors "the court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may then and there be required of him, and such debtor may then and there be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence; and may compel the delivery to the assignee of any property or estate embraced in the assignment." *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

16. Though not included in schedule.—*Geilinger v. Philippi*, 133 U. S. 246, 33 L. Ed. 614; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430. See ante, "Effect of Errors or Omissions," IV. E, 2, c.

17. Transfer of funds in bank.—An assignment for the benefit of creditors has the effect, when a bank has been notified thereof, to transfer to the assignee all right to any funds in its hands which the assignor could assert. *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704.

Such an assignment would, it seems, have priority over a draft or check on such fund where notice of the assignment has been given to the bank before it has

tion,¹⁸ insurance policies,¹⁹ claims against the United States, etc.²⁰

The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations.²¹ But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignor resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it.²²

Partial Assignments.—In the case of partial assignments, however, only the property enumerated and described in the schedule passes.²³

Application of Usual Rules Governing Interpretation of Written Instruments.—Whether certain property passed by virtue of a deed of assignment for the benefit of creditors, is to be determined by the general rules governing the interpretation of written instruments, the controlling one of which is that effect must be given to the intention of the parties as disclosed by the instrument to be construed.²⁴

2. EFFECT ON PROPERTY SITUATED IN OTHER STATES.—**The operation of voluntary or common-law assignments** upon property situated in other states has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the state in which the assignment is sought to be enforced. The cases are not numerous, but they are all consonant with the above general principle.²⁵

notice of the draft or check by presentation for payment or otherwise. *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. Ed. 704; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 855. See the titles BANKS AND BANKING; BILLS, NOTES AND CHECKS.

18. **Choses in action.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

19. **Insurance policy.**—An assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured, in case of loss. It is not necessary that the assignment should be accompanied by an actual delivery of the policy. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614.

20. **Claim against United States.**—*Milnor v. Metz*, 16 Pet. 221, 10 L. Ed. 943; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Mayer v. Whyte*, 24 How. 317, 16 L. Ed. 657. See, also, *Comegys v. Vasse*, 1 Pet. 193, 196, 7 L. Ed. 108.

"In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and

proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which congress sought to suppress by the act of 1853." *Goodman v. Niblack*, 102 U. S. 556, 560, 561, 26 L. Ed. 229.

"In *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065, it was held that an assignment by operation of law to an assignee in bankruptcy was not within the prohibition of the statute; and in *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229, a voluntary assignment by an insolvent debtor, for the benefit of creditors, was held valid to pass the title to a claim against the United States." *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861.

21. **Legal title to stock in corporation.**—*Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690.

22. **Equitable title to such stock.**—*Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690. See the titles CORPORATIONS; STOCK AND STOCKHOLDERS.

23. **Partial assignment passes only property enumerated in schedule.**—See ante, "Schedule and Inventory," IV, E, 2.

24. **Determination according to general rules governing interpretation.**—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314. See, generally, the title INTERPRETATION AND CONSTRUCTION.

25. **Voluntary assignments.**—*Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835.

The rule as to statutory assignments is, however, somewhat different; while the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated.²⁶

D. Priorities.—Priority of Assignment over Subsequent Attachments or Liens.—Where an insolvent debtor has lawfully preferred one creditor to another in payment, by an assignment bona fide made, no subsequent attachment or subsequently-acquired lien, will avoid the assignment.²⁷

Priority over Equitable Assignments, as by Check, etc.—See ante, "In General," VIII, C, 1.

IX. Assignees and Trustees.

A. Necessity.—As to necessity for intervention of trustee, effect of conveyance directly to creditors, etc., see ante, "Necessity for Intervention of Trustee," IV, D, 2.

B. Appointment and Qualification—1. APPOINTMENT.—Who May Be Appointed.—As to who may act as assignee or trustee for the benefit of creditors, see ante, "To Whom Made," IV, C.

26. Statutory assignments.—*Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835. See, also, *King v. Cross*, 175 U. S. 396, 44 L. Ed. 211. See the title INSOLVENCY.

"As was said by Mr. Justice McLean in *Oakley v. Bennett*, 11 How. 33, 44, 13 L. Ed. 593: 'A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding in rem against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment.' Similar language is used by Mr. Justice Story in his *Conflict of Laws*, § 414." *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835.

"Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicil of the owner, will be held to be valid in the courts of another country, where the property is situated and a different local rule prevails. We had occasion to consider this subject somewhat in *Cole v. Cunningham*, 133 U. S. 107, 129, 33 L. Ed. 538, and it was there said: 'Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens

of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance.'" *Barnett v. Kinney*, 147 U. S. 476, 37 L. Ed. 247.

27. Priority over subsequent attachments or liens.—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614. See

Removal and Appointment of Successor by Court.—Provision is usually made for the removal of an assignee by the court under certain circumstances, and for the filling by the court of vacancies, however occasioned.²⁸

Notice of Appointment.—By express statute in some jurisdictions, provision is made for publishing notice of the appointment of the assignee.²⁹

2. **QUALIFICATION.**—In some states the assignee, before possession of or exercising any control over the assigned property, is required to execute a bond conditioned for the faithful performance of his duties.³⁰

C. Duties, Rights, Powers and Liabilities—1. **DUTY TO RECORD ASSIGNMENTS.**—See ante, "Recordation," IV, H.

2. **DUTY TO FILE INVENTORY OR SCHEDULE.**—In some jurisdictions assignees for the benefit of creditors are required by statute to file an inventory or schedule of the estate or effects assigned, which shall be sworn to.³¹

the titles ATTACHMENT AND GARNISHMENT; JUDGMENTS AND DECREES; LIENS.

28. Removal and appointment by court.—The 14th section of the Texas act of 1879 declares that "if any assignee becomes unsuitable to perform the trust refuses or neglects so to do, or mismanage the property, the county judge or judge of the district court, may, upon the application of the assignor, or one or more of the creditors, upon reasonable notice to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and, in case of vacancy by death or otherwise, shall appoint another in his place, who shall have the same power and be subject to the same liabilities as the original assignee." *Bachrack v. Norton*, 13 U. S. 337, 33 L. Ed. 377.

Appointment by court on death of first trustee.—Where a debtor has conveyed to a trustee real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee is appointed by the court, upon the application of the creditors, to execute the trust, and the conveyance of the estate, it is necessary that the heirs at law of the first trustee shall be parties to the same; as the legal title to the estate does not pass to the substituted trustee, by the appointment, but remained in the legal heirs. *Greenleaf v. Queen*, 1 Pet. 138, 139, 7 L. Ed. 85.

29. Publication of notice of appointment.—*Smith, etc., Co. v. McGroarty*, 136 U. S. 237, 34 L. Ed. 346.

30. Necessity for bond.—*Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524; *Bachrack v. Norton*, 132 U. S. 337, 33 L. Ed. 377.

By the statutes of Arkansas relating to assignments, it is provided that, in all cases in which any person shall make an assignment of any property, whether real, personal, mixed or choses in action, for the payment of debts before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall make and

execute a bond to the state of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditional that such assignee shall pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof, and faithfully perform the duties according to law. Act, February 16, 1859, § 1, as amended by act February 23, 1883, *Mansfield's Digest*, 1884, p. 219. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524.

In Pennsylvania, under the act of 1836, the assignees, on the return of the inventory and appraisal, are required to give bond "to the commonwealth that they will in all things comply with the provision of the act of assembly, and shall faithfully execute the trust confided to them." *Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326.

Effect of failure to give bond.—"In *Windham v. Patty*, 62 Tex. 490, the court held that the failure of the assignee to give a bond ought not to defeat the assignment, but that the creditors might apply for the appointment of another assignee to fulfill the trust." *Bachrack v. Norton*, 132 U. S. 337, 33 L. Ed. 377.

31. Duty to file inventory.—By a statute of Pennsylvania, passed in 1836, "assignees for the benefit of creditors and other trustees" were directed to record the assignment, file an inventory of the property conveyed, which should be sworn to, have it appraised, and give bond for the faithful performance of the trust, all of which proceedings were to be had in one of the state courts. That court was vested with the power of citing the assignees before it, at the instance of a creditor who alleged that the trust was not faithfully executed. The assignees of the bank of the United States chartered by Pennsylvania, recorded the assignment as directed, and filed accounts of their receipts and disbursements in the prescribed court, which were sanctioned by that court. *Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326.

3. **RIGHT AND TITLE TO PROPERTY.**—See ante, "Title and Rights Acquired by Assignee," VIII, A.

4. **DISPOSITION OF ASSIGNED PROPERTY.—In General.**—An assignee for the benefit of creditors has as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment.³²

Sale in Accordance with Terms of Instrument.—Where, by the terms of a deed, conveying real estate in trust, to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed, by public auction, the trustee is bound to conform to this mode of sale. This is the test of value, which the grantor thought proper to require; and it is not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interests for those for whom he acted.³³

5. **POWER TO SUE FOR AND RECOVER ASSETS OF ESTATE.**—An assignee for the benefit of creditors has the power to sue for and recover, in the name of such assignee, everything belonging or appertaining to the assigned estate, and generally do whatever the debtor might have done in the premises.³⁴

6. **RIGHT AND DUTY TO DEFEND SUITS.—In General.**—It is the duty of assignees for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction and the facts and circumstances of the case will admit or warrant, to defend suits to set aside the assignment.³⁵

"By the statutes of Arkansas relating to assignments it is provided: 'Sec. 305. In all cases in which any person shall make an assignment of any property, whether real, personal, mixed or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond,' etc. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524.

"The statutes of Missouri restricting voluntary assignments have always been construed rather strictly by the supreme court of the state. By the earliest statute upon the subject, 'in all cases in which any person shall make a voluntary assignment of his lands, tenements, goods, chattels, effects and credits, or any part thereof, to any person, in trust for his creditors or any of them, it shall be the duty of the assignee' to file an inventory of the assigned property in the office of the clerk of the circuit court of the county in which the assignee resides. *Missouri Rev. Stat. of 1845, c. 10, § 1*; re-enacting act of February 15, 1841, § 1, *Missouri Laws of 1840-41, p. 13*. In the Revised Statutes of 1855, c. 8, § 1, that section was re-enacted." *Chicago, etc., Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.

32. **Has same powers as debtor at time of assignment.**—*Hubbard v. Tod*, 171 U. S. 474, 43 L. Ed. 246.

33. **Sale in accordance with terms of in-**

strument.—*Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

As to the effect of stipulation as to sale of property by assignee, see ante, "Stipulations as to Sale of Property by Assignee," VII, B, 2.

34. **Power to sue for and recover assets.**—*Hubbard v. Tod*, 171 U. S. 474, 43 L. Ed. 246.

Suit on notes not specially assigned or indorsed to assignees.—In *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264, it was queried whether, where all the property of the late bank of the United States had been assigned, by a general assignment, in trust, to assignees, for the purpose of liquidating its affairs, any action at law could be maintained by the assignees, on certain promissory notes, indorsed to, and the property of the bank, which had not been specially assigned nor indorsed to the assignees. It was held that, however this might be, it was clear, that a suit in equity might be maintained by the assignees against the parties to the notes. See the title **BILLS, NOTES AND CHECKS**.

35. **Defense of suits.**—*Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839.

Duty to set up proceedings pending in federal court.—If a federal court is already seized of the question of the validity of the trust, they should set up such pending proceeding against any attempt by parties in a state court to bring decision of the case within its cognizance. If, when the federal court has acquired previous jurisdiction, they submit with a mere appearance, and without any opposition to the jurisdiction of the state court, and pass over to a receiver appointed by

Conclusiveness on Beneficiaries of Decree against Trustee.—Where a trustee is invested with such powers and subjected to such obligations that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party.³⁶

7. **DUTY TO FILE REPORTS AND ACCOUNT.**—An assignee for the "benefit of creditors is subject to the supervision of the court or judge, who may compel him from time to time to file reports,³⁷ and to exhibit his accounts.³⁸

8. **DEGREE OF DILIGENCE DEMANDED OF ASSIGNEES.**—Assignees for the benefit of creditors are, as bailees and trustees of the property intrusted to their care and management, responsible only for common or ordinary diligence, such as prudent men exercise in respect to their own private affairs. But this degree of diligence the law exacts, and the courts of justice are bound to enforce.³⁹

X. Presentation and Proof of Claims and Distribution of Assets.

Necessity for Presentation and Proof to Vest Creditor's Interest.—As to necessity for presentation or proof of claim in order to vest the creditor's interest in the fund to be distributed, see ante, "When Creditor's Interest Vests," VIII, B.

Compliance with Conditions of Assignment as to Release of Claims.—As to the limitation of distribution of assigned estates to such creditors as file release of their claims, see ante, "As to Release or Discharge of Debtor," VII, B, 1, b.

Effect of Attempt to Secure Preference on Creditor's Right to Participate in Distribution.—See ante, "Effect of Creditor's Attempt to Secure Preference upon His Participation in Proceeds," V, C, 3, b.

Distribution of Proceeds of Assignment for Benefit of Partnership and Individual Creditors.—Where the assignment includes all the property of the assignors as partners and individually, for the benefit of partnership and individual creditors, it should be construed distributively, and the partnership assets applied to the payment of partnership debts and the individual assets to individual liabilities.⁴⁰

it the assets of the trust, they will be held personally liable for them all in the federal court. *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839.

36. **Decree against trustee concludes beneficiaries though not parties.**—*Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843.

37. **Duty to file reports.**—Under the Iowa statutes the assignee is at all times subject to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by statute. *Boek v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

38. **Duty to exhibit accounts.**—"By the seventh section of the Pennsylvania act, 1836, the court are authorized, on the application of any person interested, to issue a citation to any assignee or trustee for the benefit of creditors, whether appointed by a voluntary assignment or in

pursuance of the laws relating to insolvent debtors, etc., requiring him 'to appear and exhibit, under oath or affirmation, the accounts of the trust in the said court,' etc.. The ninth section authorizes the court to give notice, by publication, when the accounts will be acted on, that objections to them may be made. And by the eleventh section, where a trustee has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, when so required by law, or to file the accounts of his trust, 'it shall be lawful for the court' (of common pleas) 'to issue a citation, etc., to show cause why he should not be dismissed.'" *Shelby v. Bacon*, 10 How. 56, 68, 13 L. Ed. 326.

39. **Responsible for exercise of ordinary diligence.**—*Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839. See the title BAILMENTS.

40. **Assignment of all property for partnership and individual creditors.**—*Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

Distribution Pro Rata on Bill to Set Aside Assignment.—See post, "Proceedings to Set Aside Assignment," XI.

XI. Proceedings to Set Aside Assignment.

When Proper.—No creditor can have an assignment for the benefit of creditors set aside at his suit, except it be on the ground that he has been defrauded.⁴¹

Necessity for Judgment.—The principle is elementary that a general creditor cannot assail as fraudulent against creditors an assignment or transfer of property made by his debtor until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer.⁴² The existence of judgment, or of judgment and execution, is necessary, first, as adjudicating and definitely establishing the legal demand, and second, as exhausting the legal remedy.⁴³

Duty of Assignee to Defend.—See ante, "Right and Duty to Defend Suits," IX, C, 6.

Evidence.—As to evidence of fraudulent intent, burden of proof, etc., see ante, "Effect of Fraud," VI.

Distribution Pro Rata.—Where creditors, who were so upon simple contract debts, filed a bill in chancery to set aside a deed made by the debtor as being fraudulent against creditors, and other creditors came in as parties complainants, the court below was right in ordering pro rata distribution amongst all the creditors, none of them having a judgment or other lien at law. The complainants who first filed the bill have no preference thereby over the other creditors.⁴⁴

ASSIGNS.—See note 1.

41. On ground of fraud.—*Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696.

42. Necessity for previous judgment.—*Cates v. Allen*, 149 U. S. 451, 37 L. Ed. 804, citing *Waite on Fraud. Con.*, § 73; *Day v. Washburn*, 24 Wall. 352, 16 L. Ed. 712. See, generally, the titles CREDITORS' SUITS; FRAUDULENT AND VOLUNTARY CONVEYANCES.

43. *Cates v. Allen*, 149 U. S. 451, 37 L. Ed. 804.

44. Distribution pro rata.—*Day v. Washburn*, 24 How. 352, 16 L. Ed. 712.

1. Assigns.—In *Hoffeld v. United States*, 186 U. S. 273, 276, 46 L. Ed. 1160, it is said: "Assigns, or, as the word is more commonly spelled, 'assignees,' are of two classes depending upon the manner of their creation: First, voluntary assigns, who are created by act of the parties; and, second, assignees created by operation of law. Whether in a given case an assignee belongs to the first or

second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a bona fide purchaser with respect thereto. Upon the other hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale."

ASSISTANCE. WRIT OF.

BY R. E. MAXWELL.

CROSS REFERENCES.

See the titles **EJECTMENT**; **EQUITY**; **POSSESSION, WRIT OF.**

As to appealability of order granting writ of assistance when effecting receivers, see the title **APPEAL AND ERROR**, vol. 1, p. 976. As to stay of writ pending appeal, see the title **SUPERSEDEAS AND STAY OF PROCEEDINGS.**

Power to Issue Writ.—The power to issue the writ of assistance results from the principle, that the jurisdiction of the court to enforce its decree is co-extensive with its jurisdiction to determine the rights of the parties.¹

For What Purpose Issued.—A writ of assistance may be issued by a court of equity to enforce its orders and decrees.²

Against Whom Writ May Issue.—The writ of assistance can only issue against parties bound by the decree.³

1. **Power to issue writ.**—*Terrell v. Allison*, 21 Wall. 289, 291, 22 L. Ed. 634.

2. **For what purpose issued.**—*Gormley v. Clark*, 134 U. S. 338, 33 L. Ed. 909; *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed. 435.

To put owner of title under a decree in possession.—A writ of assistance may be issued to put the petitioner in possession where his title is established by a decree under the Illinois Burnt Records Act. *Gormley v. Clark*, 134 U. S. 338, 350, 33 L. Ed. 909.

A writ of assistance is an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed, as against parties who are bound by the decree and who refuse to surrender possession pursuant to its direction or other order of the court. *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634. See, generally, the title **MORTGAGES AND DEEDS OF TRUST.**

Where decree is annulled by act of congress.—There was a decree in May, 1852, abating a bridge across the Ohio river at Wheeling, West Virginia. In August, 1852, congress passed an act declaring the bridges across the Ohio at Wheeling law-

ful structures at their then height and position. After the passage of this act, the bridge was continued in use. The complainants motioned for a writ of assistance to execute the decree of May, 1852, by the abatement of the bridge, and attachment against the owners for disobeying said decree. After the passage of the act of congress referred to, the bridge no longer being an unlawful interference with a public right, the motion for a writ of assistance was overruled. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 429, 15 L. Ed. 435.

3. **Against whom writ may issue.**—*Terrell v. Allison*, 21 Wall. 289, 291, 22 L. Ed. 634.

Authorities are scarcely needed to support these propositions, it being universally admitted that writs of assistance can only issue against parties affected by the decree, which is only saying that the execution cannot exceed the decree which it enforces. *Howard v. Milwaukee, etc., R. Co.*, 101 U. S. 837, 849, 25 L. Ed. 1081.

A purchaser of property at a sale under a decree, in which an indispensable party was not made a party to the suit, is not entitled to a writ of assistance to obtain possession of the property bought. *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634.

ASSOCIATIONS.

BY R. E. MAXWELL.

- I. What Included within Term, 633.**
- II. Membership, 633.**
- III. Power to Hold Property in Trust, 634.**
- IV. Dealings between Association and Members, 634.**
- V. Liability for Debts of Association, 634.**
- VI. Liability of Members for Acts of Each Other, 635.**
- VII. Actions by Associations, 635.**
- VIII. Dissolution, 635.**

CROSS REFERENCES.

See the titles **ASSIGNMENTS**, ante, p. 549; **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**; **BUILDING AND LOAN ASSOCIATIONS**; **CHARITIES**; **ILLEGAL CONTRACTS**; **JOINT-STOCK COMPANIES**; **PRINCIPAL AND AGENT**; **RELIGIOUS SOCIETIES**; **SUMMONS AND PROCESS**.

As to organizing associations to prevent competition at judicial sales, see the title **JUDICIAL SALES**.

I. What Included within Term.

Association of persons as used in §§ 2347, 2348 and 2350 of the Revised Statutes includes incorporated as well as unincorporated associations.¹

II. Membership.

Relation of Membership Fixed by Contract.—The relation of the members and the society may be fixed by contract.²

Withdrawal of Members.—One may withdraw his membership from a community society, by leaving and remaining absent from the community a great length of time;³ or by acknowledging that he has withdrawn.⁴

1. What included within term.—United States *v.* Trinidad Coal, etc., Co., 137 U. S. 160, 34 L. Ed. 640.

2. Membership.—Schwartz *v.* Duss, 187 U. S. 8, 47 L. Ed. 53.

3. Withdrawal of members.—Speidel *v.* Henrici, 120 U. S. 377, 30 L. Ed. 718.

Releases all right of interest in property.—Where one, as a member of a voluntary association living together as a community, left the community and was gone for more than fifty years, he cannot by a bill in equity, claim any interest in the funds, against persons holding the funds in trust for the association. Speidel *v.* Henrici, 120 U. S. 377, 30 L. Ed. 718.

4. Receipt acknowledging withdrawal conclusive.—The Harmony Society was established upon the basis of community of property, and one of the articles of association provided, that if any member withdrew from it, he should not claim a share in the property, but should only re-

ceive, as a donation, such sum as the society chose to give. One of the members withdrew, and received the sum of two hundred dollars, as a donation, for which he gave a receipt, and acknowledged that he had withdrawn from the society, and ceased to be a member thereof. A bill was then filed by him, claiming a share of the property, upon the ground that he had been unjustly excluded from the society by combination and covin, and evidence offered to show that he had been compelled to leave the society by violence and harsh treatment. The evidence upon this subject related to a time antecedent to the date of the receipt. There was no charge in the bill impeaching the receipt, or the settlement made at its date. Held, that under the contract, the settlement was conclusive, unless impeached by the bill. Baker *v.* Nachtrieb, 19 How. 126, 15 L. Ed. 528. See, generally, the title **COM-PROMISE AND SETTLEMENT**.

III. Power to Hold Property in Trust.

An association cannot take a bequest in trust as a society when not incorporated at time of testator's death, nor can it be taken by the individuals composing the association.⁵

IV. Dealings between Associations and Members.

Renunciation of Property to Association.—Where members by contract contribute property to the association and renounce all individual ownership, they are considered as having finally and irrevocably parted with all their contributions,⁶ and at their death no rights are left to their heirs or personal representatives.⁷

Renunciation of Individual Property as Constituting a Perpetuity.—Articles of an association containing a renunciation of individual property do not constitute a perpetuity; the association exists at the will of its members; a majority of them may at any time order a sale of the property, and break up the association.⁸

Sale of Property to Member.—Where real property owned by an association is sold under a parol agreement to an individual member and no payment is made, the contract is destitute of a consideration and no legal title passes.⁹

V. Liability for Debts of Association.

Where an association purchases a tract of land, and one of the members fails

5. Power to hold property in trust.—In the year 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item, what shall remain of my military certificates, at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792, the legislature of Virginia, passed an act repealing all English statutes; in 1795, the testator died. The Baptist Association in question had existed as a regularly organized body, for many years before the date of his will; and in 1797 was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia Baptist Association." Held, that the association, not being incorporated at the testator's decease, could not take this trust, as a society. That the bequest could not be taken by the individuals who composed the association at the death of the testator. *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. 1, 4 L. Ed. 499. See, also, the titles CHARITIES; TRUSTS AND TRUSTEES; WILLS.

6. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554; *Schwartz v. Duss*, 187 U. S. 8, 47 L. Ed. 53.

May relinquish proceeds of their joint labor.—Members of an association may by contract relinquish their individual interest in the proceeds of their joint labor

for the common benefit of the association. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554.

Sufficiency of consideration to support gift.—A promise to support a member during health or sickness, and at his withdrawal to give him the amount which the association believes he is justly entitled to, is a sufficient consideration to support a gift by such person of his property to the association. *Schwartz v. Duss*, 187 U. S. 8, 47 L. Ed. 53.

No trust is created.—By contribution of all their property to the association, no trust is created in favor of the members or their heirs. *Schwartz v. Duss*, 187 U. S. 8, 47 L. Ed. 53.

7. *Schwartz v. Duss*, 187 U. S. 8, 47 L. Ed. 53.

A society called Separatists, emigrated from Germany to the United States. They were very poor, and one of them, in 1817, purchased land in Ohio, for which he gave his bond, and took the title to himself. Afterwards, they adopted two constitutions, one in 1819, and one in 1824, which they signed, and in 1832 obtained an act of incorporation. The articles of association, or constitutions of 1819 and 1824, contained a renunciation of individual property. The heirs of one of the members who signed these conditions, and died in 1827, cannot maintain a bill of partition. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554.

8. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554. See, generally, the title PERPETUITIES.

9. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554.

to pay his part, his assignee, who holds a certificate which is evidence of title and membership in the association, is not liable for the whole of the unpaid purchase money, but is affected only as a member of the association, and the purchase price chargeable on the funds generally.¹⁰

VI. Liability of Members for Acts of Each Other.

Members of an association may not be liable for negligence of each other, though the act is in accordance with the purpose of the association, if they have not the power to select, control or discharge.¹¹

VII. Actions by Associations.

Certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others, having the like interests, as part of the same society, for purposes common to all, and beneficial to all.¹²

VIII. Dissolution.

The facts that the membership of an association has greatly diminished and that the remaining members therein have determined to transfer their property to a corporation, do not operate as a dissolution.¹³

ASSUME.—See note 1.

10. *Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564.

The scrip or certificate holders, in the association called the New England Mississippi Land Company, hold their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual subpurchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; these titles being in fact, now vested in the trustees of the New England Mississippi Company itself, as part of its common stock, and not in the

individual holders. *Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564.

11. *Guy v. Donald*, 203 U. S. 399, 51 L. Ed. 245.

The members of the Virginia Pilot Association are not liable for the negligence of each other. *Guy v. Donald*, 203 U. S. 399, 51 L. Ed. 245.

12. *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521.

13. *Schwartz v. Duss*, 187 U. S. 8, 47 L. Ed. 53.

1. Assume a contract.—See *Mills v. Dow*, 133 U. S. 423, 424, 33 L. Ed. 717.

Assume a mortgage.—See *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667.

ASSUMPSIT.

BY WALTER CARRINGTON.

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I. Legal Denomination, Origin and History.

The more legal denomination of the action of assumpsit is trespass on the case upon promises.¹ This form of action originated, like many others, under the Stat. of Westm. 2, 13 Edw. I, c. 24, § 2. Its establishment was strenuously resisted through several reigns, but was sustained, upon full consideration, in a case decided in 44 Elizabeth.²

II. When the Action Lies.

A. In General.—Assumpsit is founded on a contract express or implied.³ At common law the action will not lie upon a record or other specialty,⁴ but will lie upon any other contract, whether expressed by the party, or implied by law.⁵ It cannot be maintained to recover any damages resulting from a tort, which in-

1. Legal denomination.—Carroll v. Green, 92 U. S. 509, 513, 23 L. Ed. 738, quoting 3 Woodson's Lect. 168.

When the statute of South Carolina of 1712 was enacted, the term case was as well understood to embrace assumpsit as anything else in the law of procedure to which it is now held to apply. Carroll v. Green, 92 U. S. 509, 514, 23 L. Ed. 738.

2. Origin and history.—Slade's Case, 4 Coke 92. Carroll v. Green, 92 U. S. 509, 513, 23 L. Ed. 738.

The action of assumpsit for the use and occupation of lands and houses, existed in Virginia anterior to the cession of the District of Columbia to the United States. Lloyd v. Hough, 1 How. 153, 11 L. Ed. 83.

3. Assumpsit founded on contract.—Carroll v. Green, 92 U. S. 509, 23 L. Ed. 738; West v. Smith, 8 How. 402, 12 L. Ed. 1130.

A breach of contract express or implied is essential as a basis of an action of assumpsit. Boylan v. Hot Springs R. Co., 132 U. S. 146, 33 L. Ed. 290.

4. Will not lie upon a record or other specialty.—Hilton v. Guyot, 159 U. S. 113, 199, 40 L. Ed. 95; January v. Goodman, 1 Dall. 208, 1 L. Ed. 103; Young v. Preston, 4 Cranch 239, 2 L. Ed. 607; Tayloe v. Sandiford, 7 Wheat. 13, 19, 5 L. Ed. 384.

Assumpsit will not lie upon a policy of insurance, under the corporate seal, unless a new consideration be averred. Marine Ins. Co. v. Young, 1 Cranch 332, 2 L. Ed. 126.

An agreement under seal for the payment of money cannot be received to support the common money counts. Junction R. Co. v. Bank, 12 Wall. 226, 20 L. Ed. 385.

Though articles of copartnership have been sealed between partners, yet, upon an account stated, and a balance struck, assumpsit will lie. Fresh v. Gilson, 16 Pet. 327, 334, 10 L. Ed. 982.

In Pennsylvania, the form of the action of assumpsit is employed not only in cases where, at the common law, it would have been appropriate, but also in cases in which the action would formerly have been in debt or covenant. Stewart v. Barnes, 153 U. S. 456, 464, 38 L. Ed. 781.

5. Action will lie upon any contract other than a specialty.—Hilton v. Guyot, 159 U. S. 113, 199, 40 L. Ed. 95.

Assumpsit and not covenant, is the proper action to bring upon an unsealed instrument. LeRoy v. Beard, 8 How. 451, 12 L. Ed. 1153.

A special parol contract can be enforced

volves no breach of contract.⁶ It will lie, however, to recover damages resulting from a false warranty,⁷ or to recover from a defendant in the character of an attorney at law, the amount of a loss sustained by reason of neglect or unskillful conduct,⁸ or upon an implied obligation arising out of defendant's breach of a duty imposed by statute, and a required performance of that duty by the plaintiff in consequence.⁹

Action Will Lie against a Corporation.—The ancient doctrine that a corporation can act in matters of contract only under its seal has been departed from by modern decisions; and it is now considered that the agents of a corporation may, in many cases, bind it and subject it to an action of assumpsit.¹⁰

Privity of Contract.—No doubt the general rule is that privity of contract

in an action of assumpsit only. Phillips, etc., *Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

At common law a foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon such judgment was not in debt, grounded upon a record or a specialty; but was either in debt, as for a definite sum of money due by simple contract, or in assumpsit upon such a contract. *Hilton v. Guyot*, 159 U. S. 113, 200, 40 L. Ed. 95. See the title JUDGMENTS AND DECREES.

6. Assumpsit will not lie for a tort.—*Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290.

Plaintiff purchased a ticket from the defendant railroad company for a passage to H. S. and back, at a reduced rate of fare, which was then signed by him and by the ticket agent. The ticket contained a contract expressly providing that it should not be good for a return trip unless signed and stamped by defendant's agent at H. S., and no agent or employee of defendant was authorized to alter, modify or waive any conditions of the contract. Upon plaintiff's return trip he neglected to have his ticket signed and stamped, but the baggage master upon being shown the ticket punched it and checked his baggage, and the gateman passed him through the gate. The plaintiff refused to pay additional fare. It was held that the unstamped ticket giving plaintiff no right to a return passage, there was no contract in force between him and defendant to carry him back from H. S., and, therefore, that he could not maintain assumpsit to recover any damages, direct or consequential, for his expulsion from defendant's train, and was not prejudiced in such an action by the exclusion of evidence concerning the circumstances attending such expulsion and the consequent injuries to him or his business. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290.

7. Will lie to recover damages for false warranty.—*Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642.

The ancient remedy for a false warranty was an action on the case sounding in

tort. The remedy by assumpsit is comparatively of modern introduction. In *Williamson v. Allison*, 2 East. 447, Lord Ellenborough said it had "not prevailed generally above forty years." In *Stuart v. Wilkins*, 1 Douglas 18, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. One of the considerations which led to the practice of declaring in assumpsit was that the money counts might be added to the special counts upon the warranty. *Schuchardt v. Allen*, 1 Wall. 359, 368, 17 L. Ed. 642.

8. Will lie for neglect or unskillful conduct of attorney.—*Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

9. Breach of duty imposed by statute.—This raises an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 12, 33 L. Ed. 231.

10. Assumpsit lies against a corporation.—*Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222. See, also, *Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552.

Assumpsit will lie against a corporation, on a contract not under its corporate seal, and it is immaterial in such case whether the agent of the corporation who made the contract in its behalf was appointed under seal or not, or whether he put his own seal to the contract, the doctrine of merger not applying to such a case. *Bank v. Guttschlick*, 14 Pet. 19, 29, 10 L. Ed. 335, citing with approval *Randall v. Van Vechten*, 19 Johns 60. The action, in this case, was assumpsit against a bank, on a contract under the seals of the president and cashier. It was held that the action was well brought.

In an early Pennsylvania case, which has been since overruled, it was held that indebitatus assumpsit does not lie against a corporation, but that an express promise must be shown in order to recover. *Brookbill v. Turnpike Co.*, 3 Dall. 496, 1 L. Ed. 694, overruled in *Chestnut Hill, etc., Turnpike Co. v. Rutter*, 4 S. & R. 6, 16. See the title CORPORATIONS.

between a plaintiff and defendant is necessary for the maintenance of an action of assumpsit.¹¹ But there are many exceptions to this rule. Thus where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person, such third person may bring an action of assumpsit.¹² Another exception to the rule is where the plaintiff is the beneficiary solely interested in the promise,¹³ as where one person contracts with another to pay money or deliver some valuable thing to a third.¹⁴ But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue.¹⁵

B. Special Assumpsit.—Where the action is brought upon an express contract, special assumpsit is the proper form in which to bring it.¹⁶

C. General Assumpsit—1. IN GENERAL.—Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff.¹⁷ Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfill that obligation.¹⁸ But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law.¹⁹ The question of when an action will lie upon the common counts is in some states regulated by statute.²⁰

11. Privity of contract generally essential to maintenance of suit.—*National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75; *Cary v. Curtis*, 3 How. 236, 248, 11 Ed. 576.

12. When privity of contract is not essential.—*National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75.

13. National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75.

It is now the prevailing rule in this country, that a party may maintain assumpsit on a promise not under seal made to another for his benefit. *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855.

14. National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75.

If money be delivered by A to B to be paid over to C although no promise is made by B to C, yet C may recover the money from B in an action of assumpsit. *Lawrason v. Mason*, 3 Cranch 492, 493, 2 L. Ed. 509.

A letter from the defendants to J. M., saying that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of assumpsit against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn. *Lawrason v. Mason*, 3 Cranch 492, 493, 2 L. Ed. 509.

15. Promise to pay existing debt of another.—*National Bank v. Grand Lodge*, 98 U. S. 123, 124, 25 L. Ed. 75.

16. When special assumpsit should be brought.—See *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762. And see post, "Performance or Part Performance under a Special Contract," II, C, 2.

Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor is a payment at his request, and is an express assumpsit to reimburse the amount. *Hall v. Smith*, 5 How. 96, 12 L. Ed. 66.

17. Foundation of indebitatus assumpsit, and when it lies.—*Bailey v. New York, etc., R. Co.*, 22 Wall. 604, 638, 22 L. Ed. 840; *United States v. Russell*, 13 Wall. 623, 639, 20 L. Ed. 474; *The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272; *Goddard v. Foster*, 17 Wall. 123, 141, 21 L. Ed. 589; *Curtis v. Fiedler*, 2 Black 461, 478, 17 L. Ed. 273.

18. Goddard v. Foster, 17 Wall. 123, 141, 21 L. Ed. 589; *Curtis v. Fiedler*, 2 Black 461, 478, 17 L. Ed. 273; *Bailey v. New York, etc., R. Co.*, 22 Wall. 604, 639, 22 L. Ed. 840; *The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272.

19. Bailey v. New York, etc., R. Co., 22 Wall. 604, 639, 22 L. Ed. 840; *Curtis v. Fiedler*, 2 Black 461, 478, 17 L. Ed. 273; *United States v. Russell*, 13 Wall. 623, 639, 20 L. Ed. 474; *The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272.

20. Where the declaration contained a special count upon municipal bonds and coupons, and the common counts for money paid, money had and received, etc., it was held, that under the Illinois Statute, Revised Statutes, 1870, c. 110, § 58, the common counts were sufficient to support a judgment for the plaintiff without reference to any question of the legal authority to issue the bonds described in

Torts of Public Officers.—The government is not liable on an implied assumpsit, for the torts of its officer committed while in its service, and apparently for its benefit. To admit such liability would involve the government in all its operations, in embarrassments, losses, and difficulties, subversive of the public interest.²¹

2. PERFORMANCE OR PART PERFORMANCE UNDER A SPECIAL CONTRACT.—Where there is a special agreement, open and subsisting at the time the cause of action arises, a general indebitatus assumpsit cannot be maintained.²² But if the agreement has been wholly performed,²³ or if its further execution has been prevented by the act of the defendant,²⁴ or by the consent of both parties;²⁵ or if the contract has been fully performed in respect to any one distinct subject included in it;²⁶ the plaintiff may recover upon a general indebitatus assumpsit. But if there has been no breach of the agreement, an implied assumpsit does not arise, unless it be shown that the parties have abandoned the agreement, or have rescinded or modified it so as to give rise to such an implication.²⁷

Where a parol contract which is void has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a quantum meruit.²⁸

the first count. *Santa Anna v. Frank*, 113 U. S. 339, 28 L. Ed. 978.

21. Torts of public officers.—*Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

22. Special agreement unexecuted.—*Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222.

23. Agreement wholly performed.—*Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463.

It is a well-settled principle, where a special contract has been performed, that a plaintiff may recover on the general counts. *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 565, 9 L. Ed. 222.

When a special contract has been fully executed according to its terms, and nothing remains to be done but the payment of the price, the plaintiff may sue either on it, or in indebitatus assumpsit, relying, in this last case, upon the common counts. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 565, 9 L. Ed. 222.

And in either case the contract will determine the rights of the parties. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762.

An indenture in the nature of a lease, which included certain contracts with third parties in relation to the property leased, provided that if the revenue derived from such contracts should fall below the sum agreed to be paid as rent, the lessee should have the right to declare the contract void and surrender the demised property or to pay in lieu of the agreed rent such share of the net revenue derived from the assigned contracts as the parties might at the time agree upon. It was held that where the revenue from the assigned contracts fell below the agreed rent, and the lessee did not elect

to declare the lease void, and the parties did not agree upon the sum to be paid, the lessor was entitled to recover a sum to be assessed by the jury in the nature of a quantum meruit, not to exceed the whole of the net revenue derived from the assigned contracts. *Pullman's Palace Car Co. v. Central Transp. Co.*, 139 U. S. 62, 35 L. Ed. 69.

24. Complete execution of contract prevented by act of defendant.—*Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *United States v. Behan*, 110 U. S. 338, 346, 28 L. Ed. 168.

Where a person, on a given contract, covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, such person, if he prevent any arbitration, may be sued at law on a quantum meruit. *Humaston v. American, etc., Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

Whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party upon election to rescind, may sue on a quantum meruit for anything he has done under the contract previously to the rescission. *Ankeny v. Clark*, 143 U. S. 345, 353, 37 L. Ed. 475.

25. Complete execution waived by consent of parties.—*Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463.

26. Complete performance in respect to one distinct subject.—*Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463.

27. Breach of agreement essential to raise implied assumpsit.—*Hawkins v. United States*, 96 U. S. 689, 698, 24 L. Ed. 607.

28. Void parol contract wholly or partly executed.—*Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518.

Benefit Received by Corporation under Prohibited Contract.—Where a corporation has received a benefit under a contract which it was prohibited by statute from entering into, it may be compelled to respond therefor in an action upon a quantum meruit.²⁹

One who has let the use of personal property to another under a special contract by which the latter agrees to purchase it upon certain conditions being fulfilled, cannot repudiate the contract and sue upon a quantum meruit for the use of the property.³⁰

3. **MONEY HAD AND RECEIVED**—a. *In General.*—Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received;³¹ or as the rule is more frequently expressed, assumpsit for money had and received will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund.³² The form of the indebtedness or the mode in which it was incurred is immaterial.³³ But the law never implies a promise to pay, unless duty creates the obligation to pay;³⁴ and more especially it never implies a promise to do an act contrary to duty or contrary to law.³⁵ The action will lie for money paid upon a consideration which happens to fail, or for money got through imposition.³⁶ So, it would seem, it

29. **Benefit received by corporation under prohibited contract.**—*De La Vergne, etc., Machine Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 65.

30. **Use of personal property let upon condition.**—*Washington, etc., Steam Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479.

Where plaintiffs put a machine on board of defendant's boat for the purpose of experiment under an agreement that defendants should pay for it if on trial they approved of and were willing to give the price asked, but otherwise plaintiffs should have leave to take it away, it was held that the plaintiffs could not without stating their terms or offering to fulfill their contract by a sale of the machine, repudiate the contract and sue for the use of the machine. *Washington, etc., Steam Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479.

31. **When the action will lie.**—*Gaines v. Miller*, 111 U. S. 395, 397, 28 L. Ed. 466.

"In order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity." *Butler, J.*, in *Stratton v. Rastall*, 2 T. R. 370, quoted with approval in *Cary v. Curtis*, 3 How. 236, 247, 11 L. Ed. 576.

32. *Bayne v. United States*, 93 U. S. 642, 643, 23 L. Ed. 997; *United States v. State Nat. Bank*, 96 U. S. 30, 35, 24 L. Ed. 647; *Bend. v. Hoyt*, 13 Pet. 263, 269, 10 L. Ed. 154; *Cary v. Curtis*, 3 How. 236, 246, 11 L. Ed. 576; *Morris v. Tarin*, 1 Dall. 147, 148, 1 L. Ed. 76.

"This action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such case the duty of the defendant to pay, the law im-

poses to him a promise to pay." *Mr. Justice Daniel* in *Cary v. Curtis*, 3 How. 236, 250, 11 L. Ed. 576.

"Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which, ex equo et bono, he ought to refund." *Mr. Justice Clifford*, in *Nash v. Towne*, 5 Wall. 689, 702, 18 L. Ed. 527.

33. *United States v. State Nat. Bank*, 96 U. S. 30, 35, 24 L. Ed. 647; *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997.

34. *Cary v. Curtis*, 3 How. 236, 25, 11 L. Ed. 576; *Morris v. Tarin*, 1 Dall. 147, 148, 1 L. Ed. 76.

In an action for money had and received, if the defendant may, in equity and good conscience, retain the money in his hands, there can be no recovery. *Barr v. Craig*, 2 Dall. 151, 1 L. Ed. 327.

The law will never imply a promise where it would be unjust to the party to whom it would be imputed, and contrary to equity so to imply it. *Cary v. Curtis*, 3 How. 236, 251, 11 L. Ed. 576.

There must be room for implication as between the parties to the action, and the recovery must be ex equo et bono, or it can never be. *Cary v. Curtis*, 3 How. 236, 247, 11 L. Ed. 576.

It is necessary to show some privity between the owner and receiver of the money or some mala fides, or at least a receipt of the money without valuable consideration. *Rapalje v. Amory*, 2 Dall. 51, 1 L. Ed. 285.

35. *Cary v. Curtis*, 3 How. 236, 251, 11 L. Ed. 576.

36. *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

The action "lies for money paid by mis-

will lie where the defendant has consented (where he can properly consent) to hold money for the use of the plaintiff.³⁷ The action may sometimes be brought concurrently with debt.³⁸ There have been many cases decided by the supreme court illustrative of the foregoing general principles.³⁹

take, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under such circumstances." *Bend v. Hoyt*, 13 Pet. 263, 269, 10 L. Ed. 154, quoting with approval *Lord Mansfield in Moses v. McFarlan*, 2 Burr. 1005, 1012.

37. *Cary v. Curtis*, 3 How. 236, 249, 11 L. Ed. 576.

Such consent need not be express, but it must, if not so, rest upon fair and natural implication or legal intendment. Where such implication or intendment is excluded, forbidden by the position of the parties, by positive law, or by the character of the transaction, consent or any obligation upon which to imply it is entirely removed. *Cary v. Curtis*, 3 How. 236, 249, 11 L. Ed. 576.

38. The official bond given by a receiver of public moneys does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for money had and received for the balance of account, and an action of debt, upon the bond, against the principal and sureties, may be maintained at the same time. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

39. Money deposited in bank.—Where the charter of a bank provides that the bank shall receive money on deposit without being required to give an obligation under seal to repay it, by the simple act of depositing money in the bank a liability to repay will be implied, which will sustain an action of assumpsit for money had and received. *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437.

In case of a payment made to a bank of its own notes, afterwards discovered to be forged, upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank, upon their general account, either upon an insimul computasent, or as for money had and received. *United States Bank v. Bank*, 10 Wheat. 333, 6 L. Ed. 334.

If the cashier of a bank, without authority, buy gold for the bank, and it goes into the funds of the bank, the bank is liable in an action for money had and received. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008.

Action to recover back purchase money of land.—To maintain an action of assumpsit for money had and received to recover back the purchase money of land,

it was held sufficient for the plaintiff to prove that the defendant received the money by mistake, imposition, or deceit. *D'Utricht v. Melchor*, 1 Dall. 428, 1 L. Ed. 208.

"Parties receiving moneys illegally paid by a public officer are liable *ex æquo et bono* to refund them." *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 212, 41 L. Ed. 399.

A party who, without right and with guilty knowledge, obtains money of the United States, from a disbursing officer, becomes indebted to the United States, and they may recover the amount in an action for money had and received. *United States v. State Nat. Bank*, 96 U. S. 30, 35, 24 L. Ed. 647; *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997.

Certificate of stock in public funds obtained by false representations.—Where one falsely represents himself as a public creditor, thereby obtaining a certificate of stock in the public funds, the government may waive the tort, affirm the transaction, and recover in an action for money had and received the value of the certificate, with the interest paid thereon. *Fenimore v. United States*, 3 Dall. 357, 1 L. Ed. 634.

Money paid under a certificate from persons not authorized by law to give it may be recovered back by the United States in an action for money had and received. *United States v. Todd*, 13 How. 52, 14 L. Ed. 47, note.

Money received for goods purchased in part with plaintiff's money.—H. and others, merchants in Baltimore, consigned a vessel and cargo to W. and others, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed that on the failure to get a freight to Batavia, or to sell the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods for the United States, but with instructions to the master, committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited, at Amsterdam, and W. and others purchased, in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others of their determination to hold them responsible

b. Money Paid on a Contract Which Has Been Broken or Rescinded.—Where money has been paid on a contract which is rescinded, an action for money had

for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. *W.* and others brought an assumpsit against *H.* and others, to recover from them the moneys advanced; the declaration contained the three usual money counts. It was held that the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action; that the sale of the cargo and receipt of the money by the defendants created an assumpsit to pay the money so received. *Willinks v. Hollingsworth*, 6 Wheat. 240, 5 L. Ed. 251.

Action by assignee of choses in action against debtor.—The general principle of law is, that choses in action are not at law assignable; but if assigned, and the debtor promise to pay the debt to the assignee, the latter may maintain an action against the debtor, as money received to his use. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234. See the title ASSIGNMENTS, ante, p. 549.

An acceptance of a bill of exchange is evidence of money had and received by the acceptor for the use of the holder, and, therefore, indebitatus assumpsit will lie in favor of the payee against the acceptor. *Raborg v. Peyton*, 2 Wheat. 385, 4 L. Ed. 268. See the title BILLS, NOTES AND CHECKS.

Action by residuary legatees against administrator cum testamento annexo.—Assumpsit for money had and received will lie against an administrator cum testamento annexo by residuary legatees, without proof of an express assumption by him. *Hellback v. Van Buskirk*, 4 Dall. 147, 1 L. Ed. 777. See the title EXECUTORS AND ADMINISTRATORS.

Where the lawful representative of a deceased person ratifies sales of property made by an agent of executors in their own wrong, he may maintain an action on the common count for money had and received to recover the proceeds of such sale. *Gaines v. Miller*, 111 U. S. 395, 28 L. Ed. 466.

Receipt by attorney of proceeds of unauthorized note given by him.—The defendant had with others, received the proceeds of a joint and several promissory note discounted for them by the plaintiff bank and this note was afterwards renewed by their attorney, under a power of attorney authorizing him to give a joint note; but he gave a joint and several note, the proceeds of which the attorney received, and appropriated to pay the note already discounted at the bank. It was held, that although the power of attorney may not have been executed, in exact conformity to its terms, and may not have authorized the giving of a

joint and several note (a question the court did not decide), yet the receipt of the proceeds of the note by the attorney, and the appropriation thereof to the payment of the former note, was sufficient evidence to sustain an action on the money counts. *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172.

One who has in good faith received currency in payment of an existing debt, cannot be compelled to repay such currency because it subsequently develops that the currency paid had been embezzled by the one who made the payment. *Rankin v. Chase Nat. Bank*, 188 U. S. 557, 565, 47 L. Ed. 594.

One who has sold goods of a bankrupt, under an authority from him, is not liable in an action for money had and received, until he has received the money for them. *Ralston v. Bell*, 2 Dall. 242, 1 L. Ed. 365.

Money received by one partner during the partnership, is not received for the use of either, but for the use of both the partners. Therefore assumpsit does not lie by one partner against another, to recover the balance of the proceeds of a partnership adventure, unless they have settled their account and struck the balance. *Ozeas v. Johnson*, 4 Dall. 434, 1 L. Ed. 897. See the title PARTNERSHIP.

The law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement. *The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272; *Cary v. Curtis*, 3 How. 236, 250, 11 L. Ed. 576.

A mere speculative bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimates, or may be nothing, is not a bargain on which the law will raise a promise to refund the purchase money, if the consideration should fail, and therefore, in such event an action for money had and received will not lie. *Taylor v. Riggs*, 1 Pet. 591, 606, 7 L. Ed. 275.

Payment of bill of exchange by drawer before legal obligation accrues.—A bill of exchange was protested for nonacceptance, and one of the drawers voluntarily paid the principal, without waiting for a protest for nonpayment, which was, however, subsequently made. It was held, in an action for money had and received to plaintiff's use, that the drawer could not recover back the money paid as damages. *Morris v. Tarin*, 1 Dall. 147, 1 L. Ed. 76.

Indorsement of promissory note "without recourse."—An action for money had

and received will lie to recover it back.⁴⁰ The action may also be maintained to recover back purchase money paid when the articles sold are not delivered,⁴² or where the vendor does not make title,⁴³ or to recover back money paid as the price of work when the work has not been done.⁴⁴

c. *Money Paid on an Illegal Contract*.—While a contract, the making of which is not *malum in se*, although prohibited by law, remains executory, a party to it may rescind it and recover, in an action for money had and received, money advanced by him to the other party who has not performed any part of it.⁴⁵ But as a general rule if an illegal contract be executed and both parties are in *pari delicto*, neither of them can recover from the other money paid by him on the contract.⁴⁶ Where, however, the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence in the illegal conduct, there is no parity of *delictum* between them, and the party so protected by the law or so acting under compulsion, may recover any money paid by him in an action for money had and received, though the illegal transaction be completed.⁴⁷

and received cannot be maintained against one merely on the ground of his indorsement of a promissory note "without recourse." *Welch v. Lindo*, 7 Cranch 159, 3 L. Ed. 301.

Collateral undertaking to save party harmless for money advanced to another.—An action for money had and received is not maintainable upon a collateral undertaking to save a party harmless for money advanced to another. *Douglass v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626.

Under the act of congress of December 31st, 1792, which declares, that if a false oath be taken in order to procure a register for a vessel, the vessel or its value shall be forfeited until the United States have elected whether they will proceed against the vessel as forfeited, or against the person who took the false oath, for its value, the property of the vessel does not vest in the United States; and the United States cannot maintain an action for money had and received, against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel, and received the purchase money before seizure of the vessel. *United States v. Grundy*, 3 Cranch 337, 2 L. Ed. 459.

40. Money paid on a contract which is rescinded.—*Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222.

An action for money had and received will lie to recover back purchase money paid upon a contract of sale which has been rescinded. *Ankeny v. Clark*, 148 U. S. 345, 352, 37 L. Ed. 475.

42. Recovery of purchase money when articles sold are not delivered.—*United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346; *Nash v. Towne*, 5 Wall. 689, 696, 18 L. Ed. 527.

Receiving the price of goods sold and to be delivered, the refusal to deliver, and a conversion of the goods, constitute plenary evidence of an implied promise to

refund the price paid for them, and an action for money had and received is an appropriate remedy for the vendee on such refusal to deliver. *Nash v. Towne*, 5 Wall. 689, 690, 18 L. Ed. 527.

43. Recovery of purchase money where vendor does not make title.—*Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219. See, also, *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1153.

44. Recovery of money paid for work which is not performed.—*United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346.

45. Where contract remains executory.—*Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

"A recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiae*; the *delictum* is incomplete; the contract may be rescinded by either party." Note of Mr. Frere to *Smith v. Bromley*, 2 Dong. 696, quoted with approval in *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453. See, also, *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49, 60, 26 L. Ed. 347.

46. Where contract is executed.—*Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347.

When the parties are in *pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the payment of money, and has not been repudiated by the defendant, the plaintiff cannot recover back the money paid under the contract. *Harriman v. Northern Securities Co.*, 197 U. S. 241, 296, 49 L. Ed. 739.

47. Thomas v. Richmond, 12 Wall. 349, 355, 20 L. Ed. 453.

"Lord Mansfield, in *Smith v. Bromley*, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: 'If the act be in itself immoral, or a violation of the general laws of public policy, both parties are in *pari*

Money Paid for Municipal Securities Issued without Authority.—Where a municipal corporation, without authority to do so, issues bills as a currency, the holders thereof cannot recover the amount, in an action for money had and received. Especially is this so, where the receiving, as well as issuing, of the unlawful bills is expressly prohibited.⁴⁸ So where a state constitution forbids any city within its bounds to become indebted to an amount exceeding five per cent. of its taxable property, one who purchases bonds of a city issued in violation of such provision, cannot recover the money so paid in an action for money had and received.⁴⁹

A person who receives the prize money, in a lottery, for a ticket which he had caused to be fraudulently drawn as a prize, is liable to the lottery contractors in an action for money had and received for their use, it being no defense in such case that the lottery was illegal. The defendant will not be permitted to take advantage of his own fraud.⁵⁰

d. Money Paid to an Agent.—Where money is voluntarily paid to an agent without notice of objection and by him paid over to his principal, an action for money had and received will not lie against the agent. But where the agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining it, and before he paid it over received notice of the plaintiff's claim and a warning not to part with the fund, the action may be maintained against him.⁵¹

e. Money Paid under a Mistake.—**Mistake of Fact.**—Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action for money had and received will lie to recover it back.⁵² But even in cases of money paid under a mistake of facts, if the party has been guilty of negligence, or of a breach of his proper duty in the

delicto, but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover." *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453. See the title **ILLEGAL CONTRACTS**.

48. Bills issued as currency.—*Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

Semble, that a bank or other private corporation issuing bills contrary to law, might be compelled to pay the holder in an action for money had and received, although the bills themselves were void, if the receiving of the bills were not expressly prohibited. But if the receiving as well as issuing were prohibited, both parties would be in pari delicto, and no action could be sustained for the amount of the bills. *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

49. Bonds issued in violation of constitutional provision.—*Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

50. Prize money in lottery fraudulently procured.—*Catts v. Phalen*, 2 How. 376, 11 L. Ed. 306.

51. Money paid to an agent.—*Carey v. Curtis*, 3 How. 236, 11 L. Ed. 576. See the titles **PAYMENT; PRINCIPAL AND AGENT**.

52. Money paid under a mistake of facts.—*United States v. Barlow*, 132 U. S. 271, 33 L. Ed. 346; *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. Ed. 947; *Bend v. Hoyt*, 13 Pet. 263, 269, 10 L. Ed. 154; *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

As to what constitutes a mistake of fact, see the title **MISTAKE AND ACCIDENT**.

Money paid by United States under misapprehension as to defendant's services.—The United States may maintain an action to recover a sum of money paid by it to defendant, where such payment was induced by defendant's misrepresentations to the secretary of the treasury, leading to a misapprehension upon his part as to the nature of defendant's services. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

Money paid by the United States to subcontractors for carrying the mail, under a clear mistake of fact as to the services performed by them, may be recovered back in an action for money had and received. *United States v. Barlow*, 132 U. S. 271, 33 L. Ed. 346.

Money paid for counterfeit treasury notes.—Where notes purporting to be 7-30 treasury notes, but which were in fact counterfeit, endorsed by the holders thereof "to the order of the secretary of the treasury for redemption," were purchased before their maturity under the

transaction, he cannot maintain an action for money had and received, against the other party, whose rights or conduct have been affected by such negligence or breach of duty.⁵³

Mistake of Law.—An action for money had and received will not lie to recover back money voluntarily paid under a mistake of law.⁵⁴

f. *Money Paid under Compulsion or Duress*—(1) *In General*.—Ordinarily, where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered.⁵⁵ But money paid under compulsion or duress to one not entitled to receive it, may be recovered back in an action for money had and received.⁵⁶ But the action cannot be sustained unless the coercion or duress consists of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.⁵⁷

authority of the act of August 12, 1866 (14 Stat. 31), by an assistant treasurer of the United States, it was held that the payment by him thereof did not, without the further order of the secretary of the treasury, retire them, and that the United States might before such order was given, if it acted without undue delay, recover the money paid for the notes in an action for money had and received. *Cooke v. United States*, 91 U. S. 389, 23 L. Ed. 237.

Import duties.—An action of assumpsit generally lies against a collector of import duties to recover back an excess of duties paid to him under a mistake of fact, if notice thereof has been given him before he has paid over the money to the government. *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154.

Money paid for bonds apparently well executed when in fact they were not, because of a false date, may be recovered back in an action for money had and received. *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153.

53. *Bend v. Hoyt*, 13 Pet. 263, 270, 10 L. Ed. 154; *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. Ed. 949.

54. **Money paid under a mistake of law.**—*Badeau v. United States*, 130 U. S. 439, 452, 32 L. Ed. 997; *Bend v. Hoyt*, 13 Pet. 263, 269, 10 L. Ed. 154; *United States Bank v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125.

"A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back." *Lamborn v. Board of County Comm'rs*, 97 U. S. 181, 24 L. Ed. 927.

55. **Money voluntarily paid cannot be recovered.**—*United States v. Edmonston*, 181 U. S. 500, 510, 45 L. Ed. 971; *Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528; *Railroad Co. v. Commissioners*, 98 U. S. 541, 543, 25 L. Ed. 196; *Elliott v. Swartwout*, 10 Pet. 137, 154, 9 L. Ed. 373. See the title PAYMENT.

56. **Money paid under compulsion or duress.**—*Loneragan v. Buford*, 148 U. S. 581, 37 L. Ed. 566; *Lamborn v. Board of County Comm'rs*, 97 U. S. 181, 185, 24 L. Ed. 923; *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 495; *Bank v. Bank*, 6 Pet. 8, 8 L. Ed. 299.

Money obtained by moral duress, not justified by law, and not paid except to obtain possession of property withheld on grounds manifestly wrong, may be recovered in action of assumpsit. *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405.

Money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. *Lamborn v. Board of County Comm'rs*, 97 U. S. 181, 185, 24 L. Ed. 926; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373.

Payment to prevent threatened sale of mortgaged property.—Money paid, in excess of what was due, in order to prevent a threatened sale of mortgaged property, may be recovered back, as paid under duress. *Swift, etc., Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341.

If a person illegally claims a fee colore officii, the payment is not voluntary so as to preclude the party from recovering it back. *Swift, etc., Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341.

Payments made to a common carrier, to induce it to do what by law, without them, it is bound to do, are not voluntary, and may be recovered back. *Swift, etc., Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341.

57. **Character of coercion or duress that will warrant action.**—*Radich v. Hutchins*, 95 U. S. 210, 24 L. Ed. 409.

Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an

Interest on Sum Illegally Exacted.—In *Pennsylvania*, where one accepts payment of a sum that had been illegally exacted from him, without a demand for interest, he cannot thereafter bring an action of assumpsit to recover such interest.⁵⁸

(2) *Taxes*—(a) *In General*.—Taxes voluntarily paid cannot be recovered back.⁵⁹ But when taxes are paid under protest that they are being illegally exacted or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, the money so paid may, on occasion, be recovered back in an action for money had and received.⁶⁰ Generally speaking, however, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances.⁶¹ To warrant a recovery there must generally be coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.⁶² But where such coercion is exercised, the money paid may always be recovered back in an action for money had and received, if there is no statutory provision to the contrary.⁶³

immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016.

And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary. *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016. See the titles DURESS; PAYMENT.

58. Action not maintainable to recover interest on sum illegally exacted.—*Stewart v. Barnes*, 153 U. S. 456, 38 L. Ed. 781.

59. Taxes voluntarily paid cannot be recovered back.—*Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *Philadelphia v. Diehl*, 5 Wall. 720, 733, 18 L. Ed. 614; *State Tonnage Tax Cases*, 12 Wall. 204, 209, 20 L. Ed. 370. See the titles PAYMENT; TAXATION.

60. Protest of illegality or notice of suit.—*Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *Philadelphia v. Diehl*, 5 Wall. 720, 731, 18 L. Ed. 614; *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154.

If a tax is illegal or was erroneously assessed, and the party assessed paid it by compulsion of law, or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in an action of assumpsit for money had and received, unless the legislative authority, in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit. *State Tonnage Tax Cases*, 12 Wall. 204, 209, 20 L. Ed. 370.

61. *Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016; *Railroad Co. v. Commissioners*, 98 U. S. 541, 545, 25 L. Ed. 196.

62. Generally there must be coercion to warrant recovery.—*Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *Railroad Co. v. Commissioners*, 98 U. S. 541, 545, 25 L. Ed. 196; *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016.

63. Assumpsit for money had and received the appropriate remedy.—"Parties compelled to pay an illegal assessment ought to have a convenient remedy to redress the injury, and inasmuch as it is enacted by congress that no suit for the purpose of restraining the assessment or collection of taxes shall be maintained in any court, it is believed that there is no more appropriate or effectual remedy known to the common law than the action of assumpsit for money had and received." *Philadelphia v. Diehl*, 5 Wall. 720, 733, 18 L. Ed. 614.

"Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue, which were unknown at common law." *State Tonnage Tax Cases*, 12 Wall. 204, 209, 20 L. Ed. 370.

Payment to prevent illegal seizure or detention of property.—Illegal taxes or other public exactions, paid by one to prevent an illegal seizure of his property by an officer claiming authority to seize it, or to liberate his property from illegal detention by such officer, may be recovered back in an action for money had and received, unless prohibited by some statutory regulation to the contrary. *Lamborn v. Board of County Comm'rs*, 97 U. S. 181, 24 L. Ed. 926.

When a party not liable to taxation is called upon peremptorily to pay upon a warrant in the nature of an execution run-

Effect of Statute Requiring Payment of Taxes Collected into Public Treasury.—A promise on the part of a collector of taxes to repay a tax illegally collected and paid only under protest, cannot be implied where a statute makes it the duty of such officer to pay into the public treasury without any deduction on account of claims of any description the gross amount that he receives.⁶⁴

(b) *Import Duties.*—Duties illegally exacted on goods as imported merchandise and paid under protest, may be recovered back in an action for money had and received, when such goods were not imported but were brought from one domestic port to another, and this though to prevent the seizure of the goods plaintiff entered them as imported merchandise.⁶⁵ But assumpsit for money had and received will not lie against a collector of import duties to recover duties alleged to have been illegally collected upon an importation of merchandise, that remedy in such case, having been taken away by act of congress.⁶⁶

ning against his property, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily and by showing that he is not liable, recover it back in an action for money had and received. *Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196.

But in *Kansas*, where one pays tax money without protest into the county treasury to redeem lands, and with no knowledge of illegality in the tax, he cannot afterwards recover back the money so paid, when the tax was afterwards decided to be illegal, on the ground that the money so paid was paid by reason of fraud, duress, or mistake of fact. *Lamborn v. Board of County Comm'rs*, 97 U. S. 181, 24 L. Ed. 926.

64. **Effect of statute requiring payment of taxes collected into public treasury.**—*The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

65. **Import duties illegally exacted on goods not imported.**—*De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041.

66. **Duties illegally exacted upon imported goods.**—Act June 30, 1864, c. 171, 13 Stat. 202, 214. Revised Statutes, §§ 2931, 3011; Act Feb. 27, 1877, 19 Stat. at L. 240, 247; Act June 10, 1890, 26 Stat. at L. 131, c. 407. *De Lima v. Bidwell*, 182 U. S. 1, 177, 45 L. Ed. 1041; *Schoenfeld v. Hendricks*, 152 U. S. 691, 38 L. Ed. 601; *Hager v. Swayne*, 149 U. S. 242, 243, 37 L. Ed. 719; *Arnson v. Murphy*, 109 U. S. 238, 27 L. Ed. 920.

Prior to the passage of the act of March 3, 1839, it had been held that an action of assumpsit would lie against a collector of import duties to recover back duties illegally exacted by him of an importer where the latter at the time of payment gave notice that the duties charged were too high and that he intended to sue to recover back the amount paid. *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. But under the act of 1839 requiring moneys collected for duties to be deposited to the credit of the treasurer of the United

States and making it the duty of the secretary of the treasury to draw his warrant upon the treasurer in case he found more money had been paid to the collector than the law required, it was held that an action for money had and received would not lie against a collector for duties illegally exacted by him unless the suit was brought before the money was paid into the treasury. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576; *Curtis v. Fiedler*, 2 Black 461, 17 L. Ed. 273. Subsequently the explanatory act of February 26, 1845, was passed which by legislative construction of the act of 1839 restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted and to set forth distinctly the grounds of objection. *Curtis v. Fiedler*, 2 Black 461, 17 L. Ed. 273; *Arnson v. Murphy*, 109 U. S. 238, 27 L. Ed. 920; *De Lima v. Bidwell*, 182 U. S. 1, 177, 45 L. Ed. 1041; *Greely v. Thompson*, 10 How. 225, 13 L. Ed. 397; *Greely v. Burgess*, 18 How. 413, 415, 15 L. Ed. 455; *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405; *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125. The act of 1845 was in force until repealed by implication by the act of June 30, 1864, ch. 171, 13 Stat. 202, 214, Revised Statutes, §§ 2931, 3011. *Barney v. Watson*, 92 U. S. 449, 23 L. Ed. 730. By this last statute the right to bring assumpsit against the collector to recover back duties illegally collected was taken away and a remedy given based exclusively upon the statute. *Arnson v. Murphy*, 109 U. S. 238, 27 L. Ed. 920; *Hager v. Swayne*, 149 U. S. 242, 243, 37 L. Ed. 719; *De Lima v. Bidwell*, 182 U. S. 1, 177, 45 L. Ed. 1041. Subsequently the act of 1864 was repealed by the act of June 10, 1890, 26 Stat. at L. 131, ch. 407, and under the latter act an action cannot be maintained against the collector either at common law or under the statutes, but there is substituted therefor a proceeding before the board of general appraisers. *Schoenfeld v. Hendricks*, 152 U. S. 691,

(c) *Internal Revenue Duties*.—Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue duties illegally assessed.⁶⁷ But under the act of July 13, 1866, § 19, such an action cannot be maintained until the taxpayer has appealed to the commissioner of internal revenue, and the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken.⁶⁸

g. *Money Paid to a Trustee for a Specific Purpose*.—If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shown to be at an end. But if the plaintiff shows that the specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such balance (the trust being closed) becomes a clear and liquidated sum, for which the action will lie.⁶⁹

4. *MONEY LENT OR ADVANCED*.—The contract arising out of a payment upon a check is a contract for money advanced, and must be so declared on.⁷⁰ An action for money lent is not maintainable upon a collateral undertaking to save a party harmless for money advanced to another.⁷¹

5. *MONEY PAID*.—To entitle a plaintiff to recover for money paid to the use of defendant, it must appear that he was bound to pay it, or that it was paid at defendant's request.⁷²

38 L. Ed. 601; *De Lima v. Bidwell*, 182 U. S. 1, 177, 45 L. Ed. 1041. See the title *REVENUE LAWS*.

67. *Internal revenue duties illegally assessed*.—The *Assessor v. Osbornes*, 9 Wall. 567, 574, 19 L. Ed. 748; *Philadelphia v. Diehl*, 5 Wall. 720, 731, 18 L. Ed. 614; *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

Collectors of internal revenue, as well as collectors of import duties, are required by the act of congress to pay all moneys by them collected into the treasury of the United States, and where such moneys have been collected and the payment has been made into the treasury, the law in the absence of any other statutory regulations upon the subject, would not imply any promise on the part of the collector to pay back the amount to the taxpayer, even if it appear that the assessment was erroneous or illegal, as he could not, in such case, be under any obligation to pay the money twice, and to have paid it back to the taxpayer in the first place would have been contrary to his official duty as prescribed by an act of congress. But the right of the plaintiff in such a case to maintain an action for money had and received, if the tax is illegal and he is not otherwise in fault, does not depend alone upon an implied promise as at common law, but is grounded upon provisions of the internal revenue acts, which warrant the conclusion as a necessary implication that congress intended to give the taxpayer such remedy. *Philadelphia v. Diehl*, 5 Wall. 720, 732, 18 L. Ed. 614; *The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272.

Interest on tax illegally exacted.—In Pennsylvania where one has accepted from the government the repayment of an internal revenue tax that had been illegally exacted from him without a de-

mand for interest, he cannot thereafter bring an action of assumpsit to recover such interest. *Stewart v. Barnes*, 153 U. S. 456, 38 L. Ed. 781.

68. *Condition precedent to action*.—*The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

This provision operates on all suits brought subsequently to the time fixed by the act for it to take effect. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

But did not apply to a case pending at the time of its enactment. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272; *Philadelphia v. Diehl*, 5 Wall. 720, 733, 18 L. Ed. 614.

The statute applies to suits brought in state courts as well as in federal. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

Prior acts giving taxpayers the right to bring the action without imposing such condition, did not confer on them any such vested right so to sue, in regard to transactions which occurred before the passage of the act of 1866, as that they still could sue irrespective of the condition imposed by that act, after the time when such act by its terms was to take effect. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272. See the title *REVENUE LAWS*.

69. *Money paid to a trustee for a specific purpose*.—*McLaughlin v. Swann*, 18 How. 217, 220, 15 L. Ed. 357. See the title *TRUSTS AND TRUSTEES*.

70. *Money lent or advanced*.—*Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100. See ante, "Money Had and Received," II, C, 3.

71. *Douglass v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626.

72. *Character of payment that will support action for money paid*.—*King v. Riddle*, 7 Cranch 168, 3 L. Ed. 304.

6. **GOODS SOLD AND DELIVERED.**—An implied contract of purchase is essential as a basis for an action for goods sold and delivered.⁷³

7. **WORK AND LABOR DONE AND MATERIALS FURNISHED.**—In the absence of an express promise to pay for work done and materials furnished, the law will imply one, and on such implied promise, a recovery may be had upon a quantum meruit.⁷⁴

Services Performed or Materials Furnished under Special Contract.—But an action upon the common count for work and labor done or for mate-

Payment upon contract void under statute of frauds.—When one person pays money for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid to the use of defendant at his request. But in such case the suit must be brought upon the implied promise. No recovery can be had in an action based upon and seeking to enforce the void contract. *Dunphy v. Ryan*, 116 U. S. 491, 29 L. Ed. 703.

Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Hall v. Smith*, 5 How. 96, 12 L. Ed. 66.

Money paid by one receiving a draft.—Where the declaration in a suit by A. against B. as indorser of a protested draft, the indorsement being, "Pay to A. or order for account of B.," contains a count for money paid for the use of B. at his request. A. is entitled under such count to recover from B. either for money paid without consideration, money loaned, or money advanced on the faith of the delivery of the draft. *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250.

Where A. ordered B. to purchase goods for him and to draw on him for the amount, which he did, and A. refused to accept or pay the bills, it was held that B. could recover from A. upon a count for money paid, laid out and expended. *Riggs v. Lindsay*, 7 Cranch 500, 3 L. Ed. 419.

73. Basis of action for goods sold and delivered.—*Schutz v. Jordan*, 141 U. S. 213, 35 L. Ed. 705.

Wheat delivered in pursuance of contract which defendant failed to perform.—Where A. agreed to convey to B. certain tracts of land by a good and sufficient deed of conveyance, in consideration of B. delivering to A. twelve thousand bushels of wheat, and B. performed his part of the contract by delivering the wheat, and A. neglected and refused to convey the land by any good or sufficient deed, it was held that B. could treat the contract as at an end, and bring an action of assumpsit to recover the value of the wheat. *Ankeny v. Clark*, 148 U. S. 345, 37 L. Ed. 475.

Goods of one party passing into possession of another without his knowledge.

—A contract of purchase will not be implied from the fact that goods belonging to one party passed into the possession of another, if such transfer of possession was surreptitious and without the knowledge of the latter, nor from the further fact that unknown to such latter party his agent in pursuance of a wrongful combination with the plaintiffs sold the goods and put the proceeds in his principal's possession, but without his knowledge. *Schutz v. Jordan*, 141 U. S. 213, 35 L. Ed. 705.

Where a contract for the sale of goods which is void but not illegal has been performed on both sides, the vendor cannot maintain a quantum valebat for the market value of the goods less the amount paid by the vendee. *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159, 48 L. Ed. 130.

74. Action maintainable upon implied promise.—*Delaware City, etc., Nav. Co. v. Reybold*, 142 U. S. 636, 35 L. Ed. 1141; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934.

Basis of action.—The right to recover on a quantum meruit for work done and labor performed by the plaintiff which enured to the benefit of the defendant is based on the principle of general law that one who accepts the benefit of another's services shall be held liable to pay what they are reasonably worth. *Delaware City, etc., Nav. Co. v. Reybold*, 142 U. S. 636, 35 L. Ed. 1141.

Services rendered as agent in conducting a commercial adventure.—Compensation for services rendered by the plaintiff, as agent for the defendant in conducting a certain commercial adventure at his request and for his benefit, may be recovered in an action of assumpsit for the value of the services rendered. *Godard v. Foster*, 17 Wall. 123, 132, 21 L. Ed. 589.

Paving done by municipality upon neglect of street railroad company to do it.—An action upon an implied assumpsit may be brought by a municipal corporation against a street railroad company to recover for work done and materials furnished by plaintiff in paving certain streets upon the neglect of the defendant to do so, as required by its charter. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231.

rials furnished will not lie for services performed or materials furnished under a special written contract.⁷⁵ So long as the special agreement remains in force and unrescinded, the plaintiff must declare upon it.⁷⁶

But when a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it, he may be made liable upon an implied promise to make reasonable remuneration in respect to such work.⁷⁷

Special Contract Not Fulfilled in Manner nor within Time Prescribed.

—So one who has in good faith fulfilled a special contract, but not in the manner nor within the time prescribed by the contract, may, if the other party has sanctioned or accepted the work, recover upon the common counts in indebitatus assumpsit.⁷⁸

Services upon Contract Void under Statute of Frauds.—When one person performs services for another upon a contract void under the statute of frauds, he may recover for such services upon the quantum meruit count.⁷⁹ But in such case the suit should be brought upon the implied promise.⁸⁰

8. USE AND OCCUPATION.—The action of assumpsit for use and occupation is founded upon contract either express or implied.⁸¹ To maintain it there must be established the relation of landlord and tenant, a holding by the defendant under a knowledge of the plaintiff's title or claim, and under circumstances which amount to an acknowledgment of, or acquiescence in, such title or claim, and an agreement or permission on the part of the plaintiff.⁸² The action will not lie where the possession has been acquired and maintained under a different or ad-

75. Services performed or materials furnished under special contract.—Hubbard v. New York, etc., Investment Co., 119 U. S. 696, 30 L. Ed. 548; Hawkins v. United States, 96 U. S. 689, 697, 24 L. Ed. 607.

Where there is a special contract under which services have been rendered, by which the entire compensation is regulated and made contingent, there can be no recovery on a quantum meruit. Marshall v. Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

76. Hawkins v. United States, 96 U. S. 689, 697, 24 L. Ed. 607.

If A. agree, under seal, to do certain work for B., and does part, but is prevented by B. from finishing it, according to contract; A. cannot maintain a quantum meruit against B., for the work actually performed, but must sue upon the sealed instrument. Young v. Preston, 4 Cranch 239, 2 L. Ed. 607.

77. Benefit derived from work done under abandoned contract.—Hawkins v. United States, 96 U. S. 689, 697, 24 L. Ed. 607.

78. Special contract not fulfilled in manner nor within time prescribed.—Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762.

Where one continues, after the time for completing a special contract has expired, with the knowledge and permission of the other party, to do the work specified in the contract, and also to do extra work, and furnish materials necessary for both, the law implies in such a case that the work done and materials furnished were to be paid for. Dermott v. Jones, 23 How. 220, 16 L. Ed. 442. See, also,

Fresh v. Gilson, 16 Pet. 327, 334, 10 L. Ed. 982.

Where a railroad construction contract is not performed within the time limited, time being of the essence of the contract, there can be no recovery on the agreement, but a subsequent performance and acceptance will authorize a recovery on a quantum meruit. Slater v. Emerson, 19 How. 294, 15 L. Ed. 626; Emerson v. Slater, 22 How. 28, 16 L. Ed. 360.

79. Services upon contract void under statute of frauds.—Dunphy v. Ryan, 116 U. S. 491, 497, 29 L. Ed. 703.

80. Dunphy v. Ryan, 116 U. S. 491, 497, 29 L. Ed. 703.

81. Action founded upon contract.—Lloyd v. Hough, 1 How. 153, 159, 11 L. Ed. 83; Hill v. United States, 149 U. S. 593, 598, 37 L. Ed. 862; Bigby v. United States, 188 U. S. 400, 405, 47 L. Ed. 519.

82. What is essential to maintenance of action.—Lloyd v. Hough, 1 How. 153, 159, 11 L. Ed. 83. See the title LANDLORD AND TENANT.

Where a party executes a deed-poll, reserving rent, and the grantee enters into possession, he is under the same liability to pay such rent as if the deed were an indenture inter partes, and he had executed it. The law implies a promise to pay which may be enforced by an action of indebitatus assumpsit. Sanger v. Upton, 91 U. S. 56, 64, 23 L. Ed. 220.

So where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase money, and it may be recovered; but the action must be in case,

verse title, or where it was tortious and makes the holder a trespasser.⁸³ One who enters into possession of land in virtue of an agreement or understanding that he is to be a purchaser of it, cannot be held liable for use and occupation if the purchase be actually concluded.⁸⁴

III. Limitation of Action.

The action must be brought within the time limited by the statute of limitations.⁸⁵ The principle which in some cases makes the statute of limitations run from the time of the knowledge of the fraud or injury does not apply to the action of assumpsit.⁸⁶

IV. Amount Recoverable.

In the instance of a special contract which has been wholly executed and the time of payment passed, if the plaintiff proceeds in general assumpsit, the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages.⁸⁷ But, where the action is in special assumpsit, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled.⁸⁸ If the performance of a condition for the valuation of property sold be rendered impossible by the act of the vendee,

and not debt on the specialty. *Carroll v. Green*, 92 U. S. 509, 514, 23 L. Ed. 738.

83. When the action will not lie.—*Lloyd v. Hough*, 1 How. 153, 159, 11 L. Ed. 83; *Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862; *Bigby v. United States*, 188 U. S. 400, 405, 47 L. Ed. 519; *West v. Smith*, 8 How. 402, 12 L. Ed. 1130.

An action in the nature of assumpsit will not lie for damages for the use and occupation of land by the United States without plaintiff's consent and without compensation being made to him, where the United States claims that the land is submerged under its navigable waters, and that it has a paramount right to use it as against plaintiff or any other person. *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862.

84. *Carpenter v. United States*, 17 Wall. 489, 21 L. Ed. 680.

85. Limitation of action.—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

The statute of limitations of North Carolina interposes a bar to actions of assumpsit after three years. *Wilcox v. Plummer*, 4 Pet. 172, 180, 7 L. Ed. 821.

The Maryland statute of limitations of three years was a good bar to an action of assumpsit for money had and received, brought to try a title to lands in the city of Washington, under the 5th section of the Maryland Statute of November, 1791, ch. 45. *Beatty v. Burnes*, 8 Cranch 98, 3 L. Ed. 500.

In the statute of limitations in force in the District of Columbia in 1809, the exception in favor of merchants' accounts applied as well to actions of assumpsit as to actions of account. *Mandeville v. Wilson*, 5 Cranch 15, 3 L. Ed. 23.

Action one of assumpsit and not founded on a statute.—An action by a mu-

nicipal corporation against a street railway company to recover for work done and materials furnished in paving certain streets, upon the neglect of the latter to do so as required by its charter, is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence, and is founded on the implied obligation and not on the statute, and therefore unless brought within the time limited for bringing such actions is barred, although the statute of limitations does not apply to actions founded on statutes. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231; *Washington, etc., R. Co. v. District of Columbia*, 136 U. S. 653, 34 L. Ed. 549.

86. Time from which statute runs.—*Wilcox v. Plummer*, 4 Pet. 172, 176, 7 L. Ed. 821.

87. Special contract wholly executed.—*Hume v. United States*, 132 U. S. 406, 413, 33 L. Ed. 393.

The defendant himself may give in evidence the special agreement for the purpose of lessening the quantum of damages to which the plaintiff is entitled. *Perkins v. Hart*, 11 Wheat. 237, 252, 6 L. Ed. 463.

88. *Hume v. United States*, 132 U. S. 406, 413, 33 L. Ed. 393.

Effect of fraud in inception of contract of sale.—But in an action of special assumpsit to recover the contract price of goods delivered, if there was fraud in the inception of the contract, and performance was accepted in ignorance thereof, and under circumstances excusing the nonreturn of the goods, only the market value of such goods can be recovered. *Hume v. United States*, 132 U. S. 406, 33 L. Ed. 393.

its price must be fixed by the jury on a quantum valebat.⁸⁹ In an action of assumpsit to recover damages for the nondelivery of property purchased, the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, the property for the nondelivery of which the action was brought.⁹⁰ Counsel fees are not recoverable in an action of assumpsit.⁹¹

In an action of assumpsit for money had and received the plaintiff waives all torts and special damages, and cannot recover a greater amount than the defendant has received,⁹² except that he may as a general rule, recover interest as damages for the detention.⁹³ But in a case where money has been received and paid under mistake, no fraud or surprise being imputed to either party, interest is not allowed.⁹⁴

In an action for compensation for services rendered by the plaintiff at the request and for the benefit of the defendant, the plaintiff is entitled to recover such sum, as the reasonable quantum meruit value of his services, as the jury, upon the evidence, may regard to be proper.⁹⁵

In an action for the use and occupation of plaintiff's lands if defendant enjoyed the exclusive use and occupation of the lands and stocked them to their full capacity, the plaintiff is entitled to recover the entire rental value of the lands for grazing purposes.⁹⁶

V. Parties.

When Third Person May Sue in His Own Name.—Where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person, such third person may bring an action of assumpsit in his own name.⁹⁷

When Agents May Sue in Their Own Name.—Where agents have made a contract, and have an interest in the transaction to the extent of their commissions, they may maintain assumpsit for the money in their own names, instead of that of the principals.⁹⁸

VI. Pleading.

A. Declaration.—1. JOINDER OF SPECIAL AND GENERAL ASSUMPSIT.—The

89. Performance of condition for valuation of property sold rendered impossible by vendee.—*Humaston v. American, etc., Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

Where a person who on a given contract, covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, prevents any arbitration, and is sued at law on a quantum valebat, the sum due him may be ascertained by a jury under instructions from the court. If the jury, under such instructions, find that only so much is due, the plaintiff can recover nothing more. *Humaston v. American, etc., Tel. Co.*, 20 Wall. 20, 22 L. Ed. 279.

90. Court cannot compel acceptance of property in mitigation of damages.—*Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484. Generally, as to damages, see the title DAMAGES.

91. Counsel fees not recoverable.—*Oelrichs v. Spain*, 15 Wall. 211, 231, 21 L. Ed. 43.

92. Money had and received.—*Eastwick v. Hugg*, 1 Dall. 222, 223, 1 L. Ed. 109.

93. Eastwick v. Hugg, 1 Dall. 222, 223, 1 L. Ed. 109.

Where a party pays money on a consideration which fails, and which in equity should be refunded—as for the goods deliverable in futuro, but not delivered—the measure of damages on the recovery back is the sum paid and interest upon it. *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

94. Jacobs v. Adams, 1 Dall. 52, 1 L. Ed. 33.

95. Services rendered.—*Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

When a party injured by the stoppage of a contract elects to rescind it, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. *United States v. Behan*, 110 U. S. 338, 345, 28 L. Ed. 168.

96. Use and occupation.—*Lazarus v. Phelps*, 156 U. S. 202, 39 L. Ed. 397.

97. When third person may sue in his own name.—*National Bank v. Grand Lodge*, 98 U. S. 423, 25 L. Ed. 75.

98. When agents may sue in their own name.—*McCullough v. Roots*, 19 How. 349, 15 L. Ed. 681. See the title PRINCIPAL AND AGENT.

common counts may be joined with special counts in the declaration in assumpsit.⁹⁹

2. **RECOVERY LIMITED TO CLAIMS RAISED BY DECLARATION.**—The plaintiff cannot recover upon a claim not raised by the declaration.¹

3. **SUFFICIENCY OF ALLEGATIONS**—a. *Special Assumpsit.*—**Contract of Sale.**—Where in an action of assumpsit on a contract for the sale and delivery of property, the declaration sets out the contract in ordinary form and according to its legal effect, it is sufficient.²

In an action of assumpsit for false warranty, a scienter need not be averred; and if averred, need not be proved.³

b. *General Assumpsit.*—A promise to pay is an essential allegation in the declaration in indebitatus assumpsit.⁴

Special Circumstances of Case Need Not Be Stated.—In an action of assumpsit for money had and received, the plaintiff is under no necessity to state the special circumstances of his case, but may make it out by evidence on the trial.⁵

99. **Joinder of special and general assumpsit.**—Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the nondelivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods, and that he has converted the same to his own use, the plaintiff, at his election, may have damages for the nondelivery of the goods, or he may have judgment for the price paid and lawful interest. *Nash v. Towne*, 5 Wall. 689, 702, 18 L. Ed. 527.

Where one, fraudulently exhibiting to another a sealed instrument reciting that the person exhibiting it has a claim for a sum of money on a third party (he having no claim whatsoever), fraudulently induced that other to buy it from him, and such other buying it, paid him in money for it, and took an assignment under seal on the back of the instrument, the person thus defrauded may recover his money in assumpsit, on a declaration containing special counts setting out the instrument as inducement, and averring the utter falsity of its recitations, and the fraud of the whole transaction; the declaration containing also the common counts. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299.

1. **Recovery limited to claims raised by declaration.**—*St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 30 L. Ed. 1077.

In an action against a railroad company where the only contract alleged by the declaration to have been broken is that contained in bills of lading sued on, and involving only the duty of defendant as a common carrier in transporting the goods, the defendant cannot be held liable for a breach of duty as a warehouseman. *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 30 L. Ed. 1077.

One who declares in trespass de bonis asportatis cannot, without amending his complaint, recover as upon an account for money had and received. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 38 L. Ed. 627.

2. **Contract of sale.**—*Struthers v. Drexel*, 122 U. S. 487, 30 L. Ed. 1216.

By a contract between D. & S. which recited that D. had purchased four hundred shares of stock of a certain corporation sold by the trustee thereof, S. in consideration of one dollar agreed that at the end of one year from date if D. desired him to do so he would purchase the stock at the price D. had paid for it. At the time specified D. tendered the stock and upon S. refusing to receive or pay for it, brought an action of assumpsit for the contract price. The declaration set forth a contract whereby the plaintiff sold and agreed to deliver to defendant the specified number of shares of the corporate stock at the specified price, to be paid by defendant on delivery, in consideration whereof defendant undertook and promised to accept such stock and pay for the same on delivery. It was held, that this set out the contract according to its legal effect and was sufficient, and that the failure to set out the recital that plaintiff had purchased the stock from the trustee of the corporation, or to state the consideration of one dollar paid by the plaintiff was immaterial. *Struthers v. Drexel*, 122 U. S. 487, 30 L. Ed. 1216.

3. **In assumpsit for false warranty, scienter need not be averred.**—*Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642.

4. **Promise to pay.**—*Fiedler v. Curtis*, 2 Black. 461, 17 L. Ed. 273.

Thus in an action for money had and received, the implied promise to pay must be charged in the declaration. *Cary v. Curtis*, 3 How. 236, 250, 11 L. Ed. 576.

5. **Statement of special circumstances of case not essential.**—*Eastwick v. Hugg*, 1 Dall. 222, 223, 1 L. Ed. 109.

In indebitatus assumpsit, for money al-

4. **CORRESPONDENCE OF ALLEGATIONS AND EVIDENCE**—a. *Rule Stated*.—The declaration must be supported by evidence conforming to its allegations,⁶ but this requirement is fulfilled, if the substance of the declaration is proved.⁷

b. *Amendment to Cure Variance*.—Where a variance between a special count in assumpsit and the evidence introduced to support is purely technical, and in no way affects the merits of the case, it may be cured by amendment.⁸

5. **VARIANCE BETWEEN DECLARATION AND ACCOUNT FILED IN PRIOR ATTACHMENT PROCEEDING**.—Where the plaintiff in assumpsit had prior to bringing that action sued out an attachment against the defendant, which was discharged by the appearance of the defendant, and giving bail, a variance between the manner in which the defendant was charged in the account filed in the attachment, and in the declaration in assumpsit, to which the defendant pleaded the general issue, is immaterial.⁹

leged to have been illegally exacted under color of law, a declaration, which avers the fact of indebtedness, and a promise in consideration thereof, is sufficient on general demurrer, although it does not allege with particularity the laws under color of which the exactions were made, nor the circumstances attending the payment, unless it appears that the alleged indebtedness was impossible in law. *Liverpool, etc., Steamship Co. v. Emigration Comm'rs*, 113 U. S. 33, 28 L. Ed. 899.

6. **Evidence must conform to allegations of declaration**.—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

Notes conforming in legal effect to allegations of common count.—C. loaned money to plaintiffs in error who executed notes for the amount payable to their own order and indorsed in blank. After C.'s death his executors filled in the blank indorsement with an order to pay to B. & M. executors of C. and brought an action of assumpsit the declaration containing the usual common counts in which all the transactions were alleged to have taken place with C. It was held that the notes conformed in legal effect to the allegations of the common counts. *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086.

7. **Proof of substance of declaration sufficient**.—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

Where flour intended to be sent to Boston was sold at Neenah, upon Lake Michigan, in midwinter, and the letter of sale stated that the flour was sold "free on board steamer at Neenah," and was now "stored," the inference would be that the flour was to remain in the storehouse where it was until the navigation opened in the spring, and that it was to be withdrawn and delivered on board a steamer at Neenah, free of charge to the purchasers, before the spring season of navigation closed (which was May 31). Accordingly such a sale will support a declaration (the flour not being delivered), alleging a sale of flour, stored at Neenah, and an agreement to deliver the same, when requested, free of charge,

to the purchasers, on board of a steamer to be procured or furnished by the vendors at the place where it was stored, after navigation should open, and a reasonable time before the 31st day of May following, to be conveyed to the purchasers, at Boston, in the ordinary manner of transportation. *Nash v. Towne*, 5 Wall. 689, 690, 18 L. Ed. 527.

Proof of a sale and payment by a sight draft, duly paid, will support a declaration of a sale for so much "in hand paid." *Nash v. Towne*, 5 Wall. 689, 690, 18 L. Ed. 527.

8. **Amendment**.—*Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086. See the title AMENDMENTS, vol. 1, p. 288.

C. loaned money to plaintiffs in error who executed notes for the amount payable to their own order and indorsed in blank. After C.'s death his executors filled in the blank indorsement with an order to pay to B. & M., executors of C., and brought an action of assumpsit on the notes, and in a special count described them as having been indorsed and delivered to C. It was held that the variance could be cured by amendment. *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086.

9. **Variance between declaration and account filed in prior attachment proceeding**.—*Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

F. had sued out an attachment, under the law of Maryland, against R. B., and had filed an account against J. D. R., said to have been assumed by R. B. R. B. appeared, gave special bail, and discharged the attachment. F. then filed a declaration in indebitatus assumpsit "for money had and received," and "for goods sold and delivered," to which R. B. pleaded the general issue. The court attached no importance to this variance, between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail and the appearance of the defendant; the defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference could be had

B. Plea—1. GENERAL ISSUE OR NON ASSUMPSIT.—It has been long since established, that under non assumpsit, the defendant may give in evidence anything which shows that no debt was due, at the time when the action was commenced, whether it arise from an inherent defect in the original promise, or a subsequent discharge and satisfaction.¹⁰ But this rule has, in some jurisdictions, been changed by statute.¹¹ Under a plea of non assumpsit, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of

to the proceedings on the attachment. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

10. What may be given in evidence under non assumpsit.—*Young v. Black*, 7 Cranch 565, 3 L. Ed. 440; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

"Whilst, at the common law, under the general issue in assumpsit, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit—such as payment, release, accord and satisfaction, and a former recovery, and excuses for nonperformance of the contract; and also that it had become impossible or illegal to perform it." *Mr. Justice Field in Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 266, 26 L. Ed. 539.

Everything which disaffirms the contract; everything which shows it to be void; may be given in evidence under the general issue. *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

Infancy may be given in evidence under the general issue. *Stansbury v. Marks*, 4 Dall. 130, 1 L. Ed. 771.

Authority to issue bonds, bona fides and notice.—Where a declaration in assumpsit upon bonds of a county issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, bona fides and notice. *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

Validity of consideration and constitutionality of law in which contract originated.—In an action of assumpsit on a promissory note, the record stated, "that neither party having required a jury, the cause was submitted to the court; and the court having seen and heard the evidence, the court found, that the defendants did assume as the plaintiff had declared; that the consideration for the note and the assumpsit was for loan office certificates, loaned by the state of Missouri, at her loan office in Chariton, which certificates were issued under "an act for establishing loan offices," etc. It was held that it

could not be doubted, that the declaration was on a note given in pursuance of the act of Missouri; and that under the plea of non assumpsit, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

Record of former judgment.—Upon the issue of non assumpsit, the defendant may give in evidence the record of a former judgment between the same parties, on the same cause of action. *Young v. Black*, 7 Cranch 565, 3 L. Ed. 440; *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. Ed. 959.

If a promissory note upon which an action is brought has been merged in a judgment previously recovered thereon, such judgment being a bar to the action, an exemplification of its record is admissible under the general issue. *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783.

Equitable defenses.—In Pennsylvania it has been held that in assumpsit for money had and received the defendant may, under the general issue, go into all the equity of the case, and set up any equitable defense. *Eastwick v. Hugg*, 1 Dall. 222, 223, 1 L. Ed. 109; *Barr v. Craig*, 2 Dall. 151, 1 L. Ed. 327.

11. The Code of Procedure of New York did away entirely in that state with the practice of allowing defenses under the general issue which do not go directly to the validity of the original cause of action, and required parties relying upon anything which, admitting the original existence of the cause of action, went to show its discharge—such as a release or payment or other matter—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. But no other change was made in the matters admissible under the general denial. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 267, 26 L. Ed. 539.

Denial of execution of instrument required to be by sworn plea.—Where, as in Alabama, a statute enacts that the execution of a written instrument cannot be questioned unless the defendant by a sworn plea deny it, a county sued in assumpsit with a plea of general issue, on instruments alleged to be its bonds issued to a railroad, cannot object that there was no evidence that the seal on the bonds was the proper seal. *Chambers*

the court.¹²

In an action of assumpsit by a corporation, a plea of non assumpsit admits the competency of the plaintiff to sue as such.¹³

2. **TENDER.**—In the action of assumpsit, the principle of the plea of tender is that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender. Such a tender and refusal do not discharge the debt, and hence the plea must proceed to allege that the defendant is still ready to perform, and it must contain a profert in curia of the money tendered.¹⁴

3. **PAYMENT WITH LEAVE.**—In Pennsylvania, the defense, in an action for goods sold and delivered, of breach of warranty or fraudulent representations as to the quality of the goods, may be set up by way of recoupment under the plea of "payment with leave."¹⁵

VII. Evidence.

A. Presumptions and Burden of Proof.—In an action of assumpsit for money had and received the burden is upon the plaintiffs to show that the defendant ex equo et bono is bound to refund the amount sued for.¹⁶ A bill or note is prima facie evidence, under a count for money had and received, against the drawer or indorser. But the presumption that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved that the money was actually received by another party.¹⁷

B. Admissibility.—In an action on the common counts, as in all other actions, evidence to be admissible must be relevant and material to the issues involved.¹⁸

County v. Clews, 21 Wall. 317, 22 L. Ed. 517.

But under the Illinois statute, practice act, § 34, which provides that no person shall be permitted to deny on trial the execution or assignment of any instrument in writing unless he shall verify his plea by affidavit, the defendant in an action on a contract contained in bills of lading is not precluded from denying, under the plea of the general issue of non assumpsit not verified by affidavit, his liability, on the ground that the contract has been fully performed. *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 30 L. Ed. 1077.

12. **Testimony bearing upon jurisdiction of count not receivable.**—*Simms v. Hundley*, 6 How. 1, 12 L. Ed. 319.

13. **Plea admits competency of corporation to sue as such.**—*Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818. See the title CORPORATIONS.

A plea of non assumpsit to a declaration in assumpsit by an assignee in bankruptcy of an insurance company against the holder of shares of its stock, to enforce collection of the balance due thereon, admits the existence of the corporation. *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818.

14. **Tender.**—*Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484. Generally, as to tender, see the title TENDER.

15. **Payment with leave.**—*Dushane v. Benedict*, 120 U. S. 630, 30 L. Ed. 810.

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16. **Presumptions and burden of proof.**—*Bailey v. New York, etc., R. Co.*, 22 Wall. 604, 638, 22 L. Ed. 840.

17. *Page v. Bank*, 7 Wheat. 35, 5 L. Ed. 390.

18. **Special agreement executed.**—Under general counts in assumpsit, a special agreement executed may be given in evidence. *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351.

A promissory note upon which defendant has admitted his indebtedness is admissible under the common counts as evidence of money had and received by defendant to plaintiff's use. *Hopkins v. Orr*, 124 U. S. 519, 31 L. Ed. 523.

Bills drawn by plaintiff on defendants.—The defendants ordered the plaintiff to purchase salt for them, and to draw on them for the amount, which he did. Upon defendant's failure to accept and pay the bills so drawn, plaintiff brought an action of assumpsit for money paid, laid out and expended. It was held that the bills drawn by the plaintiff on defendants were admissible in evidence. *Riggs v. Lindsay*, 7 Cranch 500, 3 L. Ed. 419.

In an action for money had and received by the United States against a receiver of public moneys, not describing him in his official capacity, evidence may be given of moneys received in his official capacity. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

In such action evidence may be given of public stock received by the receiver

VIII. Verdict.

Mere informality in the verdict in an action of assumpsit is not fatal to it, if there is sufficient to authorize the court to enter it in form.¹⁹

ASSUMPTION OF RISK.—See the title MASTER AND SERVANT.

ASSURED.—See note 1.

ASYLUMS.—See the title HOSPITALS AND ASYLUMS.

AT.—See note 2.

where such stock is, by law, made receivable, at par, in payment for land sold by the United States. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

In an action for the use and occupation of lands a judgment in a prior action between the same parties for the use and occupation of the same lands is admissible to prove that defendant had exclusive possession of the lands, and that plaintiff had claimed for their use and value from the time of the original occupation thereof by defendant. *Lazarus v. Phelps*, 156 U. S. 202, 39 L. Ed. 397.

19. Mere informality not fatal to verdict.—Where the declaration, in an action of assumpsit, contained the following counts: 1. On a promissory note; 2. Indebitatus assumpsit for the hire of slaves; 3. An account stated; 4. Quantum valebat for the services of slaves; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of slaves. And the defendant pleaded, 1. The general issue; 2. Statute of limitations; 3. Payment; and the jury found a verdict for "the defendant upon the issue joined as to the within note of four hundred and fifty-six dollars, and the within account"—such verdict, although informal, was sufficient to authorize the entry of a general judgment for the defendant. *Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404.

A verdict in assumpsit, "that the defendant is guilty in manner and form as alleged in the declaration," may be amended, and judgment rendered thereon for the damages thereby assessed, the plea being non assumpsit. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412, 26 L. Ed. 518. Generally, as to verdict, see the title VERDICT.

1. Assured.—Where a policy of insurance was effected on the life of one person for the benefit of another, the question arose as to which of these persons the term **assured** referred to. The court said: "The contention of the plaintiff is that the words 'the assured' in the policy apply to the person for whose benefit the policy was effected, that is, Luchs, and not to the party whose life was insured. There are undoubtedly instances where this distinction between the terms **assured** and **insured** is observed, though we do

not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, as generally depended upon its collocation and context in the policy. We are of the opinion that, reading the policy here in connection with the declaration and the answers of Luchs, which form a part of it, and indicate the object of procuring it, the term **assured** must be held as applicable to him for whose benefit it was effected. The policy considered in *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 562, 24 L. Ed. 287, gives some support to this view. There the policy was effected by a brother for a sister's benefit, and the term **assured** was held to apply to the sister, for she recovered in a suit brought in connection with her husband on the policy. The attention of the court does not appear, however, to have been directed to that term. It may be said, also, that there could be little doubt as to its proper application in that case, as it was followed by the words 'and her executors, and administrators, or assigns,' thus limiting it to the sister. In other respects the language is substantially identical with that of the policy under consideration." *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 504, 27 L. Ed. 800.

2. At.—In *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 348, 23 L. Ed. 428, it is said: "The words 'from,' 'to,' and **at**, are taken inclusively, according to the subject matter."

At and from.—In *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 184, 7 L. Ed. 98, it is said: "A policy on a ship, **at** and **from** a port, will attach, although the ship be, at the time, undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy."

In *Dickey v. Baltimore Ins. Co.*, 7 Cranch 327, 331, 3 L. Ed. 360, it is said: "Lord Mansfield said, 'under an insurance **at** and **from** such a place as Guadeloupe, or Jamaica, the word **at** comprises the whole island, and under that word, the ship is protected in going from port to port, round the coast of the island.'" See, generally, the title MARINE INSURANCE.

At least.—Where the language of the statute was: "That public notice of the

ATLANTIC OCEAN.—See note 1.

ATTACH.—See note 2.

ATTACHES.—See the title **AMBASSADORS AND CONSULS**, vol. 1, p. 274.

time and place of the sale of real property for taxes due to the corporation of the city of Washington shall be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty-four days. *Early v. Doe*, 16 How. 619, 14 L. Ed. 1079.

At maturity.—See **MATURITY**.

At owner's risk.—See the title **CAR-RIERS**.

The phrase does not exclude willful misconduct, gross negligence or want of ordinary care either in the seaworthiness of the vessel, her proper equipment and furniture, or in her management by a master and hands. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 283, 12 L. Ed. 465.

In *Compania de Navegacion La Flecha v. Brauer*, 168 U. S. 101, 12 L. Ed. 398, it was held that these words do not cover risk from all cases such as the negligent or willful acts of the master and crew.

At sea.—See the title **ARMY AND NAVY**, ante, p. 494.

See *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557, and *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558, where it was held that officers serving on a vessel employed in actual service in bays, inlets, roadsteads or other arms of the sea are "at sea" although the vessel was not in such condition that she could be taken safely out to sea beyond the main land.

In *United States v. Barnette*, 165 U. S. 174, 178, 41 L. Ed. 675, it is said: "In order to come within the phrase at sea, as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is waterborne, even if at anchor in a bay, or port or harbor, and not in condition presently to go to sea. It has accordingly been adjudged by this court that a vessel is at sea, within the meaning of the statute, although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to

sea, beyond the mainland; or is used as a receiving ship, at anchor in port at a navy yard, communicating with the shore by a rope, and having a roof built over her deck, and not technically in commission for sea service. *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558; *United States v. Strong*, 125 U. S. 650, 31 L. Ed. 823."

At the dwelling house.—Where a statute provides that services may be made upon defendant by delivering a copy to some member of his family at the dwelling house of such defendant, it was held that a delivery of a copy to some member of his family at a distance of one hundred and twenty-five feet from the house and in a corner of the yard of the house was not a delivery at the dwelling house. *Kibbe v. Benson*, 17 Wall. 624, 21 L. Ed. 741.

1. Atlantic Ocean.—In a policy of insurance the **Atlantic Ocean** has been held to cover the Gulf of Mexico. *Merchants' Ins. Co. v. Allen*, 121 U. S. 67, 30 L. Ed. 858. And see the title **MARINE INSURANCE**.

2. Attach.—Grants of public lands by congress excepted from their provisions all lands to which homestead or pre-emption rights had **attached**. The term **attached** has been construed in several cases: "'Of all the words in the English language this word **attached** was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened, to that land, which could ripen into a perfect title by future residence and cultivation.'" *Kansas Pac. R. Co. v. Dammeyer*, 113 U. S. 629, 644, 28 L. Ed. 1122; *Sioux City, etc., Town Lot, etc., Co. v. Griffey*, 143 U. S. 32, 36 L. Ed. 64; *Whitney v. Taylor*, 158 U. S. 85, 89, 39 L. Ed. 906.

ATTACHMENT AND GARNISHMENT.

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CROSS REFERENCES.

As to the appearance of the defendants to a foreign attachment as waiving objection to the nonservice of process, see the title *APPEARANCES*, ante, p. 429. As to execution in the nature of attachment against the debtors of a bank, see the title *BANKS AND BANKING*. As to attachment for contempt, see the title *CONTEMPT*. As to attachment for costs, see the title *COSTS*. As to the taking of depositions in a scire facias against the garnishee in foreign attachments, see the title *DEPOSITIONS AND INTERROGATORIES*. As to proceedings in the nature of garnishment in aid of executions, see the title *EXECUTIONS*. As to the conclusiveness of a foreign judgment in attachment, see the title *FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS*. As to writs of inquiry and proceedings thereunder, see the title *INQUESTS AND INQUIRIES*. As to limitation of actions as applicable to proceedings, in attachment, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*. As to condemnation of property seized as prize, see the title *PRIZE*. As to the enforcement by attachment of a redelivery of goods seized for breach of the laws of the United States, see the title *SEARCHES AND SEIZURES*. As to confiscation proceedings, see the title *WAR*.

I. Definitions and General Consideration.

A. Definitions.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained.¹ For a definition of garnishment, see post, "Definition," XVI, A.

B. Origin.—Our attachment laws had their origin in the custom of London.²

C. Nature—1. *IN REM OR IN PERSONAM*.—Proceedings to enforce a debt or demand by attachment of the defendant's property partake of the character of suits, both in rem and in personam.³ An attachment is in the nature of, but not, strictly speaking, a proceeding in rem, since that only is a proceeding in rem in which the process is to be served on the thing itself.⁴ If, in an attachment suit, the defendant appears, the cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant

1. **Definitions of attachment.**—"Attachment laws, to use the words of Chancellor Kent, 'are legal modes of acquiring title to property by operation of law.' They exist in every state for the furtherance of justice, with more or less of liberality to creditors." *Green v. Van Buskirk*, 7 Wall. 139, 149, 19 L. Ed. 109.

2. **Origin.**—Chicago, etc., *R. Co. v. Sturm*, 174 U. S. 710, 714, 43 L. Ed. 1144;

McClenachan v. McCarty, 1 Dall. 375, 377, 1 L. Ed. 183.

3. **In rem or in personam.**—*Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. See post, "Nature," XVI, B.

4. *Cole v. Cunningham*, 133 U. S. 107, 116, 33 L. Ed. 538. See post, "Distinguished from Attachment in Admiralty," I, C, 4.

by the final judgment of the court.⁵ But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff and is governed by principles applicable to that class of cases.⁶ And where the action is commenced by attachment and service had by publication, it is in the nature of a proceeding in rem.⁷

2. **MESNE PROCESS.**—Attachment is mesne process,⁸ merely an incident to a suit.⁹

3. **ATTACHMENT AND EXECUTION CONTRASTED.**—Attachment is a mesne process while execution is final. Both alike command the seizure of the property of the defendant without a specific description, and in obeying the precept, the officer exercises precisely the same discretion, and with the same consequences, if he commits a wrong under the color of it. The court has the same control over both forms of its process, and has custody of the property seized by virtue of them in the same sense. The circumstance that, as to property held under attachment, the final judgment may direct its sale, while the execution is issued upon præcipe of the party, and is executed without further order, cannot alter the relation of the court, either to the officer or the property. It has jurisdiction over the latter to meet and satisfy the exigency of either writ, and that jurisdiction can be maintained only by retaining the possession acquired by the officer in executing it.¹⁰ And an attachment, and conveyance under it, are equivalent to an execution executed.¹¹

4. **DISTINGUISHED FROM ATTACHMENT IN ADMIRALTY.**—The process of attachment is not a proceeding in rem, as known and practiced in the admiralty, nor does it bear any analogy whatever to such a proceeding, as the suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is in rem in the admiralty court to enforce a maritime lien in the property.¹²

D. Object.—Attachments are made for the benefit of creditors.¹³ The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained.¹⁴ In the courts of the United States the attachment cannot be used, as

5. See the title **APPEARANCES**, ante, p. 429.

6. *Cole v. Cunningham*, 133 U. S. 107, 116, 33 L. Ed. 538; *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 715, 43 L. Ed. 1144; *Central Loan, etc., Co. v. Campbell Com. Co.*, 173 U. S. 84, 97, 43 L. Ed. 623; *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, 28 L. Ed. 729.

In *McClenachan v. McCarty*, 1 Dall. 375, 377, 1 L. Ed. 183, it was said: "The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and he has, in truth, no day in court, until he enters special bail, and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the garnishee, to disprove the debt."

7. *Maxwell v. Stewart*, 22 Wall. 77, 80, 22 L. Ed. 564.

8. **Attachment is mesne process.**—*Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390.

9. **Attachment is merely incidental.**—*Ex parte Des Moines, etc., R. Co.*, 103 U. S. 794, 796, 26 L. Ed. 461.

Attachment was never deemed an independent suit, but a means to compel the ministerial officer of the court to perform his duty, so that the plaintiff should have the fruits of his judgment. *Gwin v. Breedlove*, 2 How. 29, 35, 11 L. Ed. 167.

10. **Attachment and execution contrasted.**—*Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390. See, generally, the title **EXECUTIONS**.

11. *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 137, 7 L. Ed. 617.

12. **Attachment and admiralty distinguished.**—*Leon v. Gauceran*, 11 Wall. 185, 189, 20 L. Ed. 74. See the title **ADMIRALTY**, vol. 1, p. 119. And see ante, "In Rem or in Personam," I. C. 1.

13. **Attachments are for the benefit of creditors.**—*Inbusch v. Farwell*, 1 Black 566, 572, 17 L. Ed. 188.

14. **To secure a lien.**—*Wehrman v. Conklin*, 155 U. S. 314, 331, 29 L. Ed. 167. See, also, *Roller v. Holly*, 176 U. S. 398, 406, 44 L. Ed. 520, 523.

in the practice of other jurisdictions, as means of compelling the appearance of the defendant, or of founding jurisdiction as a proceeding in rem.¹⁵

E. Strict Pursuance of Statute Required.—The law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it.¹⁶

F. Rules Applicable Where Attachment Resembles Assumpsit.—Where proceedings instituted in a case, although commencing by an attachment, and upon what is termed a short note, in lieu of a formal declaration, assume, nevertheless, the essential character, and in some respects, the usual forms of the action of assumpsit, they must be governed by the rules applicable to such an action.¹⁷

II. Jurisdiction.

A. General Rule as to Jurisdiction of Circuit and District Courts.—In common-law causes in the circuit and district courts, the plaintiff is entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; provided that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.¹⁸ Circuit courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held.¹⁹

Rule Applicable to District Court of Porto Rico.—By analogy it would seem that the district court of Porto Rico, exercising the jurisdiction of a circuit court in its practice as to the issuing of attachments, is to adapt itself to the local practice recognized and established in Porto Rico.²⁰

B. Foreign Attachment.—In the federal courts in the case of a person being amenable to process in personam, an attachment against his property cannot be issued against him, except as a part of, or together with, process to be served upon his person.²¹

15. As means of compelling appearance or founding jurisdiction in rem.—Covell v. Heyman, 111 U. S. 176, 181, 28 L. Ed. 390. See the title ADMIRALTY, vol. 1, p. 119.

16. Strict pursuance of statutes required.—Mitchell v. St. Maxent, 4 Wall. 237, 243, 18 L. Ed. 326; Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 129, 43 L. Ed. 640; Fitzpatrick v. Flannagan, 106 U. S. 648, 657, 27 L. Ed. 211; McGinty v. Flannagan, 106 U. S. 661, 27 L. Ed. 215.

17. Rules applicable where attachment resembles assumpsit.—Fresh v. Gilson, 16 Pet. 327, 10 L. Ed. 982. See the title ASSUMPSIT, ante, p. 636.

18. General rule as to jurisdiction of circuit and district courts.—Revised Statutes, § 915.

19. Perez v. Fernandez, 202 U. S. 80, 98, 50 L. Ed. 942.

20. Rule applicable to district court of Porto Rico.—Perez v. Fernandez, 202 U. S. 80, 98, 50 L. Ed. 942.

21. Foreign attachment.—See post, "Nonresidence," III, B.

Toland v. Sprague, 12 Pet. 300, 9 L. Ed.

1093; Levy v. Fitzpatrick, 15 Pet. 167, 171, 10 L. Ed. 699; Herndon v. Ridgway, 17 How. 424, 15 L. Ed. 100; State v. Wheeling, etc., Bridge Co., 18 How. 421, 453, 15 L. Ed. 435; Chaffee v. Hayward, 20 How. 208, 215, 15 L. Ed. 853; Southern Pac. Co. v. Denton, 146 U. S. 202, 209, 36 L. Ed. 942; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 206, 37 L. Ed. 699; Ex parte Des Moines, etc., R. Co., 103 U. S. 794, 26 L. Ed. 461; Hollingsworth v. Adams, 2 Dall. 396, 1 L. Ed. 431. See post, "Jurisdiction," XVI, E.

Process of foreign attachment cannot be properly issued by the circuit courts of the United States, in cases where the defendant is domiciled abroad, or not found within the district in which the process issues, so that it can be served upon him. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093.

The true construction of the 11th section of the judiciary act of 1789, is that it did not mean to distinguish between those who are inhabitants, or found within the district, by process issued out of the circuit court, and persons domiciled abroad; so as to protect the first, and leave the

C. Conflict between State and Federal Jurisdiction—1. GENERAL RULE.

—In case of conflict of authority under a state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized, whether the one is paramount to the other, but upon the question as to which jurisdiction has first attached by the seizure and custody of the property under its process,²² and this rule applies notwithstanding the fact that the property has been brought into custody by illegal means.²³ Property seized by the sheriff, under the process of attachment from a state court, and while in the custody of the officer, cannot be seized or taken from him by a process from the district court of the United States, and an attempt to seize it by the marshal, by a notice or otherwise, is a nullity, and will give the court no jurisdiction over it, inasmuch as to give jurisdiction to the district court in a proceeding in rem, there must be a valid seizure and an actual control of the res under the process.²⁴

2. LIMITATION OF THE GENERAL RULE.—Where, under a writ of attachment, the marshal of the United States has first seized property and taken it into custody, the exclusive jurisdiction of the circuit court is established over it and over all questions concerning it; but it ought not to follow that the property is thereby withdrawn from the assertion and enforcement of claims against it by those who must necessarily pursue their remedy in the first instance in a state court. A creditor residing in the same state with the defendant and, therefore, required to institute proceedings in the state tribunal, ought to be enabled, by this writ of attachment, to subject the property of the debtor in due course, and according to the order of priority, even though when the sheriff proceeds to execute the writ

others not within the protection; but even with regard to those who are within the United States, they should not be liable to the process of the circuit courts of the United States, unless in one or other of the predicaments stated in the clause. And as to all those who were not within the United States, it was not in the contemplation of congress that they would be at all subject, as defendants, to the process of the circuit courts; which, by reason of their being in a foreign jurisdiction, could not be served upon them; and, therefore, there was no provision whatsoever in relation to them. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, cited in *Chaffee v. Hayward*, 20 How. 208, 215, 15 L. Ed. 851.

By the general provisions of the laws of the United States: 1. The circuit courts can issue no process beyond the limits of their districts; 2. Independently of positive legislation, the process can only be served upon persons within the same districts; 3. The acts of congress, adopting the state process, adopt the form and modes of service only, so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts; 4. The right to attach property to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the circuit court, in personam; that is, where they are inhabitants, or found within the United States; and not where they are aliens, or

citizens resident abroad, at the commencement of the suit, and have no inhabitancy here. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

But some of the lower federal courts have contended that Rev. Stat., § 915, Act, 1872, 17 U. S. Stat. 197, has changed this rule. See *Guillou v. Fontain*, 11 Fed. Cas. No. 5861, 7 Leg. Gaz. 321; 32 Leg. Int. 362, 1 N. Y. Weekly Dig. 269; 33 Pittsburg Leg. J. 33; Note to *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

22. Conflict between state and federal officers.—*Covell v. Heyman*, 111 U. S. 176, 177, 28 L. Ed. 390; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Riggs v. Johnson County*, 6 Wall. 166, 196, 197, 18 L. Ed. 768; *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257; *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683; *Gumbel v. Pitkin*, 124 U. S. 131, 151, 31 L. Ed. 374; *Pike v. Wassell*, 94 U. S. 711, 24 L. Ed. 307; *The Slavers*, 2 Wall. 383, 402, 17 L. Ed. 911. See, generally, the titles COURTS; EXECUTIONS.

23. *Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374.

24. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Covell v. Heyman*, 111 U. S. 176, 177, 28 L. Ed. 390. See post, "To Enforce Redelivery of Property from State to Federal Authority," III, J; "Property in Custodia Legis," VI, B; "Intervention," XII.

he finds that property in the possession of the marshal of the United States, and, therefore, subject to the jurisdiction of the federal court. In that case no rule of law or of convenience is violated if he is permitted, by service of notice upon the marshal, to make a constructive levy upon the property, subject to all prior liens, and without disturbing the marshal's possession. This, of course, would not have the effect of subjecting the marshal personally or officially to answer as garnishee to the state court as custodian of the property for the purposes of its jurisdiction, but would entitle the attaching creditor in the state court to acquire a right in the property and to appear in the proceeding in the circuit court to enforce it on a motion to distribute the proceeds of the sale of the attached property in its custody. This is the recognized practice in those states where successive attachments are authorized to be served by the same officer, acting as the executive of different courts, or by different officers each acting independently of the other. There seems to be no reason why a similar practice should not be adopted as between federal and state tribunals acting concurrently in the administration of the same laws. Indeed, every consideration of justice and convenience might be adduced to support it. And such a practice in the courts of the United States, when authorized by law in the administration of attachment proceedings as between state courts, seem to be justified as a reasonable implication from § 915 of the Revised Statutes. That section expressly secures to plaintiffs in common-law causes in circuit and district courts of the United States similar remedies by attachment against the property of the defendant to those provided by laws of the state in which such court is held for the courts thereof, and authorizes the courts of the United States, by general rules, to adopt from time to time such state laws as may be in force in the states where they are held in relation to the same subject. The remedies here spoken of, of course, are to be understood as they are defined in the state laws, and subject to the same conditions and limitations. The authority thus conferred is ample to authorize and sanction the practice of permitting the constructive levy by attaching creditors under state process upon the property in possession of the marshal and their intervention in proceedings in the circuit court of the United States for the same district where, as between state courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed.²⁵ But this limitation does not apply where the United States authorities are holding the property for duties.²⁶

3. **EXCEPTION TO THE GENERAL RULE.**—Those cases wherein the courts of the United States exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States constitute an exception to the general rule.²⁷

4. **STATE JURISDICTION AS AFFECTED BY ADMIRALTY JURISDICTION.**—The statute granting original admiralty jurisdiction does not prevent the seizure and sale, by state courts, of the interest of any owner or part owner in a vessel, by attachment, when the proceeding is a personal action against such owner to recover a debt for which he is personally liable.²⁸ There is no more valid objection to the attachment proceeding to enforce the lien in a suit in personam, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy, which a court of common law is competent to give.²⁹

25. **Limitation of the general rule.**—*Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374.

26. *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683; *Taylor v. Carryl*, 20 How. 583, 596, 15 L. Ed. 1028; *Central Loan, etc., Co. v. Campbell Com. Co.*, 173 U. S. 84, 43 L. Ed. 628.

27. **Exception to the general rule.**—*Covell v. Heyman*, 111 U. S. 176, 179, 28

L. Ed. 390. See, also, *Taylor v. Carryl*, 20 How. 583, 596, 15 L. Ed. 1028; *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683.

28. **State jurisdiction as affected by admiralty jurisdiction.**—See the title **ADMIRALTY**, vol. 1, p. 129.

29. *Johnson v. Chicago, etc., Co.*, 119 U. S. 388, 400, 30 L. Ed. 447. See the title **ADMIRALTY**, vol. 1, p. 129.

5. AS AFFECTED BY RULES REGULATING INTERSTATE COMMERCE.—As to jurisdiction of state courts as affected by rules regulating interstate commerce, see the title INTERSTATE COMMERCE.

D. Questions Incidental to Main Proceeding.—By § 915 of the Revised Statutes, the circuit court is authorized, in favor of suitors in that court, to administer the attachment laws of the state in which the court is held, and the exercise of this jurisdiction necessarily draws to itself everything properly incidental, even though it may bring into the court for the adjudication of their rights parties not otherwise subject to its jurisdiction.³⁰

E. What Law Governs.—Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there.³¹

F. As Affected by Amount in Controversy.—As to the amount in controversy as determining the jurisdiction of the United States supreme court in attachment suits, see the title APPEAL AND ERROR, vol. 1, p. 831, et seq.

G. As Affected by Defects or Irregularities.—The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment, by the fact that the affidavit may have been defective,³² or that the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities, the writ being issued and levied, the affidavit having served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment;³³ nor will the fact that the attachment issued at the beginning of the suit where the action was ex delicto, the contention being that it should only have been issued after the commencement of the suit, deprive the court of its jurisdiction.³⁴ And where jurisdiction is acquired by garnishment, a defect in service on the garnishee will not deprive the court of its jurisdiction.³⁵

H. As Dependent upon Residence of Plaintiff.—If the plaintiffs were, at the time of the commencement of the action, residents of the state, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as is necessary to satisfy their demand.³⁶

I. Jurisdiction over Garnishee.—As to jurisdiction over garnishee, see post, "Jurisdiction," XVI, E.

30. Questions incidental to the main proceeding.—*Gumbel v. Pitkin*, 124 U. S. 131, 150, 31 L. Ed. 374. See, generally, the title JURISDICTION.

"So that, in *Krippendorf v. Hyde*, 110 U. S. 276, 284, 28 L. Ed. 145, where the statute of Indiana regulating the process of attachment provided that after the institution of the suit, and before final judgment, any creditor of the defendant might file and prove his claim with the right to participate in the distribution of the proceeds of the attached property, it was said that in an action rightly instituted in the circuit court, in which the property of the common debtor was attached, all other creditors might appear in pursuance of the state law and share in the distribution, although citizens of the same state with the defendant, and although the amounts due them were less than the jurisdictional sum of \$500." *Gumbel v. Pitkin*, 124 U. S. 131, 150, 31 L. Ed. 374.

31. What law governs.—*Harris v. Balk*, 198 U. S. 215, 229, 49 L. Ed. 1023. See, generally, the title CONFLICT OF LAWS.

32. Defective affidavit as affecting jurisdiction.—*Cooper v. Reynolds*, 10 Wall. 308,

19 L. Ed. 931; *Matthews v. Densmore*, 109 U. S. 216, 220, 27 L. Ed. 921, citing *Voorhees v. Jackson*, 10 Pet. 449, 9 L. Ed. 490; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Marks v. Shoup*, 181 U. S. 562, 45 L. Ed. 1002.

33. Effect of failure to observe formalities in issuance of writ.—*Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Matthews v. Densmore*, 109 U. S. 216, 220, 27 L. Ed. 912, citing *Voorhees v. Jackson*, 10 Pet. 449, 9 L. Ed. 490; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

When the writ has been issued, the property seized, condemned and sold, it will not be held that the court had no jurisdiction for want of a sufficient publication of notice. *Cooper v. Reynolds*, 10 Wall. 308, 319, 19 L. Ed. 931.

34. As affected by time of issuing of writ.—*Cooper v. Reynolds*, 10 Wall. 308, 315, 19 L. Ed. 931.

35. As affected by defects in service of process.—*Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 698.

36. As dependent upon residence of plaintiff.—*St. Clair v. Cox*, 106 U. S. 350, 351, 27 L. Ed. 222.

J. Jurisdiction as Acquired by Levy of Attachment.—The seizure of the property, or that which is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction. Without this, the court can proceed no further; with it, the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into court the power of the court over the res is established,³⁷ and this is true although the property is brought into custody by illegal means.³⁸ In cases where there is not personal service of process on the defendant or personal appearance by him, the court cannot proceed without a levy on the property of the defendant.³⁹

K. Effect of Want of Jurisdiction.—If the court had no jurisdiction of the action, the proceedings had therein are null and void.⁴⁰

L. Objections to Jurisdiction.—In Suit on Attachment Bond.—Where judgment has been rendered for the plaintiffs in the attachment, by a court having jurisdiction over the subject, it is too late to object to those proceedings in a suit upon the bond, in which they are collaterally introduced.⁴¹

Manner of Objecting to Jurisdiction over the Person.—An objection to jurisdiction over the person, in garnishee process, cannot be raised in connection with a denial of the jurisdiction over the subject matter.⁴²

III. Grounds of Attachment.

A. Introductory.—As attachments are regulated by the various statutes, only a cursory treatment will be given. Among the more common grounds for authorizing the issuance of attachments are the following.

37. Jurisdiction as acquired by levy of attachment.—See, also, the title ADMIRALTY, vol. 1, p. 119. *Cooper v. Reynolds*, 10 Wall. 368, 19 L. Ed. 931; *Matthews v. Densmore*, 109 U. S. 216, 220, 27 L. Ed. 912; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. Ed. 490; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Tilton v. Coñield*, 93 U. S. 163, 165, 23 L. Ed. 858; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Covell v. Heyman*, 111 U. S. 176, 184, 28 L. Ed. 390; *Societe Fonciere v. Milliken*, 135 U. S. 304, 308, 34 L. Ed. 208; *Ludlow v. Ramsey*, 11 Wall. 581, 588, 20 L. Ed. 216; *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 97, 43 L. Ed. 623. See, also, *The Rio Grande*, 23 Wall. 458, 463, 23 L. Ed. 158, 159; *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, 28 L. Ed. 729; *Tyler v. Defrees*, 11 Wall. 331, 349, 20 L. Ed. 161; *Roller v. Holly*, 176 U. S. 398, 405, 44 L. Ed. 520, 523.

In revenue cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is in rem. In most such cases the res is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eluded before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into possession of another court, and thus there might arise a conflict of jurisdiction and decision, if actual seizure and retention of possession

were not necessary to confer jurisdiction over the subject." *Miller v. United States*, 11 Wall. 268, 294, 20 L. Ed. 135.

In a proceeding by attachment of property, which is in the nature of an action in rem, it is elementary that the defendant is bound, to the extent of the property levied upon, where the property is attached. *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 97, 43 L. Ed. 623.

38. Gumbel v. Pitkin, 124 U. S. 131, 155, 31 L. Ed. 374.

39. Cooper v. Reynolds, 10 Wall. 308, 309, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 725, 24 L. Ed. 565.

Thus, the court, in a suit against a non-resident, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931.

40. Effect of want of jurisdiction.—*Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

As to want of jurisdiction as a defense to garnishment proceedings, see post, "Want of Jurisdiction," XVI, M, 6.

41. Objections to jurisdiction.—*Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553. See, generally, the title JURISDICTION.

42. Manner objecting to jurisdiction over the person.—*Fitzgerald, etc., Const.*

B. Nonresidence.—A plaintiff may, in the proper action, have an attachment against the property of the defendant, when the latter is a nonresident of the state;⁴³ is a foreign corporation,⁴⁴ or acting as such.⁴⁵ And this rule is applicable to the property of citizens of a state declared to be in insurrection, found in a loyal state, in an action for debts contracted before the outbreak of the war, as in the case of other nonresidents.⁴⁶

Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608.

43. Nonresidence.—*St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222; *Societe Fonciere v. Milliken*, 135 U. S. 304, 308, 34 L. Ed. 208; *Taylor v. Knox*, 1 Dall. 158, 159, 1 L. Ed. 80; *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666; *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931; *Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 125, 43 L. Ed. 640; *Barnet's Case*, 1 Dall. 152, 1 L. Ed. 77.

"For the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and nonresidents in another." *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 98, 43 L. Ed. 623.

There can be no question of the right of the legislature of a state to pass such laws as will subject property within her territory, held or owned by nonresidents, to the payment of the debts of such owners; and the manner of doing this is also entirely within the legislative control, provided it does not violate some of the provisions of the federal or state constitutions. *McGoon v. Scales*, 9 Wall. 23, 30, 19 L. Ed. 545.

What constitutes nonresidence.—See the title DOMICILE.

"While a man remained in the state, though avowing an intention to withdraw from it, he must be considered as an inhabitant, and therefore, not an object of the foreign attachment. If an inhabitant clandestinely withdraws, or secretes himself, to avoid his creditors, he becomes liable to the domestic attachment. The having once been an inhabitant will not, however, protect a man forever from a foreign attachment, where he has notoriously emigrated from the state, and settled elsewhere. But the case before the court is that of a foreign attachment issued at the very time that the defendant was an inhabitant of the state, which cannot be maintained." *Lyle v. Foreman*, 1 Dall. 480, 1 L. Ed. 232.

In *Taylor v. Knox*, 1 Dall. 158, 159, 1 L. Ed. 80, the court said: "We would avoid laying down any general rules as to what will, or will not, make a person an inhabitant, within the attachment law, lest cases should hereafter happen, which might come within those general rules, but were not in the contemplation of the

court, in the particular case before them. We think, however, if any general rule was made, it would be reasonable, and very consonant to our laws and constitution, that the person's residence here, to make him an inhabitant, should be so long as to give him the rights of citizenship, to wit, for twelve months. And we should have no hesitation in laying this down as a rule, if it were not for those cases of dispute which may arise between creditors on a domestic attachment, and creditors on foreign attachments, where it may frequently happen, that the debtor's residence may be less than twelve months, and yet he may, and ought to, be an object of the domestic attachment law, so as to have his effects divided among all his creditors, and not swept away by the first creditor who takes out a foreign attachment. But in cases where a stranger comes among us, and remains here for a short time, and then goes away under such circumstances, as not to make him an object of the domestic attachment, it will always have considerable weight with us, that he has not resided here for twelve months." In *Barnet's Case*, 1 Dall. 152, 154, 1 L. Ed. 77, the court said: "A man who comes from another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away with design to defraud his creditors, he ought surely to be considered such an inhabitant as not to be an object of the foreign attachment, but of the domestic one, and as a person whose effects should be seized for the benefit of all his creditors, and not of the first creditor who shall take out a foreign attachment; otherwise, there would be few objects for this equitable law to operate upon."

Under the foreign attachment law of Connecticut, an absent person, who is liable in damages for breach of his covenant, is an absent debtor. *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

As to attachment of the goods of one residing abroad in the public service, see the title AMBASSADORS AND CONSULS, vol. 1, p. 273.

44. Foreign corporation.—*St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 125, 43 L. Ed. 640.

45. Henrietta Min., etc., Co. v. Gardner., 173 U. S. 123, 125, 43 L. Ed. 640.

46. As affected by war.—*Washington University v. Finch*, 18 Wall. 106, 21 L. Ed. 818. See the titles STATES; WAR.

C. Preparation to Remove.—The rule applies also to those who are about to remove, without giving security to their creditors.⁴⁷

D. No Known Domicil or Place of Business.—Where the debtor is a citizen, but has no known domicil or place of business at which payment of debt may be demanded, attachment of his property is sometimes allowed.⁴⁸

E. Absconding.—If the debtor absconds with fraudulent design,⁴⁹ or if there is reasonable grounds to believe that he will conceal himself,⁵⁰ attachment will lie against his property.

F. No Real Property.—In some jurisdictions attachment is allowed where the debtor has no real estate to secure the payment of the debt.⁵¹

G. Fraudulent Disposition or Concealment of Property.—An attachment may be had on the ground that the defendant is making a fraudulent disposition of his property,⁵² or there is reasonable ground to believe that he will conceal or undersell his property to the prejudices of his creditors.⁵³

H. Debt Due for Property Obtained under False Pretenses.—That the debt is due for property obtained under false pretenses, is in some cases ground for attachment.⁵⁴

I. Payment of Debt to Nonresident Insolvent.—The fact that a debtor of an insolvent is preparing to send funds outside of the state to the insolvent for the purpose of paying the insolvent's claim against him, will not justify an attachment of the goods of the insolvent's debtor by a creditor of such insolvent.⁵⁵

47. Preparation to remove.—Barnet's Case, 1 Dall. 152, 1 L. Ed. 77; Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 125, 43 L. Ed. 640.

48. No known domicil or place of business.—Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942.

49. Absconding with fraudulent design.—St. Clair v. Cox, 106 U. S. 350, 352, 27 L. Ed. 222; Lyle v. Foreman, 1 Dall. 480, 1 L. Ed. 232; Barnet's Case, 1 Dall. 152, 1 L. Ed. 77; Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942.

The Porto Rican statute provides that if the debtor disappears from his home or place of business, leaving no one in charge, attachment will lie. Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942.

50. Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942; Barnet's Case, 1 Dall. 152, 1 L. Ed. 77.

51. No real property.—Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942.

52. Fraudulent disposition of property.—Deutsch v. Wiggins, 15 Wall. 539, 547, 21 L. Ed. 228; Fitzpatrick v. Flannagan, 106 U. S. 648, 655, 27 L. Ed. 211; McGinty v. Flannagan, 106 U. S. 661, 27 L. Ed. 215; Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 43 L. Ed. 640; Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942; St. Clair v. Cox, 106 U. S. 350, 352, 27 L. Ed. 222.

As by converting the property into money or part thereof into money; Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 125, 43 L. Ed. 640; or notes. Eames v. Kaiser, 142 U. S. 488, 492, 35 L. Ed. 1091.

"No class of cases is more common than that of attachments sued out for goods which are claimed to have been

fraudulently assigned." Browning v. De Ford, 178 U. S. 196, 202, 44 L. Ed. 1033.

"The language of the Mississippi Code of 1871, describing one of the grounds for which an attachment might issue, was that 'the debtor has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors or give an unfair preference to some of them.' In the case * * * of Eldridge v. Phillipson, the question was presented directly for decision for the first time to the supreme court of that state. It was then decided that no preference could be held to be unfair which, tested by the rules of law, is legal; and that as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preferences is mere surplusage. This construction is confirmed by the fact that the words in question have been omitted from the Code of 1880 by the legislature of Mississippi. In our opinion, this interpretation of the statute is correct, and we accordingly adopt it. The ruling of the circuit court, to the contrary, we adjudge, therefore, to be erroneous." Fitzpatrick v. Flannagan, 106 U. S. 648, 659, 27 L. Ed. 211; McGinty v. Flannagan, 106 U. S. 661, 27 L. Ed. 215.

53. Perez v. Fernandez, 202 U. S. 80, 93, 50 L. Ed. 942; Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 43 L. Ed. 640.

54. Debt due for property obtained under false pretenses.—Henrietta Min., etc., Co. v. Gardner, 173 U. S. 123, 125, 43 L. Ed. 640.

55. Payment of debt to nonresident insolvent.—Simpson v. Dall, 3 Wall. 460, 476, 18 L. Ed. 265.

J. To Enforce Redelivery of Property from State to Federal Authority.

—Where a seizure has been made for a breach of the laws of the United States and the property seized is taken from the federal officer by intervention of state authority, the court of the United States having cognizance of the seizure may enforce a redelivery thereof by attachment.⁵⁶

K. In Partnership Matters.—As to the grounds of attachment where partnerships are involved, see the title PARTNERSHIP.

IV. Joinder of Parties.

Several creditors may not unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill.⁵⁷

V. In What Actions Attachments May Issue.

To what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide.⁵⁸ As to actions against non-residents, see ante, "Nonresidents," III, B. See, also, the title FOREIGN CORPORATIONS.

Actions by and against National Banks.—As to attachments in actions by and against national banks, see the title BANKS AND BANKING.

As to actions against ambassadors and consuls, see the title AMBASSADORS AND CONSULS, vol. 1, p. 273.

As to actions against executors and administrators, see the title EXECUTORS AND ADMINISTRATORS.

In Admiralty.—As to attachments in admiralty, see the title ADMIRALTY, vol. 1, p. 119.

Actions for Damages for Nondelivery of Goods.—Under the act of assembly of Maryland of 1795, in an action for damages for the nondelivery of goods, where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, attachment will lie.⁵⁹

Actions upon Debts Not Yet Due.—The statute law of some of the states allows, in certain cases, an attachment to be maintained upon debts, not yet due. But it is only under very special circumstances,⁶⁰ and the same proceeding may be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due.⁶¹

VI. Property Subject to Attachment.⁶²

A. Ownership Must Be in Debtor.—Creditors could not make a valid attachment when to their knowledge the property no longer belonged to their

56. To enforce redelivery of property from state to federal authority.—*Slocum v. Mayberry*, 2 Wheat. 1, 4 L. Ed. 169. See the title SEARCHES AND SEIZURES.

57. Joinder of parties.—*Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889. See, generally, the title PARTIES.

58. In what actions attachments may issue.—*Rothschild v. Knight*, 184 U. S. 334, 341, 46 L. Ed. 573.

59. Action for damages for nondelivery of goods.—*Goldsborough v. Orr*, 8 Wheat. 217, 225, 5 L. Ed. 600. *Quære* where damages unliquidated.

60. Actions on debts not yet due.—*Black v. Zacharie*, 3 How. 483, 511, 11 L. Ed. 690; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

The Louisiana statute does not apply to debts resting in mere contingency,

whether they will ever become due to the attaching creditor or not; nor to any case except of absconding debtors. *Black v. Zacharie*, 3 How. 483, 511, 11 L. Ed. 690.

Thus when a creditor, residing in Louisiana, drew bills of exchange upon his debtor, residing in South Carolina, which bills were negotiated to a third person and accepted by the drawee, the creditor had no right to lay an attachment upon the property of the debtor, until the bills had become due, were dishonored, and taken up by the drawer. *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690.

61. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 126, 43 L. Ed. 640.

62. As to property subject to garnishment, see post, "Property Subject to Garnishment," XVI, I.

debtor.⁶³ It has been held that goods, a receipt for which has been assigned as a pledge for advances, are not subject to attachment at the instance of a creditor of the pledgee.⁶⁴ Where the grantee of land was to hold the same only upon fulfillment of certain conditions, after a breach of these conditions the land is not subject to attachment in an action against the grantee.⁶⁵

B. Property in Custodia Legis.—General Statement.—Property in custodia legis is not subject to a levy under process which would have the effect of taking it out of his possession and control.⁶⁶

As to successive levies by the same officer, see post, "Successive Levies," IX, H, 4.

As to holding officer liable as garnishee, see post, "Against Whom Garnishment May Issue," XVI, J.

Property Previously Attached as Property of Another.—A previous attachment of property, as the right of another, could not divest the interest of the actual owner of the property in the same; so as to prevent the sheriff from attaching the same property, under a writ of attachment issued for a debt of the same actual owner.⁶⁷

Goods Held for Duties.—An attachment from a state court cannot be levied upon merchandise imported, but not entered at the custom house. From their arrival in port, the goods are in legal contemplation, in the custody of the United States. An attachment of such goods presupposes a right to take the possession and custody, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has the right to hold the possession to answer the exigency of the writ. The act of congress recognizes no such authority, and admits of no such exercise of right nor has the United States recognized or provided for a concurrent possession or custody by any such officer in such manner that the United States might hold for the purpose of collecting duties, and the sheriff might attach the residuary right, subject to the prior claim.⁶⁸

C. As Affected by Possession.—As a general rule it matters not in whose

63. Ownership must be in debtor.—*Black v. Zacharie*, 3 How. 483, 513, 11 L. Ed. 690.

As to admissibility of deeds to show ownership of property, see the title DOCUMENTARY EVIDENCE.

64. Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats soon after the opening of canal navigation and these documents, were indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained. *Gibson v. Stevens*, 8 How. 384, 12 L. Ed. 1123. See the title PLEDGE AND COLLATERAL SECURITY.

65. *Schlesinger v. Kansas City, etc., R. Co.*, 152 U. S. 444, 38 L. Ed. 507.

Trustees convey land to B. upon the express condition that B. should construct certain lines of railroad within a given time. B. assigned the contract to a construction company, which company failed to comply with the conditions of the contract made between the trustees and B.

In an action against the construction company, the property in question was held not to be subject to attachment for the reason that the breach of contract reinvested the title to the property in the trustees. *Schlesinger v. Kansas City, etc., R. Co.*, 152 U. S. 414, 38 L. Ed. 507.

66. Property in custodia legis.—*Gumbel v. Pitkin*, 124 U. S. 131, 156, 31 L. Ed. 374; *Taylor v. Carryl*, 20 How. 583, 584, 15 L. Ed. 1028; *Ross v. Clarke*, 1 Dall. 354, 1 L. Ed. 173; *Covell v. Heyman*, 111 U. S. 176, 179, 28 L. Ed. 390; *The Slavers*, 2 Wall. 383, 402, 17 L. Ed. 911; *Pike v. Wassell*, 94 U. S. 711, 24 L. Ed. 307; *Freeman v. Howe*, 24 How. 450, 454, 16 L. Ed. 749; *Riggs v. Johnson County*, 6 Wall. 166, 196, 18 L. Ed. 768; *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257. See post, "Property in Custodia Legis," XVI, I, 3.

Here it will be perceived that no distinction is made between writs of attachment and executions upon judgments, and that the principle embraces both. *Covell v. Heyman*, 111 U. S. 176, 180, 28 L. Ed. 390. See the title EXECUTIONS.

67. Property previously attached as property of another.—*Livingston v. Smith*, 5 Pet. 90, 8 L. Ed. 57. See post, Successive Levies, IX, H, 4.

68. Goods held for duties.—*Taylor v. Carryl*, 20 How. 583, 596, 15 L. Ed. 1028;

possession the property is found, if the taking be otherwise rightful.⁶⁹ Under some statutes, however, the property cannot lawfully be taken from the possession of a third person.⁷⁰

D. Interest in Personalty, Generally.—As Determined by Right to Participate in Profits.—Such an interest or trust in goods as will entitle the defendant to receive or participate in the profits arising from such goods, is subject to attachment.⁷¹

E. Property in Hands of Consignee.—Goods which have been consigned to commission merchants for the use of another are not subject to attachment for debts of the consignor while in the possession of the consignee.⁷² Goods which have been consigned for sale on account of a consignor, the proceeds of which are to be applied first to the satisfaction of claims of the consignee against the consignor, the remainder to be applied to settling other debts of the consignor, are not subject to attachment by creditors of the consignor, the consignee having the prior right to the goods.⁷³

Harris v. Dennie, 3 Pet. 292, 7 L. Ed. 683, cited in *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 281, 8 L. Ed. 392.

Twenty-three cases of silk were imported from Canton, in the ship *Rob Roy*, into the port of Boston, consigned to George De Wolf and John Smith; after the arrival of the vessel, with the merchandise on board, the collector caused an inspector of the customs to be placed on board; soon afterwards, and prior to the entry of the merchandise, and prior to the payment, or any security for the payment, of the duties thereon, the merchandise was attached by the deputy sheriff of the county, in due form of law, as the property of G. De Wolf and J. Smith, by virtue of several writs of attachment, issued from the court of common pleas for the county of Suffolk, at the suit of creditors of G. De Wolf and Smith; these attachments were so made, prior to the inspector's being sent on board the vessel. At the time of the attachment, the sheriff offered to give security for the payment of the duties on the merchandise, which the collector declined accepting; the merchandise was sent to the custom house stores, by the inspector, and several days after, the custom house storekeeper gave to the deputy sheriff an agreement, signed by him, reciting the receipt of the merchandise from the inspector, and stating, "I hold the said merchandise to the order of James Dennie, deputy sheriff." The marshal of the United States afterwards attached, took and sold the merchandise, under writs and process in favor of the United States, against George De Wolf; which writs were founded on duty bonds, due and unpaid, for a larger amount than the value of the merchandise, given before by De Wolf and Smith, who, before the importation of the merchandise, were indebted to the United States, on various bonds for duties, besides those on which the suits were instituted. Held, that the attachments issued out of the court of common pleas of the county of

Suffolk did not affect the right of the United States to hold the merchandise, until the payment of the duties upon them; and that the merchandise was not liable to any attachment, by an officer of the state of Massachusetts, for debts due other creditors of George De Wolf and John Smith. *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683.

Duties claimed by state.—A domestic attachment having been issued and the auditors having advertised that all persons holding claims against the defendant should send in their accounts and a dividend having been made among such creditors, the commonwealth has no such preference as will entitle it to full payment for duties upon a cargo imported by the defendant previous to the issuing of such attachment. *Hollingsworth v. Hamelin*, 1 Dall. 151, 1 L. Ed. 77. See the titles STATES; REVENUE LAWS.

69. As affected by possession.—*Livingston v. Smith*, 5 Pet. 90, 98, 8 L. Ed. 57.

70. Marks v. Shoup, 181 U. S. 562, 45 L. Ed. 1602.

71. Interest in personalty.—*Rea v. Missouri*, 17 Wall. 532, 544, 21 L. Ed. 707.

72. Property in hands of consignee.—*Grove v. Brien*, 8 How. 429, 12 L. Ed. 1142. See the title FACTORS AND COMMISSION MERCHANTS.

Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the canal boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer. *Grove v. Brien*, 8 How. 429, 12 L. Ed. 1142.

73. Stevenson v. Pemberton, 1 Dall. 2, 1 L. Ed. 11.

F. Property Mortgaged or Pledged.⁷⁴—**Equity of Redemption.**—The equity of redemption upon a mortgage of real property is liable to attachment.⁷⁵

Interest of Mortgagee.—But the interest of the mortgagee in real property is not subject to attachment.⁷⁶

G. Property of Sister State.—The property of a state is not subject to attachment in the courts of a sister state.⁷⁷

H. Bank Property.—As to attachment of bank property, see the title **BANKS AND BANKING**.

I. Exempt Property.—As to exempt property, see the titles **EXEMPTIONS FROM EXECUTION AND ATTACHMENT**; **HOMESTEAD EXEMPTIONS**.

J. Property Engaged in Interstate Commerce.—As to attachment of property engaged in interstate commerce, see the title **INTERSTATE COMMERCE**.

K. Partnership Property.—As to attachment of partnership property, see the title **PARTNERSHIP**.

L. Property Held in Trust.—By statutes in some states it is provided that realty holden by any one in trust for another shall be liable to attachment against the person to whose use they are holden.⁷⁸

VII. The Affidavit.

A. Necessity for.—As a general rule, an affidavit is a necessary preliminary to issuing the writ.⁷⁹

B. Necessary Allegations.—Among the more common allegations which are required in the affidavit are those stating the amount⁸⁰ and validity of the claim,⁸¹ and the grounds of the attachment;⁸² that the attachment is not sued out for the purpose of injuring or harassing the defendant,⁸³ and that the plaintiff will probably lose his debt unless such attachment is issued.⁸⁴

C. By Whom Made.—The affidavit may be made by the plaintiff, his agent or attorney.⁸⁵

D. Before Whom Made.—As to sufficiency of affidavits before the lord mayor of London, see the title **AFFIDAVITS**, vol. 1, p. 200.

74. Property mortgaged or pledged.—See the titles **CHATTEL MORTGAGES AND CONDITIONAL SALES**; **MORTGAGES AND DEEDS OF TRUST**; **PLEDGE AND COLLATERAL SECURITY**. See, also, ante, "Ownership Must Be in Debtor," VI, A.

75. Equity of redemption.—*Gibson v. Stevens*, 8 How. 384, 401, 12 L. Ed. 1123; *Campbell v. Pratt*, 5 Wheat. 429, 432, 5 L. Ed. 126; *Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 791.

76. Interest of mortgagee.—*Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544.

77. Property of sister state.—*Nathan v. Commonwealth of Virginia*, 1 Dall. 77, 1 L. Ed. 44.

78. Property held in trust.—See post, "Trust Funds," XVI, I, 5. *McGoon v. Scales*, 9 Wall. 23, 29, 19 L. Ed. 545.

79. Necessity for affidavit.—As to affidavits, generally, see the title **AFFIDAVITS**, vol. 1, p. 200. *Voorhees v. Jackson*, 10 Pet. 449, 470, 9 L. Ed. 490; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Matthews v. Densmore*, 109 U. S. 216, 220, 27 L. Ed. 912.

80. Allegation as to amount of claim.—

United States v. Bryant, 111 U. S. 499, 503, 28 L. Ed. 496; *Marks v. Shoup*, 181 U. S. 562, 45 L. Ed. 1002.

81. Allegation as to validity of claim.—*Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538; *United States v. Bryant*, 111 U. S. 499, 403, 28 L. Ed. 496; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 125, 43 L. Ed. 640; *Ludlow v. Ramsey*, 11 Wall. 581, 20 L. Ed. 216.

82. Allegation as to grounds of attachment.—*Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538; *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 95, 43 L. Ed. 623; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 125, 43 L. Ed. 640.

83. Allegation as to purpose of plaintiff.—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

84. Allegation as to necessity for attachment.—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

85. By whom affidavit may be made.—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640; *United States v. Bryant*, 111 U. S. 499, 503, 28 L. Ed. 496.

E. On Information and Belief.—Where affidavit is made by the plaintiff's agent or attorney, he is only required to swear to the best of his knowledge and belief.⁸⁶

F. Form of Affidavit.—An affidavit which follows the language of the statute under which it issues is sufficient in form, notwithstanding the fact that the language of the affidavit may be open to criticism.⁸⁷

G. Effect of Defects or Irregularities.—A writ of attachment which is fair on its face, issued from a court which had jurisdiction both of the parties and of the subject matter of the suit in the regular course of judicial proceeding by that court, and which the officer of the court in whose hands it was placed is bound to obey, is not void because there is a defect in the affidavit on which the attachment issued.⁸⁸

H. Collateral Attack.—The validity of the affidavit cannot be collaterally attacked.⁸⁹

I. Amendment.—Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others.⁹⁰ Where a statute expressly authorizes amendments to defective affidavits, there is no objection on principle, under such provisions, to amendment, adding a new ground of attachment.⁹¹

VIII. The Bond or Undertaking.

A. Bond Given by Plaintiff.—Object.—The object of laws providing for attachment bonds is to secure the absentee from all damages he may sustain by illegal seizure of his property.⁹²

As Affected by Residence of Defendant.—A statute which requires that where a bond is required as a prerequisite to the issue of an attachment against a resident, produces no unlawful discrimination by permitting process of attachment against a nonresident without giving a like bond.⁹³

86. On information and belief.—United States v. Bryant, 111 U. S. 499, 504, 28 L. Ed. 496.

87. Form of affidavit.—Societe Fonciere v. Milliken, 135 U. S. 304, 308, 34 L. Ed. 208.

It has been held, that an affidavit following the language of the statute and alleging that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such," is not rendered invalid by the fact that it is disjunctive in form, the court in its opinion saying; "There are no distinct causes for an attachment stated in this affidavit. The single cause is nonresidence, the cause stated in clause two, quoted above; and while the language of the affidavit may be open to criticism, yet its meaning is clear. It describes only one cause for attachment, to wit, nonresidence, and was sufficient to sustain an attachment. There can be but little doubt, therefore, that the court had jurisdiction of the lands by attachment, and of the defendant by service upon its agent." Societe Fonciere v. Milliken, 135 U. S. 304, 308, 34 L. Ed. 208.

88. Effect of defects or irregularity in affidavits.—As to defects or irregularities in the affidavits as affecting the jurisdiction, see ante, "As Affected by Defects or Irregularities," II, G. Matthews v. Densmore, 109 U. S. 216, 218, 219, 27 L. Ed. 912; Wehrman v. Conklin, 155 U. S. 313,

29 L. Ed. 167; Ludlow v. Ramsey, 11 Wall. 581, 20 L. Ed. 216.

It is not enough to set aside, in a collateral proceeding, a sale made under the attachment laws of Tennessee, that the affidavit on which the attachment issued did not state, as the Code of Tennessee directs that such affidavits should do, that the claim to secure which the attachment process was prayed was "a just claim;" it stating such facts, however, as made the justice of the claim inferable almost as of necessity. Ludlow v. Ramsey, 11 Wall. 581, 20 L. Ed. 216.

89. Collateral attack.—See post, "Collateral Attack," IX, G; "Collateral Attack," XIV, C. Matthews v. Densmore, 109 U. S. 216, 27 L. Ed. 912. See also, Wehrman v. Conklin, 155 U. S. 313, 29 L. Ed. 167; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Huff v. Hutchinson, 14 How. 586, 587, 14 L. Ed. 553.

90. Amendment.—As to amendments generally, see the title AMENDMENTS, vol. 1, p. 288. Tilton v. Coffield, 93 U. S. 163, 23 L. Ed. 858.

91. Fitzpatrick v. Flannagan, 106 U. S. 648, 650, 27 L. Ed. 211.

92. Object of bond from plaintiff.—Fleitas v. Cockrem, 101 U. S. 301, 304, 25 L. Ed. 954.

93. Necessity for bond as affected by residence of defendant.—Central Loan,

In Suits by the United States.—Where an attachment issues from a circuit court, by the United States, no bond, obligation, or other security is required from the United States, either to prosecute the suit, or to answer in damages or costs. The adoption of the state practice "as near as may be" does not have the effect to abrogate this provision.⁹⁴

Amount.—The Louisiana practice requires an attachment bond to be in "a sum exceeding by one-half" the claim of the creditor.⁹⁵ The fact that the amount of an attachment bond was fixed by an order of a judge makes no difference as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings.⁹⁶

Amount of Recovery in Action on Bond.—By signing an attachment bond, the surety simply agrees that he will be responsible for damages resulting directly from the attachment.⁹⁷ By the law of Florida, counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds.⁹⁸

Judgment.—A judgment on an attachment bond which gives a privilege on the property attached, with recourse on the property and sureties on the bond upon which the property attached was released, is erroneous.⁹⁹

B. Bond Given by Defendant.—As to bonds given by the defendant in attachment proceedings, see post, "Discharge by Undertaking," XI, J.

C. Bond Given by Garnishee.—As to the bond sometimes given by the garnishee, see post, "Undertaking in Lieu of Payment," XVI, H, 4.

etc., *Co. v. Campbell Commission Co.*, 173 U. S. 84, 98, 43 L. Ed. 623.

94. Necessity for bond in suits by United States.—*United States v. Bryant*, 111 U. S. 499, 505, 28 L. Ed. 496.

95. Amount of bond.—*Fleitas v. Cockrem*, 101 U. S. 301, 25 L. Ed. 954.

96. Fleitas v. Cockrem, 101 U. S. 301, 25 L. Ed. 954.

97. Amount of recovery in action on bond.—*Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 143, 47 L. Ed. 744.

A reflection on the credit of the defendant in the attachment by the bringing of the actions is not a result due to the attachment and consequently will not be considered in assessing damages against a surety in the attachment bond. *Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 143, 47 L. Ed. 744.

Failure to deliver material to a manufacturing company against which an attachment has been issued will not be considered as damages resulting from the attachment. *Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 143, 47 L. Ed. 744.

Net profits which have been earned from the carrying on of a certain business may be admitted in evidence, not as in and of itself constituting the measure of damages, but as tending to show what damages may have been sustained by an interruption of the business caused by the attachment. *Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 143, 47 L. Ed. 744.

98. Counsel fees.—*Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 136, 47 L. Ed. 744.

"Liability for these counsel fees being,

as declared by its highest court, a part of the obligation assumed by the obligor in an attachment bond given in the courts of Florida, should be enforced in every court in which an action on such a bond is brought. This action was commenced in a circuit court of the state, and if it had proceeded there to judgment unquestionably a liability for counsel fees would have been sustained, and it cannot be that by removing the case to the federal court such liability has been taken away." *Fidelity, etc., Co. v. Bucki, etc., Lumber Co.*, 189 U. S. 135, 139, 47 L. Ed. 744.

99. Judgment on bond.—*Fleitas v. Cockrem*, 101 U. S. 301, 25 L. Ed. 954.

In an action on a promissory note for \$5,000 and interest, the defendant appeared and filed an exception of lis pendens. Subsequently, on a supplemental petition praying therefor, an attachment against the defendant's property was issued upon the plaintiff's entering into bond for \$3,200, as prescribed by the order of the court. The court denied the motion of the defendant to set aside the attachment, upon the ground that the amount of the bond was insufficient. The property, seized under the writ, was released upon the defendant's entering into bond for \$9,100. The jury found for the plaintiff the amount of the debt and interest; the court rendered judgment against the defendant therefor, "with privilege upon the property attached, and with recourse on the principal and sureties on the bond, upon which the property attached was released." Held, that the court erred in rendering any other than personal judgment against the defendant. *Fleitas v. Cockrem*, 101 U. S. 301, 25 L. Ed. 954.

IX. The Writ or Order.

A. By Whom Issued.—The various jurisdictions differ in allowing the writ of attachment to be issued by the judge,¹ justice,² or clerk.³

B. Time of Issuance.—**In General.**—As a general rule attachment will not issue until the suit has been duly instituted,⁴ but it may be issued in a proper case either at the commencement of the suit,⁵ or at any time during its progress.⁶ Summons afterwards cannot cure that which was void from the beginning.⁷

Issuance on Sunday.—Where the laws of the state where the attachment is sued out render process illegal when issued on Sunday, it is illegal in the attaching officer to take possession of property under writs in his hands issued on Sunday.⁸

C. To Whom Delivered.—The writ is directed to the sheriff or other officer by whom it is to be served.⁹

D. Contents and Formal Requisites.—**Direction as to Seizure and Custody of Property.**—The officer is directed to attach¹⁰ and safely keep so much of the property of the defendant as will satisfy the plaintiff's demand, with costs and expenses.¹¹

Direction as to Summons of Defendant.—The laws of some states require that the writ shall direct the officer to summon the defendant if found within the jurisdiction.¹²

Direction as to Service of Copy of Writ and Inventory.—Some of the state laws require that the writ shall direct the officer to serve on the defendant a copy of the attachment and of the inventory of the property attached.¹³

Sealing.—Where the law requires that writs of attachment shall be sealed, a writ issued with an ordinary private seal or scroll thereon with a statement that no engraved seal has as yet been produced will be a sufficient compliance with the

1. **Judge.**—*Perez v. Fernandez*, 202 U. S. 80, 93, 50 L. Ed. 942; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640; *Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538.

In Oklahoma the order for attachment may be signed by the probate judge, acting in the absence of the district judge, conformably to a power to that effect given by the territorial statute. *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 95, 43 L. Ed. 623.

2. **Justices.**—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

3. **Clerks.**—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

"In Oklahoma the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty." *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 95, 43 L. Ed. 623.

"It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court." *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 96, 43 L. Ed. 623.

4. **Time of issuance.**—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640. See, also, *Cooper v. Reynolds*, 10 Wall. 308, 315, 19 L. Ed. 931. See ante,

"As Affected by Defects or Irregularities," II. G.

5. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

6. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 43 L. Ed. 640.

In jurisdiction where the plaintiff is allowed to have the property attached at the time of issuing the summons, or at any time afterwards, the attachment, if issued before the summons, is a nullity. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 129, 43 L. Ed. 640.

7. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 129, 43 L. Ed. 640.

8. **Issuance on Sunday.**—See, generally, the title SUNDAYS AND HOLIDAYS. *Gumbel v. Pitkin*, 124 U. S. 131, 146, 31 L. Ed. 374.

9. **To whom writ is delivered.**—*Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538; *St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222.

10. **Directing seizure of property.**—*Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538; *St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222.

11. **Directing custody of property.**—*Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538.

12. **Directing summons of defendant.**—*St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222.

13. **Directing service of copy of writ and inventory.**—*St. Clair v. Cox*, 106 U. S. 350, 352, 27 L. Ed. 222.

requirement.¹⁴

E. Effect of Irregularities.—Mere irregularities in the proceedings in procuring the writ will not render it void and thus invalidate the proceedings thereunder;¹⁵ nor will the fact that the writ was made returnable upon a day which had not been fixed as the first day of the next term of the court, though it was subsequently fixed upon that day, render it void.¹⁶

F. Effect of Want of Authority to Issue.—Attachments issued without authority of law are illegal and void.¹⁷

G. Collateral Attack.—The validity of the writ cannot be questioned collaterally.¹⁸

H. Execution of the Writ or Order—1. **SERVICE OF COPY OF WRIT.**—The laws of some states declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons.¹⁹

2. **SEIZURE OF PROPERTY**—a. *Definition of Seizure.*—By the seizure of a thing is meant the taking of the thing into possession. As applied to subjects capable of manual delivery, the term means caption.²⁰

b. *Purpose of Seizure.*—A seizure of personal property under an order of attachment is made for the purpose of security.²¹

14. **Stealing.**—Wehrman v. Conklin, 155 U. S. 314, 330, 29 L. Ed. 167.

"O'Brien County, Iowa, was not organized as an independent county until February 6, 1860. The writ was issued January 14, 1861. The county officers being evidently not yet in a complete working condition, the clerk affixed an ordinary private seal or scroll to the writ, with a statement that no seal had yet been procured. Granting that a failure to use an engraved seal actually provided would avoid the writ, certainly the clerk was entitled to a reasonable time to procure such seal. In the meantime, however, the rights of suitors and of the public ought not to be prejudiced by the lack of one. The whole civil and criminal business of the county ought not to come to a stop simply through the failure of its officers to provide it with a seal. As was justly observed by the learned judge of the circuit court: 'The only purpose of the seal is to authenticate the issuance of the writ. May not such authentication be furnished in other ways, if for any reason the court is without an engraved seal for a time? Suppose that today the engraved seal of O'Brien County should be destroyed or stolen, must all the judicial proceedings therein be brought to a standstill, awaiting the procurement of another engraved seal? Would not this be subverting substance to mere form? Would it not be permissible for the court to continue the issuance of writs of attachment and execution, having attached thereto a scroll as a seal, the writ on its face showing the reason thereof?' Wehrman v. Conklin, 155 U. S. 314, 330, 29 L. Ed. 167.

15. **Effect of irregularities.**—See ante, "As Affected by Defects or Irregularities," II, G; "Effect of Defects or Irregularities," VII, G. Wehrman v. Con-

lin, 155 U. S. 314, 331, 29 L. Ed. 167; Matthews v. Densmore, 109 U. S. 216, 229, 27 L. Ed. 912; McGoon v. Scales, 9 Wall. 23, 30, 19 L. Ed. 545; Cooper v. Reynolds, 10 Wall. 308, 309, 19 L. Ed. 931.

The fact that the petition for the attachment described the judgment sued upon as having been rendered on May 12, 1860, when in fact it was not rendered until September 12, will not invalidate the writ. Wehrman v. Conklin, 155 U. S. 314, 331, 29 L. Ed. 167.

Nor will the fact that in changing the venue of the action to another county, the transcript of the record was sent to such county without being certified by the seal of the court in which the suit was brought, render the writ and all the proceedings thereunder void. Wehrman v. Conklin, 155 U. S. 314, 331, 29 L. Ed. 167.

16. Wehrman v. Conklin, 155 U. S. 314, 331, 29 L. Ed. 167.

17. **Effect of want of authority to issue.**—Pacific Nat. Bank v. Mixer, 124 U. S. 721, 722, 31 L. Ed. 567.

18. **Collateral attack.**—Matthews v. Densmore, 109 U. S. 216, 220, 27 L. Ed. 912. See, also, Wehrman v. Conklin, 155 U. S. 314, 331, 29 L. Ed. 167; Cooper v. Reynolds, 10 Wall. 308, 309, 19 L. Ed. 931; McGoon v. Scales, 9 Wall. 23, 30, 19 L. Ed. 545; Huff v. Hutchinson, 14 How. 586, 14 L. Ed. 553. See ante, "Collateral Attack," VII, H. See, generally, the title **JUDGMENTS AND DECREES**.

19. **Service of copy of writ.**—St. Clair v. Cox, 106 U. S. 350, 352, 27 L. Ed. 222. See the title **SUMMONS AND PROCESSES**.

20. **Definition of seizure.**—See, also, **SEIZURE**. Pelham v. Rose, 9 Wall. 103, 106, 19 L. Ed. 602.

21. **Purpose of seizure.**—Maxwell v. Stewart, 22 Wall. 77, 80, 22 L. Ed. 564.

c. *Necessity for Seizure to Give Jurisdiction.*—As to the necessity of levy for the purpose of acquiring jurisdiction, see ante, "Jurisdiction as Acquired by Levy of Attachment," II, J.

d. *Modes of Seizure Classified.*—The modes of seizure must vary; it may be either actual or constructive;²² the manner, and whether actual or constructive, depending upon the nature of the thing seized.²³

e. *Necessity for Actual Manucaption.*—Where the res is movable personal property, capable of actual manucaption an actual seizure of the property is necessary to constitute a levy at law.²⁴ But seizure does not necessarily involve taking into manual possession for lands cannot be seized as movable chattels may, nor can actual manucaption be taken of stocks and credits.²⁵

f. *Objections to Manner of Seizure.*—Where every person, who is in a position, in reference to the property, to object to the manner in which the writ of attachment was executed, consents that the property be placed under the control of the court, the proceeds of the sale to be applied to the attachment liens in their order, creditors who did not obtain judgments until after such consent order was made cannot be heard to object to the manner in which the property was originally seized and brought into court, and made subject to its orders. The attaching creditors, the debtors, and the assignee of the debtors, having all approved what was done, subsequent judgment creditors, the consent order of sale not being impeached on the ground of fraud, acquire no such rights in the property as entitled them to question the disposition made of it or of the proceeds of sale.²⁶

g. *Effect of Failure to Execute the Writ.*—Where the writ of attachment is sued out in an action, but no levy is made on the property of the defendant, the suit stands as if it had been instituted by summons alone.²⁷

3. CUSTODY AND CONTROL OF PROPERTY—a. *Acquired by Seizure.*—Whenever property has been seized by an officer of the court by virtue of its process of attachment, the property is to be considered as in the custody of the court and under its control for the time being,²⁸ subject to the judgment of the court until re-

22. *Seizure classified into actual or constructive.*—*Miller v. United States*, 11 Wall. 268, 296, 20 L. Ed. 135.

23. *Mode depends upon nature of res.*—*Pelham v. Rose*, 9 Wall. 103, 106, 19 L. Ed. 602; *Miller v. United States*, 11 Wall. 268, 296, 20 L. Ed. 135.

24. *Necessity for actual seizure.*—See ante, "Jurisdiction as Acquired by Levy of Attachment," II, J; post, "Successive Levies," IX, H. 4. *Gumbel v. Pitkin*, 124 U. S. 131, 146, 31 L. Ed. 374; *Miller v. United States*, 11 Wall. 268, 294, 20 L. Ed. 135; *Pelham v. Rose*, 9 Wall. 103, 106, 19 L. Ed. 602.

25. *Miller v. United States*, 11 Wall. 268, 296, 20 L. Ed. 135; *Pelham v. Rose*, 9 Wall. 103, 106, 19 L. Ed. 602, held a promissory note capable of caption distinguishing it from the debt which the note represented.

26. *Objections to manner of seizure.*—*Walter v. Bickham*, 122 U. S. 320, 325, 20 L. Ed. 1185.

27. *Effect of failure to execute the writ.*—*New York, etc., R. Co. v. Estill*, 147 U. S. 591, 607, 37 L. Ed. 292.

28. *Custody and control.*—See post, "Custody and Control of Effects," XVI, L. *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374; *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337; *Krippe-ndorf v. Hyde*, 110 U. S. 276, 280, 28 L. Ed. 145; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Stiles v. Davis*, 1 Black 101, 17 L. Ed. 33; *Mitchell v. St. Maxent*, 4 Wall. 237, 243, 18 L. Ed. 326.

It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him. *Gumbel v. Pitkin*, 124 U. S. 131, 145, 31 L. Ed. 374; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390.

"In *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337, it was said, 'When a marshal upon a writ of attachment on mesne process takes property of a person not named in the writ, the property is in his official custody and under the control of the court, whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way except in the court from which the writ issued.'"
Gumbel v. Pitkin, 124 U. S. 131, 145, 31 L. Ed. 374. See the title REPLEVIN.

leased,²⁹ and an interest is vested in the officer for the purposes of that judgment.³⁰

b. *Goods Attached in Hands of Common Carrier*.—Where the goods are attached in the hands of a common carrier, to whom they have been delivered for transportation, the carrier is not justified in giving them up to the consignee while the proceeding in attachment is pending.³¹ This rule holds even where the goods have been attached for the debt of a third person, and under a proceeding to which the employer of the carrier is not a party.³² The right of the sheriff to hold them is a question of law to be determined by the court having jurisdiction of the attachment suit, and not by the will of either the carrier or his employer.³³

c. *Interference with Custody*.—No other court has a right to interfere with the possession acquired by levy of the writ unless it be some court which may have a direct supervisory control over the court whose process had first taken possession, or some superior jurisdiction in the premises.³⁴

d. *Retention of Possession by Debtor*.—As to the custom of allowing the debtor to retain possession of the property by giving a bond for that purpose, see the title FORTHCOMING AND DELIVERY BONDS.

e. *Duties and Liabilities of Officer*.—As to the duty and liability of the officer in regard to the exercise of ordinary care for the preservation of the property seized, see the titles SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.

4. **SUCCESSIVE LEVIES**.—On principle and reason, the validity of successive levies by the same officers on the same property is a recognition of the practical fact, that there may be, after a taking into the custody of the law the property of the debtor, an effectual imposition of another writ without an actual caption, or a taking away of the property, or an appropriation of it for the time being, to the attaching creditor's claim. The second writ in the hands of the same officer is executed by him *sub modo*, so it will be available to hold the surplus after satisfying the previous attachment, or the whole, if the first attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient. So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee.³⁵

29. **Subject to judgment**.—Tyrell v. Rountree, 7 Pet. 464, 468, 8 L. Ed. 749; Mitchell v. St. Maxent, 4 Wall. 237, 243, 18 L. Ed. 326.

30. **Interest vested in officer**.—Tyrell v. Rountree, 7 Pet. 464, 468, 8 L. Ed. 749. See the titles SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.

31. **Goods attached in hands of common carrier**.—Stiles v. Davis, 1 Black 101, 17 L. Ed. 33.

32. Stiles v. Davis, 1 Black 101, 17 L. Ed. 33.

33. Stiles v. Davis, 1 Black 101, 17 L. Ed. 33.

34. **Interference with custody**.—See ante, "Conflict between State and Federal Jurisdiction," II, C; "Property in Custodia Legis," VI, B. Lammon v. Feuser, 111 U. S. 17, 19, 28 L. Ed. 337; Buck v. Colbath, 3 Wall. 334, 341, 18 L. Ed. 257.

35. **Successive levies**.—See ante, "Property in Custodia Legis," VI, B. Gumbel v. Pitkin, 124 U. S. 131, 152, 31 L. Ed. 374.

"Evidently the making of a second levy by the same officer is recognized because it does not disturb his custody of the property. If the rule which prevents one officer from levying on goods seized by another officer rests mainly on the prevention of conflict of jurisdiction and the interference of one officer with the prior custodianship of another, then, on the maxim, *cessante ratione legis, cessat ipsa lex*, there seems to be no reason for the operation or recognition of the rule, where the second levy does not produce such conflict or interference. For it must be borne in mind that the other requirement of the law, that the levying of an attachment is an actual seizure of the property, is satisfied in the case of successive levies by the same officer, by a constructive application of the succeeding writ 'to the surplus after satisfying the previous attachment.' " Gumbel v. Pitkin, 124 U. S. 131, 153, 31 L. Ed. 374.

In Tomlinson v. Collins, 20 Conn. 364, it is held in such case, that the second attachment is valid even without any notice to the bailee. Gumbel v. Pitkin, 124 U. S. 131, 152, 31 L. Ed. 374.

5. **EFFECT OF LEVY**—a. *General Statement*.—Levying an execution has the double effect of creating a lien, and instituting an action.³⁶

b. *Levy as Satisfaction of Judgment*.—As to the levy of an attachment as constituting a satisfaction of the judgment, see the title JUDGMENTS AND DECREES.

c. *Attachment of Stock*.—As to attachment of the stock of a stockholder as effecting the rights of a corporation, see the titles CORPORATIONS; STOCK AND STOCKHOLDERS.

d. *Waiver of Fraud in Contract*.—The creditor, by suing and levying an attachment upon the property of the debtor for such parts of the debt as has become due, has waived fraud in a contract of sale and confirmed the sale.³⁷

e. *Conclusiveness*.—The attachment, when levied, is binding between the parties.³⁸

X. Lien and Priorities.³⁹

A. **Definition of Lien**.—The charge or encumbrance created by seizing property under an attachment to await the result of the suit is denominated a lien.⁴⁰

B. **Creation of Lien**.—A lien is created by the levying of an attachment.⁴¹

C. **Nature of Lien**.—A lien created by levying an attachment is one inchoate; it awaits the judgment of the court for its consummation, and must fall with the suit.⁴²

D. **Status of Attaching Creditor**.—It has been held that an attaching creditor stands in the light of a purchaser, and as such will be protected.⁴³

E. **Extent of Lien**.—Where the proceeding is purely in nature of a proceeding in rem, it will bind only the property attached.⁴⁴

F. **Effect of Fraud in Procurement**.—The fact that one who is in actual possession of goods under a claim to them, which claim was legally unfounded, placed them in the nominal possession of his attorney in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of other creditors, will not postpone his lien to those of the other creditors.⁴⁵

G. **As against Execution Creditors**.—As to priorities between attachments and executions, see the title EXECUTIONS.

H. **As against Prior Transfer, Conveyance or Mortgage**.—As to priority between an attachment and a prior mortgage, see the titles CHATTEL MORTGAGES AND CONDITIONAL SALES; MORTGAGES AND DEEDS OF TRUST. As to priority between attaching creditors, and assignments of stock, see the title STOCK AND STOCKHOLDERS. As to priority between attachment and prior pledge of the attached property, see the title PLEDGE AND COLLATERAL SECURITY. As to priority between attachments and fraudulent conveyances, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

I. **As against Subsequent Transfer or Sale**.—As to the rights of a pur-

36. **Levy has double effect**.—Pratt v. Law, 9 Cranch 456, 596, 3 L. Ed. 791. As to levy as creating lien, see post, "Creation of Lien," X, B.

37. **Waiver of fraud**.—See the titles CONTRACTS; FRAUD AND DECEIT; WAIVER. Adler v. Fenton, 24 How. 407, 408, 16 L. Ed. 693.

38. **Conclusiveness**.—Hooton v. Will, 1 Dall. 450, 451, 1 L. Ed. 218.

39. **Lien and Priorities**.—As to lien and priorities relating to garnishment, see post, "Lien and Priorities," XVI, K.

40. **Definition of lien**.—Peck v. Jenness, 7 How. 612, 622, 12 L. Ed. 841, affirmed in Colby v. Ledden, 7 How. 626, 12 L. Ed. 847.

41. **Creation of lien**.—Pratt v. Law, 9 Cranch 456, 496, 3 L. Ed. 791; Fidelity,

etc., Co. v. Bucki, etc., Lumber Co., 189 U. S. 135, 139, 47 L. Ed. 744.

42. **Nature of lien**.—Pratt v. Law, 9 Cranch 456, 496, 3 L. Ed. 791; Cole v. Cunningham, 133 U. S. 107, 116, 33 L. Ed. 538.

43. **Status of attaching creditors**.—Green v. Van Buskirk, 7 Wall. 139, 146, 19 L. Ed. 109; Dooley v. Pease, 180 U. S. 126, 128, 45 L. Ed. 457.

44. **Extent of lien**.—Maxwell v. Stewart, 22 Wall. 77, 80, 22 L. Ed. 564; Cole v. Cunningham, 133 U. S. 107, 116, 33 L. Ed. 538; Cooper v. Reynolds, 10 Wall. 308, 318, 19 L. Ed. 931. See, also, Green v. Van Buskirk, 7 Wall. 139, 146, 19 L. Ed. 109.

45. **Effect of lien in procurement**.—Dooley v. Hadden, 179 U. S. 646, 657, 45 L. Ed. 357.

chaser who takes property after an attachment has been levied thereon, see the titles *LIS PENDENS*; *SALES*; *VENDOR AND PURCHASER*. As to the rights of purchaser under sheriff's or marshal's sales where the property has been conveyed by the debtor during the pendency of the action, see the titles *LIS PENDENS*; *SHERIFFS, CONSTABLES' AND MARSHALS' SALES*.

Union between Prior Lien and Interest Attached.—A union by assignment between a prior lien and the interest attached will not defeat an intermediate lien.⁴⁶

J. As against Claims of the United States.—As to priority between attaching creditors and claims of the United States, see the title *UNITED STATES*.

K. As against Lien for Duties.—As to priority between attaching creditors and liens for duties on imported goods, see ante, "Property in Custodia Legis," VII, B. And see the title *REVENUE LAWS*.

L. As Affected by Relation of Judgments.—As to relation of judgments to the first day of the term as affecting attachments, see the title *JUDGMENTS AND DECREES*.

M. As Affected by Confiscation and Seizure.—As to the confiscation and seizure of property as affecting attachments thereon, see the titles *ADMIRALTY*, vol. 1, p. 119; *PRIZE*; *REVENUE LAWS*; *SEARCHES AND SEIZURES*; *WAR*.

N. As Affected by Proceedings in Bankruptcy and Insolvency.—As to the effect of bankruptcy or insolvency proceedings with relation to attachments, see the titles *BANKRUPTCY*; *INSOLVENCY*. As to the priority of an attachment issued by the United States against an insolvent bank, over other claims, see the title *BANKS AND BANKING*.

O. As against Assignments for the Benefit of Creditors.—A valid deed of assignment for the benefit of creditors generally places the property so assigned beyond the reach of the ordinary process of attachment directed against the property of the assignor,⁴⁷ but this rule is changed by statute in some states.⁴⁸

P. Termination of Lien.—The attachment liens must fall with the suit.⁴⁹

XI. Dissolution.

A. What Law Governs.—An attachment of property upon process instituted in any court of the United States will be dissolved when any contingency occurs, by which, according to the law of the state where the court is held, such attachment would be dissolved upon the process instituted in the courts of said state.⁵⁰

B. Time for Entering Motion.—It has been held that after judgment has been regularly entered upon a foreign attachment, a motion to quash such attachment comes too late.⁵¹ In Pennsylvania it was decided at an early date that a rule to show why an attachment should not be dissolved should be applied for at the first term.⁵²

C. Examination of Plaintiff's Cause of Action.—At an early date the Pennsylvania courts held that in cases of foreign attachment, they would examine into the plaintiff's cause of action, and if they found it not to be such as would entitle him to hold the defendants to special bail, they would dissolve the attachment. This rule was founded on the mischiefs which were found to arise from

46. Union between prior lien and interest attached.—Pratt v. Law, 9 Cranch 456, 496, 3 L. Ed. 791.

47. As against assignments for the benefit of creditors.—See post, "As against Assignments for the Benefit of Creditors," XVI, K. 6. McGoon v. Scales, 9 Wall. 23, 29, 19 L. Ed. 545.

48. McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545.

49. Termination of lien.—See post, "Dissolution," XI. Pratt v. Law, 9 Cranch 456, 496, 3 L. Ed. 791; Ex parte Des

Moines, etc., R. Co., 103 U. S. 796, 26 L. Ed. 461.

"To decide otherwise, would be to permit the defendant, by collusion, or his own act, to nullify the lien of the subsequent attachment." Pratt v. Law, 9 Cranch 456, 496, 3 L. Ed. 791.

50. What law governs in dissolution.—Tua v. Carriere, 117 U. S. 201, 204, 29 L. Ed. 855.

51. Time for entering motion.—White-side v. Oakman, 1 Dall. 294, 1 L. Ed. 146.

52. Miltenberger v. Lloyd, 2 Dall. 79, 1 L. Ed. 279.

groundless attachments of the ships and property of persons not inhabitants or resident within this state.⁵³

D. Effect of Issuance against Improper Party.—An attachment which issues against an improper party will be dissolved.⁵⁴

E. Effect of Appearance.—As to whether the appearance of the defendant discharges the attachment lien, see the title *APPEARANCES*, ante, p. 429.

F. Effect of Bankruptcy Proceedings.—As to proceedings in bankruptcy as effecting a dissolution of an attachment, see the title *BANKRUPTCY*.

G. Effect of Insolvency Proceedings.—As to the effect of state insolvency proceedings as working the dissolution of an attachment lien, see the title *INSOLVENCY*.

H. Effect of Removal of Causes.—As to whether removal of cause will dissolve the attachment in the state court, see the title *REMOVAL OF CAUSES*.

I. Effect of Satisfaction of Judgment against Garnishee.—As to the satisfaction of a judgment against a garnishee as satisfying the claim against the original debtor, see post, "Modes of Enforcing," XVI, H, 3; "Garnishment as a Defense," XVI, R.

J. Discharge by Undertaking—1. *ALLOWANCE*.—By the laws of some of the states, it is provided, that whenever the defendant shall have appeared in the action, he may apply to the officer or to the court for an order to discharge the attached property; but to secure that right, he must deliver to the court or officer an undertaking executed by at least two sureties, residents and freeholders in the state, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking.⁵⁵ Debtors may demand as matter of right, on complying with the requirements of the law in that behalf, to have their property discharged from attachment, and that a bond with sureties be accepted in its place.⁵⁶

2. *PURPOSE*.—The provision for the discharge of the property attached is made for the benefit of debtors.⁵⁷

3. *OPERATION AND EFFECT*.—The bond is a substitute for the attachment, although not affected by all the contingencies which might have discharged the attachment itself.⁵⁸

4. *REQUISITES AND VALIDITY*.—**Validity of Bond as Dependent upon Validity of Attachment.**—If there was no authority in law for the attachment, there could be none for taking the bond. If the attachment itself is illegal and therefore void, so also must be the bond which takes its place.⁵⁹ Where there

53. Examination of plaintiff's cause of action.—*Doane v. Penhallow*, 1 Dall. 218, 219, 1 L. Ed. 108; *Vienne v. McCarty*, 1 Dall. 154, 1 L. Ed. 79; *Miltenberger v. Lloyd*, 2 Dall. 79, 1 L. Ed. 297; *Hollingsworth v. Adams*, 2 Dall. 396, 1 L. Ed. 431.

54. Issuance against improper party.—*McCombe v. Dunch*, 2 Dall. 73, 1 L. Ed. 294; *Pringle v. Black*, 2 Dall. 97, 1 L. Ed. 305.

55. Allowance of bond.—*Inbusch v. Farwell*, 1 Black 566, 572, 17 L. Ed. 188. See, also, *Pike v. Wassel*, 94 U. S. 711, 713, 24 L. Ed. 307; *McClenachan v. McCarty*, 1 Dall. 375, 378, 1 L. Ed. 183; *Brashear v. West*, 7 Pet. 608, 621, 8 L. Ed. 801; *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

As to the right of the debtor to retain possession of the property by giving a sufficient bond, see the title *FORTHCOMING AND DELIVERY BONDS*.

56. Allowance as a matter of right.—

Inbusch v. Farwell, 1 Black 566, 572, 17 L. Ed. 188.

57. Purpose of provision for bond.—*Inbusch v. Farwell*, 1 Black 566, 572, 17 L. Ed. 188.

58. Operation and effect.—*Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 728, 31 L. Ed. 567; *Inbusch v. Farwell*, 1 Black 566, 572, 17 L. Ed. 188. See, also, *Johnson v. Chicago, etc., Co.*, 119 U. S. 388, 401, 30 L. Ed. 447.

59. Validity of bond as dependent upon validity of attachment.—*Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 728, 31 L. Ed. 567.

"Objections can be made to an attachment issued on proper legal authority, which cannot be used as a defense to a bond taken under the statute for its dissolution; but if there can be no lawful attachment, there can be no valid bond for its dissolution. The case is to be con-

was no lawful attachment, and therefore no lawful authority for taking any lawful bond whatever, the bond is neither good under the statute nor at common law, because there is no sufficient foundation to support it.⁶⁰

Necessity for Declaration to Show Jurisdiction.—A motion in arrest of judgment on an attachment bond will not be granted on the ground that the declaration on the bond does not show that the court had jurisdiction in the attachment suit, such showing being unnecessary where the court has general jurisdiction of such cases.⁶¹

Sureties.—An attachment bond will not be void by reason of the fact that only one surety has signed the same, where the bond has been accepted and the attachment discharged, although the bond need not have been accepted by the judge as sufficient security; notwithstanding the absence of another surety, the bond stands as security for the payment of the judgment.⁶²

5. **ACTIONS ON BOND.—Parties.**—Where a bond was given to a marshal in pursuance of a state statute regulating proceedings against debtors by attachment, the name of the marshal is merely formal, he having no interest in the suit, the real plaintiffs in an action on the bond being those for whose use the suit is brought.⁶³ A bond being given in the name of a marshal and his successor in office, where the latter has succeeded to the office, the suit on the attachment bond may be brought in the name of either.⁶⁴

Raising Objections to Jurisdiction.—As to the right in an action on an attachment bond to raise objections to the jurisdiction over the attachment suit, see ante, "Objections to Jurisdiction," II, L.

Partnership Debt.—Where partnership goods are attached on mesne process against the partners, for a partnership debt, the property is released on bond conditioned to pay the judgment which may be recovered against the defendants. The plaintiff may recover from the sureties in the bond the amount of the judgment notwithstanding the fact that suit has been discontinued against two defendants for want of jurisdiction, and prosecuted to judgment against the administrator of the other. The sureties in such a bond are sureties of the partnership, and if compelled to pay the money, they have an action for reimbursement against all who were partners at the date of the bond.⁶⁵ Where there are no special circumstances to render the case an exceptional one, it must be held that any judgment that would have bound the property, if it had remained under attachment in the hands of the marshal, will bind the obligors of the bond where the suit was commenced against the partnership upon a partnership contract, and the property attached was partnership property.⁶⁶

Bond Given by National Bank.—As to actions on attachment bonds given by national banks, see the title BANKS AND BANKING.

Necessity for Notice to Surety.—Where the attachment bond is given under an existing statute which provides that in the event of the decision against the defendant judgment shall go against the surety without notice to him, the judgment so rendered is not invalid, since the statute formed part of the bond

sidered as though there was no law whatever for the seizure of property by attachment before judgment in any case. As the taking of the property under such circumstances would be unlawful, so also would be the act of the magistrate in accepting the bond." *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 729, 31 L. Ed. 567.

60. *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 729, 31 L. Ed. 567. See the title BONDS.

61. **Necessity for declaration to show jurisdiction.**—*Huff v. Hutchinson*, 14 How. 586, 587, 14 L. Ed. 553.

62. **Sureties.**—*Mexican Nat. Construc-*

tion Co. v. Reusens, 118 U. S. 49, 53, 30 L. Ed. 77, citing *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

63. **Parties.**—*Huff v. Hutchinson*, 14 How. 586, 587, 14 L. Ed. 553.

64. *Huff v. Hutchinson*, 14 How. 586, 587, 14 L. Ed. 553.

65. **Partnership debt.**—*Inbusch v. Farwell*, 1 Black 566, 17 L. Ed. 188. See the titles CONTRIBUTION AND EXONERATION; PARTNERSHIP; SURETYSHIP.

66. *Inbusch v. Farwell*, 1 Black 566, 572, 17 L. Ed. 188.

and the surety virtually consented that the judgment might go against him on the bond.⁶⁷

Evidence.—In a suit on an attachment bond it is not necessary to introduce the writ of attachment as evidence, the condition of the bond referring to the judgment to be obtained, but such admission does not constitute error.⁶⁸

Defenses.—The sureties on a bond of this kind are estopped from setting up, as a defense to an action for a breach of its condition, any irregularities in the form of proceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attachment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. So, too, it is no defense that the property attached did not belong to the defendant, or that it was exempt, or that the defendant has become bankrupt or is dead. In all such cases, where there was lawful authority for the attachment, the simple question is, whether the condition of the bond has been broken; that is to say, whether there has been a judgment in the action against the defendant for the payment of money which he has neglected to make.⁶⁹

Verdict.—A judgment on an attachment bond will not be arrested on the ground that the verdict is informal, it being entered for the amount due when it should have been entered for the penalty of the bond, this being a mere informality.⁷⁰

Judgment.—The judgment upon a bond given for the dissolution of an attachment will be against the parties to the bond, in personam.⁷¹

K. Pleadings.—At an early date it was decided in Maryland that if the defendant appeared and dissolved the attachment, a declaration and subsequent pleadings were not necessary as in other actions, but the cause might be tried on a short note.⁷²

XII. Intervention.

A. Allowance.—Any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property, or its proceeds, while remaining in the control of that court.⁷³

B. Form of Proceeding.—The form of the proceeding must be determined by the circumstances of the case. If the original cause, in which the process has issued or the property or fund is held, is in equity, the intervention will be by petition *pro interesse suo*, or by a more formal, but dependent bill in equity, if necessary. Relief, either in a suit in equity, or an action at law, may properly be given, in some cases, in a summary way, by motion merely, supported by af-

67. Necessity for notice to surety.—*Johnson v. Chicago, etc., Co.*, 119 U. S. 388, 401, 30 L. Ed. 447.

68. Evidence.—*Huff v. Hutchinson*, 14 How. 586, 587, 14 L. Ed. 553.

69. Defenses.—*Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 728, 31 L. Ed. 567.

70. Verdict.—*Huff v. Hutchinson*, 14 How. 586, 587, 14 L. Ed. 553.

71. Judgment.—*Johnson v. Chicago, etc., Co.*, 119 U. S. 388, 401, 30 L. Ed. 447.

72. Pleadings.—*Goldsborough v. Orr*, 8 Wheat. 217, 225, 5 L. Ed. 600.

73. When intervention allowed.—See ante, "Questions Incidental to Main Proceeding," II, D; post, "Equities of Third Persons," XVI, N. *Covell v. Heyman*, 111 U. S. 176, 179, 28 L. Ed. 390; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Gumbel v. Pitkin*, 124 U. S. 131, 155,

31 L. Ed. 374; *Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. Ed. 145.

When, in the exercise of powers of courts to protect their own jurisdiction and officers in the possession of property that is in the custody of the law, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several states, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceed-

fidavits. In actions at law, where goods have been taken upon attachment before judgment, a proceeding in the nature of an interpleader might be appropriately ordered by the court, such as was given in the English practice,⁷⁴ and in that the respective right of the claimants to the property could generally be tried as in an action at law by a jury, upon a formal issue framed for that purpose, or with the consent of the parties by the court;⁷⁵ or, if the claim was such as that it could be determined only upon principles of equity, as administered in courts of that general jurisdiction, it would be proper to provide relief upon a bill of that nature, filed for that purpose.⁷⁶ If the statutes of the state contain provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the court, as contemplated by the Revised Statutes.⁷⁷

C. Effect of Failure to Observe Technical Forms.—Neither the marshal nor the creditors for whose benefit he acted will be allowed to say that the intervenor has been deprived of the substance of his rights, where by their illegal and oppressive conduct he had been prevented from clothing it with technical forms.⁷⁸

D. Review.—As to whether a proceeding in the nature of intervention in an attachment proceeding is reviewable, see the title *APPEAL AND ERROR*, vol. 1, p. 333.

XIII. Notice.

A. Notice by Publication.—Necessity for.—The various state statutes require that if the debtor cannot be served with process, he must be notified by publication.⁷⁹ It is the duty of the court to order such publication, and to see that it has been properly made and if there has been no such publication, a court of error might reverse the judgment.⁸⁰

Effect of Defective or Irregular Notice.—Defective or irregular publications of notice, though they might reverse a judgment for error in departing from the directions of the statute, do not render such a judgment or subsequent proceeding void.⁸¹

B. Notice by Garnishee.—It is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment.⁸² While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee, the proper publication being made by the plaintiff, it ought to have an effect

ing is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls in *Clarke v. Mathewson*, 12 Pet. 164, 172, 9 L. Ed. 1041, a dependent bill. *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374.

74. Form of proceeding.—*Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390.

75. *Krippendorf v. Hyde*, 110 U. S. 276, 284, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390; *McGinty v. Flannagan*, 106 U. S. 661, 27 L. Ed. 215.

76. *Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390.

77. Rev. Stat., §§ 914, 915, 916; *Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 181, 28 L. Ed. 390; *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374, quoting

Clarke v. Mathewson, 12 Pet. 164, 172, 9 L. Ed. 1041.

78. Effect of failure to observe technical forms.—*Gumbel v. Pitkin*, 124 U. S. 131, 147, 31 L. Ed. 374.

79. Notice by publication.—See, generally, the title *NOTICE*. *Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109; *Cooper v. Reynolds*, 10 Wall. 308, 318, 19 L. Ed. 931; *Voorhees v. Jackson*, 10 Pet. 449, 470, 9 L. Ed. 490.

80. *Cooper v. Reynolds*, 10 Wall. 308, 319, 19 L. Ed. 931.

81. Defective or Irregular Notice.—*Cooper v. Reynolds*, 10 Wall. 308, 309, 19 L. Ed. 931.

As to want of sufficient publication of notice as depriving court of jurisdiction, see ante, "As Affected by Defects or Irregularities," II, G.

82. Notice by garnishee.—*Harris v. Balk*, 198 U. S. 215, 227, 49 L. Ed. 1023. See, also, *Chicago, etc., R. Co. v. Sturm*,

upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder.⁸³ But a failure to give notice is immaterial when the facts show that the debtor has had actual notice and ample time within which to litigate the question of his liability.⁸⁴

C. Object of Notice.—In Attachment.—The object of the notice is to apprise the defendant of the commencement of the suit, and to call him in to defend and prevent the plaintiff from obtaining judgment if he can.⁸⁵

Notification by Garnishee.—The notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee.⁸⁶

XIV. Judgment and Subsequent Proceedings.

A. Default Judgment.—By the various statutes if the debtor does not appear, the creditor, on making proper proof, is entitled to judgment by default for his claim.⁸⁷

B. Extent of Judgment Lien.—In cases where there is not personal service of process on the defendant or personal appearance by him the judgment binds nothing but the property attached.⁸⁸ And if notice were actually served upon the defendant in another state, it is difficult to see why the judgment subsequently entered up would not be valid as against the land attached, though of course not against the defendant in personam.⁸⁹

C. Collateral Attack.—As to collateral attack on judgment and subsequent proceedings in attachment, see the titles JUDGMENTS AND DECREES; SHERIFFS' CONSTABLES' AND MARSHALS' SALES.

D. Enforcement of Judgment.⁹⁰—It is provided by statute in some jurisdictions, that upon the judgment by default in attachment cases a special execution will be issued to sell the property attached.⁹¹ No other property than that attached can be taken in execution to satisfy the judgment in attachment proceedings.⁹²

XV. Wrongful Attachments.

A. Liability.—Where goods are wrongfully seized⁹³ under attachment pro-

174 U. S. 710, 43 L. Ed. 1144. Although it is not therein actually decided to be necessary, because in that case notice was given and defense made.

83. *Harris v. Balk*, 198 U. S. 215, 227, 49 L. Ed. 1023. See post, "Garnishment as a Defense," XVI, R.

84. **When notice not required.**—*Harris v. Balk*, 198 U. S. 215, 228, 49 L. Ed. 1023.

85. **Object of notice.**—*Wehrman v. Conklin*, 155 U. S. 314, 331, 29 L. Ed. 167.

86. *Harris v. Balk*, 198 U. S. 215, 227, 49 L. Ed. 1023.

87. **Judgment by default.**—*Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109; *Voorhees v. Jackson*, 10 Pet. 449, 470, 9 L. Ed. 490.

88. **Extent of judgment lien.**—See, generally, the title JUDGMENTS AND DECREES. See, also, ante, "Extent of Lien," X, E. *Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109; *Cooper v. Reynolds*, 10 Wall. 308, 309, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 725, 24 L. Ed. 565.

89. *Wehrman v. Conklin*, 155 U. S. 314, 331, 29 L. Ed. 167.

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90. **Enforcement of judgment.**—See the title EXECUTIONS; SHERIFFS' CONSTABLES' AND MARSHALS' SALES.

91. *Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109. See, generally, the title EXECUTIONS.

92. *Green v. Van Buskirk*, 7 Wall. 139, 146, 19 L. Ed. 109.

93. **Liability for wrongful attachment.**—*Stiles v. Davis*, 1 Black 101, 17 L. Ed. 33; *Halliday v. Hamilton*, 11 Wall. 560, 20 L. Ed. 214.

A. in St. Louis having a standing agreement with B. & Co., in New Orleans, to ship produce to them, drawing against the shipments—the balance of any draft on one shipment not discharged by its proceeds, to be paid from the proceeds of any other shipment—bought of C., residing at Cairo, on the Mississippi, a hundred miles and more below St. Louis, a specific number of sacks of corn, then lying at a landing on the river somewhat above Cairo, though much below St. Louis, and received an order for its delivery. He did not pay for it, though the transaction was impliedly one for cash. A. delivered his order to the agents

ceedings, or held thereunder,⁹⁴ the attaching creditors, for whom and at whose request the attaching officer acted, will be held liable in damages. As to the liability of an officer for the wrongful seizure or withholding of property or for failure to seize in proper cases, see the titles *SHERIFFS AND CONSTABLES*; *UNITED STATES MARSHALS*.

B. Nature of Action.—The action against one wrongfully levying an attachment at common law is substantially one for malicious prosecution.⁹⁵

C. Malice and Want of Probable Cause.—An action for wrongful attachment at common law can be maintained only upon proof of malice and want of probable cause.⁹⁶

D. Jurisdiction.—Where the common-law action for wrongful and malicious attachment is unknown to a territorial court, the United States district court will have no jurisdiction in an action to enforce a special statutory proceeding as to the assessment of damages in attachment proceedings.⁹⁷

E. Liability of Attaching Creditor for Acts of Officer.—The attaching creditor is not answerable for the acts of the officer, unless he in some manner interferes so as to make himself liable.⁹⁸

F. Indemnity.—As to indemnifying bonds given to the attaching officer and the rights and liabilities thereunder, see the title *INDEMNITY*.

G. Procedure.—Under statutes in some jurisdictions when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages; the defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. An issue is made up, testimony taken, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any

of a steamer at St. Louis, then about to go down the river to New Orleans. These gave to him a regular bill of lading, agreeing to deliver the specified number of sacks of corn to B. & Co., in New Orleans. On the same day A. drew his bill of exchange on B. & Co., in New Orleans, telling them to charge the draft to the account of this specific shipment; and attaching to his bill of exchange, the bill of lading thus received, sold the draft in the market. Being forwarded, it was paid at maturity by B. & Co., in New Orleans; they having had no notice of any difficulty. They were at the time in advance to A. on account of other shipments. The steamer set off on her voyage, and stopping at the place where the sacks of corn were, took them on board. Proceeding further on her voyage she came to Cario, C.'s residence. C. having learned that A. had failed, had not paid for the corn and was insolvent, issued an attachment, and on the arrival of the steamer seized the corn and took it off the boat. On suit brought by B. & Co., for damages, held that after the boat took the corn on board a transfer of the property to B. & Co. was effected, and that C. had made himself liable for his act of seizure and asportation. *Halliday v. Hamilton*, 11 Wall. 560, 20 L. Ed. 214.

94. *Gumbel v. Pitkin*, 124 U. S. 131, 146, 31 L. Ed. 374.

95. *Nature of action for wrongful attachment at common law.*—*Perez v. Fernandez*, 202 U. S. 80, 96, 50 L. Ed. 942.

Under the *Porto Rican Code* the proceeding to enforce the liability for wrongful attachment is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized. *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

96. *Malice and want of probable cause*—*At common law.*—*Perez v. Fernandez*, 202 U. S. 80, 96, 50 L. Ed. 942.

Under *Porto Rican Code*.—Under the *Code* remedies given in *Porto Rico* the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases, where the attachment is vacated, irrespective of the motive in suing it out. *Perez v. Fernandez*, 202 U. S. 80, 96, 50 L. Ed. 942.

97. *Jurisdiction.*—See, generally, the titles *COURTS*; *JURISDICTION*. *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

98. *Liability of attaching creditor for acts of officer.*—*Lovejoy v. Murray*, 3 Wall. 1, 9, 18 L. Ed. 129.

cause, would seem to preclude the application of general provisions of a code giving a right of recovery for acts of fault or negligence.⁹⁹

H. Parties.—Under the Porto Rican practice one may be made a party to the attachment proceeding if damages are to be assessed against him alone.¹

I. Replevy of Goods.—As to replevin for attached goods, see the title REPLEVIN.

XVI. Garnishment.

A. Definition.—By the proceeding of garnishment, or as in some jurisdictions denominated, foreign attachment, a person whose debtor may have absconded, or who has no visible property which can be reached directly by legal process, is authorized to attach in the hands of a third person who may owe money to the judgment debtor, or have any of the effects of the latter within his control, an amount equal to the demand due to the judgment creditor.²

B. Nature.—Garnishment is but substantial attachment. It arrests the property in the hands of the granishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure.³

An Auxiliary Process.—In a court of common law, a process of foreign attachment is auxiliary and incidental to the principal cause.⁴

Proceeding in Rem.—In garnishment proceedings, whatever of substance there is must be with the debtor, he holding the res in his hands, giving character to the action as one in the action as one in the nature of a proceeding in rem.⁵

Garnishment is but a substituted mode of pursuing the same right the creditor has in the main action.⁶

C. Purpose.—The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due.⁷ The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors.⁸ The common-law remedy by attachment has been the most usual to coerce the marshal to perform his various duties; and among others, to bring into court moneys collected on executions. So in the state courts, nothing is more common

99. Procedure—Porto Rico.—Perez v. Fernandez, 202 U. S. 80, 95, 50 L. Ed. 942.

"There can be no difficulty in exercising the attachment remedies provided in the Porto Rican Code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that Code. The procedure is simply and easily administered. Nor is there anything in that special procedure encroaching upon the right to a jury trial, secured by the federal constitution, in suits at common law where the value in controversy exceeds twenty dollars. * * * Nor would the general provisions of the Revised Statutes, § 648, providing for a jury trial as to issues of fact in circuit courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican Code as to assessment for damages for wrongful attachment." Perez v. Fernandez, 202 U. S. 80, 99, 50 L. Ed. 942.

Exclusiveness of Porto Rican statute.—The plan of recovery of damages for wrongful attachments in Porto Rico is exclusive. The Porto Rican system in force at the time of the passage of the

Foraker Act, and binding until changed or amended, provided a recovery for damages in the attachment suit, by the special statutory method mentioned and not otherwise. Perez v. Fernandez, 202 U. S. 80, 95, 96, 50 L. Ed. 942.

1. Parties.—Perez v. Fernandez, 202 U. S. 80, 98, 50 L. Ed. 942.

2. Definition of garnishment.—Wanzer v. Truly, 17 How. 581, 588, 15 L. Ed. 216, dissenting opinion; Williams v. Hill, 19 How. 246, 15 L. Ed. 570.

3. Garnishment is but substantial attachment.—Miller v. United States, 11 Wall. 268, 297, 20 L. Ed. 135.

4. Garnishment on auxiliary process.—Cushing v. Laird, 107 U. S. 69, 76, 27 L. Ed. 391.

5. Garnishment a proceeding in rem.—See ante, "In Rem or in Personam," I, C, 1. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 715, 43 L. Ed. 1144.

6. Substitute for main action.—McLaughlin v. Swann, 18 How. 217, 222, 15 L. Ed. 357.

7. Purpose of garnishment.—Wanzer v. Truly, 17 How. 584, 586, 15 L. Ed. 216.

8. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 715, 43 L. Ed. 1144.

than to proceed by attachment against the sheriff, instead of resorting to a summary motion, for judgment against him by force of a statute, where he withholds moneys collected.⁹

Garnishment in Aid of Execution.—As to proceedings in aid of execution, in the nature of garnishment, see the title **EXECUTIONS**.

D. What Law Governs.—To enable the judgment creditor to arrest the payment of what is due the judgment debtor, which might be paid so as to defeat the rights of the creditor, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there.¹⁰ It is a legal necessity, and considerations of situs are somewhat artificial.¹¹

E. Jurisdiction.—In General.—No more than tangible things can a debt be appropriated by attachment without process and the power to execute the process.¹²

How Acquired.—If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state, and process be personally served upon him therein, the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that state.¹³ Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues.¹⁴ If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally.¹⁵

Objections to Jurisdiction.—As to objections to the jurisdiction, see ante, "Objections to Jurisdiction," II, L.

F. Service on Garnishee.¹⁶—Seizure of Property.—Where the property in the hands of the garnishee is susceptible of seizure or manual occupation, the service of the writ is made by seizure of the property.¹⁷ And especially is this true where property is shown to the officer and is admitted by the person in possession to be the property of the defendant in the attachment.¹⁸

Service on Individual.—The usual practice is, where there is a garnishee,

9. *Gwin v. Breedlove*, 2 How. 29, 35, 11 L. Ed. 167.

10. **What law governs.**—*Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 715, 43 L. Ed. 1144, cited in *Blackstone v. Miller*, 188 U. S. 189, 205, 47 L. Ed. 439. See the title **CONFLICT OF LAWS**.

11. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 715, 43 L. Ed. 1144.

12. **Jurisdiction.**—*Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 716, 43 L. Ed. 1144.

13. **How jurisdiction acquired.**—*Harris v. Balk*, 198 U. S. 215, 222, 49 L. Ed. 1023; *Louisville, etc., R. Co. v. Deer*, 200 U. S. 176, 178, 50 L. Ed. 426; *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 717, 43 L. Ed. 1144; *Rothschild v. Knight*, 184 U. S. 334, 341, 46 L. Ed. 573, citing *King v. Cross*, 175 U. S. 396, 44 L. Ed. 211.

14. *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439; *Harris v. Balk*, 198 U. S. 215, 222, 49 L. Ed. 1023. See, also, *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 338.

15. *Harris v. Balk*, 198 U. S. 215, 222, 49 L. Ed. 1023.

The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his

creditor, as he was in the state where the debt was contracted. * * * It would be no defense for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished, or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. *Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023.

In *Harris v. Balk*, 198 U. S. 215, 222, 49 L. Ed. 1023, the court said: "We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue."

16. See, generally, the title **SUMMONS AND PROCESS**.

17. **Seizure of Property.**—*Taylor v. Caryl*, 20 How. 583, 598, 15 L. Ed. 1028; *Brashear v. West*, 7 Pet. 608, 621, 8 L. Ed. 801.

18. *Brashear v. West*, 7 Pet. 608, 621, 8 L. Ed. 801.

merely to serve a copy of the writ of attachment on the person named as garnishee, with notice annexed by the officer, that by virtue of the writ of which that is a copy he attached all and singular the goods and chattels of the defendant, in his hands or possession, and summons him as garnishee.¹⁹ Notice to the garnishee of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid.²⁰ A notice to the debtor must be given, and can only be given and enforced where he is. This is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor.²¹

Service on Corporations.—As to service of process on corporations, see the title SUMMONS AND PROCESS.

Defect in Service.—As to defects in service as affecting jurisdiction, see ante, "As Affected by Defects or Irregularities," II, G.

Return.—In garnishment proceedings the return of the officer merely shows in general terms that he has served a copy of the writ of attachment on the person named as garnishee with notice that by virtue of the writ he has attached all and singular the goods and chattels of the defendant, in his hands or possession, and has summoned him as garnishee.²²

G. Appearance and Answer of Garnishee.—Sufficiency.—Where the garnishee is holding claims or securities of the common debtor as security, he is not required to answer in regard thereto.²³

Traverse of Answer.—The statutes in some states provide that the plaintiff may traverse the answer of the garnishee, and that he must give notice of his intention to traverse,²⁴ but where the garnishee by agreement with the plaintiff holds the property in the capacity of receiver with the understanding that he is to dispose of the same and deduct the amount of his own claim from the proceeds, the garnishee thereby releasing his claim to such property, a traverse of the answer becomes unnecessary.²⁵

Conclusiveness.—Where there is an express denial, by the garnishee, setting up an equity, of any property in his hands liable to the attachment, that allegation ought to be presumed to be supported by the local law, applicable to the facts, until the contrary is explicitly established.²⁶ Some statutes provide that the answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in writing that he elects to take issue on his answer.²⁷ Because the failure to traverse the answer of the garnishee is conclusive of his nonliability, in the garnishment proceedings, it is not therefore equally so, as between the plaintiff and defendant, in determining whether the property which has been levied upon under the attachment belonged to the defendant.²⁸

H. Order for Payment or Delivery into Court.—1. GENERAL EFFECT OF ORDER.—The order gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, "You shall not pay to your creditor the money

19. *Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538; *Brashear v. West*, 7 Pet. 608, 621, 8 L. Ed. 801, quoting Sergeant on Attachments. See, also, *Miller v. United States*, 11 Wall. 268, 297, 20 L. Ed. 135.

20. *Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023.

21. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 716, 43 L. Ed. 1144.

22. *Brashear v. West*, 7 Pet. 608, 621, 8 L. Ed. 801, quoting Sergeant on Attachments.

23. *Deacon v. Oliver*, 14 How. 610, 624, 14 L. Ed. 563.

24. **Traverse of answer.**—*Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 43 L. Ed. 623.

25. *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 43 L. Ed. 623.

26. **Conclusiveness of answer.**—*Boyle v. Zacharie*, 6 Pet. 634, 647, 8 L. Ed. 527.

27. *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 91, 43 L. Ed. 623.

28. *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 91, 43 L. Ed. 623.

which you owe him." It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor.²⁹

2. **FAILURE TO RECOGNIZE.**—After notice is served on the garnishee if he pays away the money so as to defeat the rights of the creditor, he will be held liable.³⁰

3. **Modes of Enforcing.**—If the debtor leave the state wherein he was served with notice without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant.³¹

Action by Attaching Officer.—Under the statutes in some jurisdictions the sheriff, under the direction of the court, must collect any debt or chose in action attached by him.³² To enable the attaching officer to collect the debt or chose in action of the attachment debtor, the officer may bring an action in his own name or in that of the defendant against the garnishee.³³ When the execution is executed, against a garnishee, the claim of the attaching creditor upon the defendant in the suit, his original debtor, is satisfied. He has purchased thereby the issues of his garnishment process, for an adequate consideration, and could not, consequently, be called to refund at any future time.³⁴

4. **UNDERTAKING IN LIEU OF PAYMENT.**—By the laws of Virginia, where an absent defendant is sued, and a garnishee is found within the state having funds of the absent debtor in his hands, the court may either suffer the fund to remain in the hands of the garnishee, or be paid over to the attaching creditor, security being given in either case to refund the money upon a final decree.³⁵ Where the garnishee conceals the alleged property, or contests the ownership, liability, etc., the officer would not be bound to take possession or security from the garnishee, unless indemnified by the plaintiff.³⁶

1. **Property Subject to Garnishment.**³⁷—1. **DEBTS IN SUIT.**—On general principles of justice and reason, it would be difficult to satisfy the mind, why money should not be attached in the hands of a debtor, as well after, as before, the person to whom it is due, has sued for it. If justice and reason are not opposed to it, public policy and convenience strongly recommend it.³⁸ But to subject debts of this nature the proceedings in garnishment should be before the court holding jurisdiction of the main action.³⁹

2. **OBLIGATIONS NOT MATURED.**—Debitum in presenti, solvendum in futuro are affected by attachment.⁴⁰

29. **General effect of order.**—North Chicago Rolling Mill Co. v. St. Louis Ore, etc., Co., 152 U. S. 596, 619, 38 L. Ed. 565. See post, "Lien and Priorities," XVI, K.

30. **Failure to recognize order.**—Kennedy v. Brent, 6 Cranch 187, 3 L. Ed. 194.

31. **Modes of enforcing the order.**—Harris v. Balk, 198 U. S. 215, 223, 49 L. Ed. 1023.

32. **Action by attaching officer.**—Cole v. Cunningham, 133 U. S. 107, 115, 33 L. Ed. 538.

33. **Cole v. Cunningham**, 133 U. S. 107, 115, 33 L. Ed. 538.

34. **Execution against garnishee.**—Wanzer v. Truly, 17 How. 584, 587, 15 L. Ed. 216.

35. **Undertaking in lieu of payment.**—Mattingly v. Boyd, 20 How. 128, 15 L. Ed. 845.

36. **Brashear v. West**, 7 Pet. 608, 621, 8 L. Ed. 801. See the title INDEMNITY.

37. As to property subject to attachment, generally, see ante, "Property Subject to Attachment," VI.

38. **Debts in suit.**—McCarty v. Emlen, 2 Dall. 277, 278, 1 L. Ed. 380.

"Many foreigners, resident abroad, enjoy an extensive credit from one class of citizens in this country, on account of the debts which are known to be due to them from another class; and if nothing more were necessary to shelter such foreigners from the effects of an attachment, than to bring suits against their debtors, it is obvious, that the fund which constitutes the principal security of the American trader, might be easily and irretrievably withdrawn." McCarty v. Emlen, 2 Dall. 277, 278, 1 L. Ed. 380.

39. **Wabash R. Co. v. Tourville**, 179 U. S. 322, 327, 45 L. Ed. 210.

40. **Obligations not matured.**—Walker v. Gibbs, 2 Dall. 211, 1 L. Ed. 352.

3. **PROPERTY IN CUSTODIA LEGIS.**—Property in custodia legis is not subject to foreign attachment at the suit of a former defendant.⁴¹

4. **MONEY IN HANDS OF DISTRIBUTING OFFICER.**—So long as money remains in the hands of a disbursing officer, it is as much money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects.⁴² Money in the hands of a purser, although it may be due the seamen, is not liable to an attachment by the creditors of those seamen.⁴³

5. **TRUST FUNDS.**—Funds held in trusts for the benefit of creditors are not subject to garnishment.⁴⁴ But liquidated balance remaining in the hands of trustees after the execution of the trust is subject to garnishment in the hands of the trustee.⁴⁵

6. **PROPERTY PLEDGED.**—A chose in action which has been pledged is not subject to garnishment in the hands of the pledgee to satisfy a demand of another creditor of the pledgor.⁴⁶

7. **SURPLUS ARISING FROM EXECUTION SALE.**—A surplus arising from the sale of the property of a defendant on execution may be attached in his hands.⁴⁷

8. **PROPERTY FRAUDULENTLY CONVEYED.**—As to the effect of fraud on the right of a creditor to resort to garnishment, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

9. **EQUITABLE DEMANDS, GENERALLY.**—The supreme court of Alabama has decided that merely equitable demands or rights of action, not involving a debt or assumpsit, are not the subject of the garnishee process.⁴⁸

10. **DEBTS EVIDENCED BY NEGOTIABLE PAPER.**—A bill of exchange which has been placed in the hands of trustees, with instructions to settle certain obligations therewith, is not subject to garnishment by the creditors of the drawer of such bill.⁴⁹ Foreign attachment cannot be sustained where it issued against a note indorsed in blank, while the note was in the possession of the defendant in the attachment, after such service, passed the note to a third person, for a full

41. **Property in custodia legis.**—See ante, "Property in Custodia Legis," VI, B. Ross v. Clarke, 1 Dall. 354, 1 L. Ed. 173.

C., the defendant, had obtained judgment upon a scire facias against R., the plaintiff, as special bail of one M; and a stay of proceedings was entered, until the ensuing term, when R. was to pay the money recovered into court, if, before that time, the original debtor had not satisfied the debt. The stay being elapsed, R. paid the money, but upon an apprehension that payment might have been made by M., though no accounts were received of it, he immediately issued this foreign attachment against C., and laid it in the hands of the prothonotary. Held, that the money is to be considered in the same state, as if it had been paid into the hands of the sheriff. If a proceeding of this kind were allowed, there could be no end to suits; that the foreign attachment has issued irregularly, and ought to be quashed. Ross v. Clarke, 1 Dall. 354, 1 L. Ed. 173.

42. **Money in hands of public officer.**—Buchanan v. Alexander, 4 How. 20, 11 L. Ed. 857.

43. Buchanan v. Alexander, 4 How. 20, 11 L. Ed. 857.

44. **Trust funds.**—See the title TRUSTS

AND TRUSTEES. Sharpless v. Welsh, 4 Dall. 279, 1 L. Ed. 833.

45. **Balance in trust funds.**—McLarghlin v. Swann, 18 How. 217, 220, 15 L. Ed. 357.

The attachment law of Maryland allows an attachment by way of execution to be issued upon a judgment and levied upon the credits (inter alia) of the defendant. Where an attachment of this nature was laid in the hands of garnishees who were trustees, and it appeared that, after performing the trust, there was a balance in their hands due to the defendant, the attachment will bind this balance. The defendant might have brought an action to recover it, and wherever he can do this, the fund is liable to be attached. McLaughlin v. Swann, 18 How. 217, 15 L. Ed. 357.

46. **Property pledged.**—See the title PLEDGE AND COLLATERAL SECURITY. Deacon v. Oliver, 14 How. 610, 14 L. Ed. 563.

47. **Surplus arising from execution sale.**—Gumbel v. Pitkin, 124 U. S. 131, 156, 31 L. Ed. 374.

48. **Equitable demands.**—Williams v. Hill, 19 How. 246, 252, 15 L. Ed. 570.

49. **Debts evidenced by negotiable paper.**—See, generally, the title BILLS,

consideration, without notice.⁵⁰ Money due upon a negotiable instrument in the light of a foreign bill of exchange cannot be attachment before it is payable.⁵¹

11. **PARTNERSHIP CREDITS.**—As to garnishment in actions in which partnerships are involved, see the title **PARTNERSHIP**.

12. **CORPORATE STOCK.**—As to garnishment of corporate stock, see the title **STOCK AND STOCKHOLDERS**.

J. Against Whom Garnishment May Issue.—Public Officer.—When, in the exercise of jurisdiction by the circuit court in the determination of the question raised by a petition of intervention, the nature of the marshal's title and possession comes to be inquired into, it was made apparent that he holds the property illegally as a trespasser, and in that forum can be treated as holding it in a private and not an official capacity. It is subject, therefore, to the consequence of a notice served upon the marshal as garnishee. It is held by the marshal as if it had been a surplus arising from the sale of the property of a defendant on execution, which, as is well established, may be attached in his hands.⁵² It appearing as a fact that at the time of a notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual, it is competent for the court, and having the power, it is its duty, to hold the marshal liable as garnishee.⁵³

Persons Temporarily within the Jurisdiction.—As to garnishment of persons temporarily within the jurisdiction, see ante, "Jurisdiction," II.

K. Lien and Priorities—1. **IN GENERAL.**—The goods and chattels of the defendant in the attachment in the hands of the garnishee are, after service of the writ, bound by such writ and in the officer's power to answer and abide the judgment of the court, unless the person holding the same shall give security,⁵⁴ the service of an attachment, though it is but a notice, binding the debt or the stock in the hands of the garnishee, from the time of the service, and thenceforward it is potentially in "gremio legis."⁵⁵

2. **NATURE OF RIGHTS ACQUIRED.**—The legal operation and effect of garnishment proceedings is only to impound that which is legally and equitably due from the garnishee after the adjustment of the claims between the latter and the principal debtor, and place it beyond the control of the debtor and subject to collection for the benefit of the attachment creditor. The garnishment proceedings do not have the effect and operation of an assignment or transfer to the garnishor of the due indebtedness from the garnishee so as to make the gar-

NOTES AND CHECKS. *Sharpless v. Welsh*, 4 Dall. 279, 1 L. Ed. 833.

50. *Ludlow v. Bingham*, 4 Dall. 47, 1 L. Ed. 736.

51. *Ludlow v. Bingham*, 4 Dall. 47, 62, 1 L. Ed. 736.

In a point of reason, policy and usage, as well as upon principles of convenience and equity, we think, it would be dangerous and wrong to introduce and establish a precedent of the kind. To adjudge that a note, which passes from hand to hand as cash; on which the holder may institute a suit in his own name; which has all the properties of a bank note, payable to bearer; which would be embraced by a bequest of money; and which is actually in circulation in another state; should be affected in this way, by a foreign attachment, would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments. *Ludlow v. Bingham*, 4 Dall. 47, 62, 1 L. Ed. 736.

52. **Public officers.**—See ante, "Pur-

pose," XVI, C. *Gumbel v. Pitkin*, 124 U. S. 131, 156, 31 L. Ed. 374.

53. *Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374.

As to holding the officer as garnishee as to any surplus in his hands after payment of prior claim, see ante, "Limitation of the General Rule," II, C, 2.

54. **Lien.**—*Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023; *United States v. Robertson*, 5 Pet. 641, 664, 8 L. Ed. 257; *Beaston v. Farmers' Bank*, 12 Pet. 102, 136, 9 L. Ed. 1017; *Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. Ed. 931; *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Taylor v. Carryl*, 20 How. 583, 598, 15 L. Ed. 1028; *North Chicago Rolling Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 617, 38 L. Ed. 565.

As to the undertaking in lieu of payment or delivery, see post, "Undertaking in Lieu of Payment," XVI, H, 4.

55. *Miller v. United States*, 11 Wall. 268, 297, 20 L. Ed. 135.

nishor a creditor of the garnishee.⁵⁶ The rights of the garnishor do not rise above or extend beyond those of his debtor; that the garnishee shall not by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor and can assert only the rights of the latter.⁵⁷ The garnishment invests the plaintiff with the same right of action against the garnishee which belonged to the defendant.⁵⁸

3. AS AGAINST CLAIMS BY THE UNITED STATES.—As to priorities between garnishment proceedings and claims by the United States, see the title UNITED STATES.

4. AS AGAINST CLAIM FOR USE AND OCCUPATION.—Where the garnishee was holding funds as trustee under a mortgage of a company, which company had leased property from another company, the lessor having assigned the lease to secure mortgage bonds, the garnishee operating the property temporarily in connection with the property of the lessee, but expressly disclaiming to do so under the lease; it was held that the funds in the hands of the garnishee should be paid to the judgment creditor of the lessor rather than to an assignee of the lessee.⁵⁹

5. AS AGAINST CLAIMS OF GARNISHEE.—As to priority of claims between the attaching creditor and the garnishee, see post, "Defenses Available to Garnishee," XVI, M.

6. AS AGAINST ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.—A prior assignment for the benefit of creditors is superior to a garnishment for the funds held by the assignee.⁶⁰

7. AS AGAINST FRAUDULENT TRANSFER.—As to the effect of fraudulent transfer on garnishment proceedings, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

8. AS AGAINST LIENS ACQUIRED SUBSEQUENT TO ATTACHMENT.—A bill filed in the court of chancery by another creditor against the garnishees and the defendant, filed after the laying of the attachment, and the opinion and decree of the chancellor, thereon, do not change the rights of the plaintiff in the attachment, the decree being passed without prejudice to his rights.⁶¹

L. Custody and Control of Effects.—The writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money

56. Nature of rights acquired.—See post, "Defenses Available to Garnishee," XVI, M. *North Chicago Rolling Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 617, 38 L. Ed. 565.

57. *North Chicago Rolling Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 619, 38 L. Ed. 565.

A garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit. *Schuler v. Israel*, 120 U. S. 506, 510, 30 L. Ed. 707.

58. *McLaughlin v. Swann*, 18 How. 217, 23, 15 L. Ed. 357.

59. As against claim for use and occupation.—*Milwaukee, etc., R. Co. v. Brooks Locomotive Works*, 121 U. S. 430, 30 L. Ed. 995.

60. As against assignments for the benefit of creditors.—*Sharpless v. Welsh*, 4 Dall. 279, 1 L. Ed. 833; *Spring v. South*

Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614.

Where, under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees under the assignment are insufficient to pay the amount of the just debts and dividends due to the assignees, the established doctrine in Massachusetts is, that the assignees cannot be holden as trustees of the the debtor, to the creditor who is the plaintiff in an attachment, so as to be chargeable to him in the suit. Even if the assignment were held to be constructively fraudulent in point of law, they would be entitled to retain their own bona fide debts; for as to those, they stand upon equal grounds with any other creditors. *Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559.

61. As against liens acquired subsequent to attachment.—*McLaughlin v. Swann*, 18 How. 217, 15 L. Ed. 357.

may remain in the actual custody of one not an officer of the court.⁶² If under this modern practice, the effects are understood to be confided by the law to the garnishee; still he must keep them safely; and he is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.⁶⁴ And if the officer leaves the effects in possession of the garnishee, without security, he is himself surety for their forthcoming; and in the meantime, he retains the power to remove them. The possession of the garnishee must be virtually his possession; and thus the power of the officer over the attached effects which the law requires would be preserved.⁶⁵

M. Defenses Available to Garnishee—1. **GENERAL STATEMENT.**—A garnishee in attachment has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account.⁶⁶

2. **AT LAW.**—At law the garnishee is entitled to make legal defenses,⁶⁷ and in some jurisdiction it has been held that only legal defenses can be made to the attachment.⁶⁸

3. **IN EQUITY.**—The general rule is that the garnishee's equities must be sought in a court of chancery.⁶⁹ In a state where the legal and equitable jurisdictions are distinct, and in a court of the United States, having full equity powers, a garnishee should stand as nearly as possible in the same position he would have occupied if sued at law by his creditor; and if he, or any third person, has equitable rights to the fund in his hands, they should be asserted in that jurisdiction which alone can suitably examine and completely protect them.⁷⁰

4. **SET-OFF, RECOUPMENT AND COUNTERCLAIM.**—**General Statement.**—The garnishee may properly avail himself of all claims fairly arising out of contracts with the principal debtor which were in existence when the attachment was commenced, and under or out of which his claim against the principal debtor arises.⁷¹

62. Custody and control of effects.—*Brashear v. West*, 7 Pet. 608, 622, 8 L. Ed. 801; *Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. Ed. 931; *Mattingly v. Boyd*, 20 How. 128, 15 L. Ed. 845.

64. Brashear v. West, 7 Pet. 608, 622, 8 L. Ed. 801.

65. Brashear v. West, 7 Pet. 608, 621, 8 L. Ed. 801.

66. Defenses available to garnishee.—*Schuler v. Israel*, 120 U. S. 506, 510, 30 L. Ed. 707; *McLaughlin v. Swann*, 18 How. 217, 15 L. Ed. 357; *Wanzer v. Truly*, 17 How. 584, 587, 15 L. Ed. 216; *Young v. Clarendon Tp.*, 132 U. S. 340, 346, 33 L. Ed. 356.

"Whatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit thereof as against the attaching creditor." *North Chicago Rolling Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 622, 38 L. Ed. 565.

Thus, where the garnishee files a bill in chancery, alleging the insolvency of the attachment debtor who is also debtor to the garnishee, the latter can set up all the defenses which he would have in either a court of law or a court of equity. *Schuler v. Israel*, 120 U. S. 506, 510, 30 L. Ed. 707.

Where the principal debtor has lost his rights through laches, the garnishee may set up this fact in defense. *Young v. Clarendon Tp.*, 132 U. S. 340, 346, 33 L. Ed. 356.

67. Defenses at law.—*Wanzer v. Truly*, 17 How. 584, 586, 15 L. Ed. 216; *McLaughlin v. Swann*, 18 How. 217, 15 L. Ed. 357.

68. Wanzer v. Truly, 17 How. 584, 586, 15 L. Ed. 216. See *McLaughlin v. Swann*, 18 How. 217, 223, 15 L. Ed. 357.

69. Defenses in equity.—*Wanzer v. Truly*, 17 How. 584, 586, 15 L. Ed. 216; *McLaughlin v. Swann*, 18 How. 217, 222, 15 L. Ed. 357.

70. McLaughlin v. Swann, 18 How. 217, 223, 15 L. Ed. 357.

The statutes of Mississippi do not assign any extraordinary effect to the judgment condemning the debt in the hands of the garnishee, nor do they enlarge the rights of the attaching creditor beyond those of any other assignee of a chose in action. *Wanzer v. Truly*, 17 How. 584, 587, 15 L. Ed. 216.

71. Set-off, recoupment and counterclaim.—See, generally, the title **SET-OFF, RECOUPMENT AND COUNTERCLAIM**. *North Chicago Rolling Mill Co. v. St. Louis Ore. etc., Co.*, 152 U. S. 596, 620, 38 L. Ed. 565; *United States v. Robertson*, 5 Pet. 641, 664, 8 L. Ed. 257.

Where a promissory note was given, in Mississippi, for the purchase of slaves, the title of the vendor of which afterwards proved to be defective, but in the meantime a foreign creditor of the vendor had laid an attachment in the hands of the vendee, for the amount of the promissory note, and obtained judgment

Obligation Not Matured.—The fact that the debtor is indebted to the garnishee on obligations not yet due may be set up by the garnishee as a defense to the garnishment proceedings.⁷² Where the amount is unliquidated, it cannot properly be set off in the attachment proceedings at law.⁷³

Acquisition of Claims after Service of Writ.—The garnishee may not, after service of the writ, by his own action acquire set-offs or counterclaims against the principal debtor to the prejudice of the attaching creditor.⁷⁴ Where the garnishee has been held liable as an indorser after the death of the makers of negotiable paper, he is not entitled to set off the payment of the obligation thus incurred as against claims against himself as garnishee.⁷⁵ Where the attachment debtor is insolvent at the time of the service of the garnishee process, the garnishee has the right to appropriate any moneys in its hands to the security and payment of obligations due him from such debts, whether due or not.⁷⁶

Where Assignment for the Benefit of Creditors Is Made.—As to the right of assignees under an assignment for the benefit of creditors to retain funds in their hands as against a garnishment, see ante, "As against Assignments for the Benefit of Creditors," XVI, K, 6.

Retention of Realty to Satisfy Advancements.—The garnishee, having real property under his control by virtue of a deed of trust, cannot retain it for the purpose of reimbursing himself for advances made to the judgment debtor after the execution of the deed in execution of a parol contract between them.⁷⁷

5. **PAYMENT.**—As to payment of his debt by the garnishee to the attachment debtor as a defense to the claim of the attaching creditor, see, generally, the title **PAYMENT**. See, also, ante, "Order for Payment or Delivery into Court," XVI, H.

6. **WANT OF JURISDICTION.**—Where foreign attachment in another state has been brought to judgment against a dissolved corporation and a garnishee thereof, such garnishee cannot set up as a defense that the court dissolving the corporation was without jurisdiction to do so.⁷⁸

7. **MATTERS WHICH MIGHT HAVE BEEN PLEADED BY PRINCIPAL DEFENDANT.**—The garnishee may represent the rights of the attachment debtor in his own

against him as garnishee, the purchaser of the slaves should be credited upon the judgment against him, with the value of the slaves at the time when they were taken away from him, and the damages, costs, and expenses actually paid upon the decrees of the court of chancery in Mississippi. *Wanzer v. Truly*, 17 How. 584, 15 L. Ed. 216.

"The insolvency and nonresidence of the principal debtor, to whom the garnishee is indebted in a certain, definite amount, and against whom he has a valid claim for unliquidated damages growing out of a breach of contract between them, in existence at the commencement of the garnishment proceedings, is a good ground for the exercise of equitable jurisdiction after an order, or judgment at law, declaring the sum due the principal debtor applicable to the payment of the garnishor, to stay the enforcement of such order or judgment until the unliquidated damages due the garnishee can be ascertained and set off against the amount certain owing by him to the principal debtor." *North Chicago Rolling Mill Co. v. St. Louis Ore, etc., Co.*, 152 U. S. 596, 597, 38 L. Ed. 565. See, generally, the titles **INJUNCTIONS; JUDGMENTS AND DECREES**.

72. **Obligation not matured.**—*Schuler v.*

Israel, 120 U. S. 506, 510, 30 L. Ed. 707.

73. **Unliquidated amount.**—*North Chicago Rolling Mill Co. v. St. Louis Ore, etc., Co.*, 152 U. S. 596, 615, 38 L. Ed. 565.

74. **Acquisition of claim after service of writ.**—*North Chicago Rolling Mill Co. v. St. Louis Ore, etc., Co.*, 152 U. S. 596, 622, 38 L. Ed. 565.

75. *Cramond v. Bank*, 4 Dall. 291, 1 L. Ed. 838.

In August, 1793, D. C. and A. C. indorsed a note made by H. D., which note was discounted at the banks of the defendants. Before the note became due, the maker, and both the indorsers, died, and notice of nonpayment was duly given to the executors of the surviving partner, D. C. In April, 1793, A. C. and D. C. garnished property of J. B. in the hands of the defendants. It was held that the defendants in the action were not entitled to set off against the demands of the plaintiff the balance of the note remaining unpaid. *Cramond v. Bank*, 4 Dall. 291, 1 L. Ed. 838.

76. *Schuler v. Israel*, 120 U. S. 506, 510, 30 L. Ed. 707.

77. *Williams v. Hill*, 19 How. 246, 15 L. Ed. 570.

78. **Want of jurisdiction.**—*Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307.

defense; for, being liable in law to the attachment debtor, in protecting his own interests it is proper for him to assert the rights of such debtor.⁷⁹

8. **FAILURE OF CONSIDERATION.**—The garnishee may set up as a defense to the claim against him, failure of consideration as between him and his creditor, the defendant in the principal action.⁸⁰

9. **EVIDENCE TO PROVE BONA FIDES OF CLAIM.**—Where the garnishee sets up a claim to the funds in his hands, he must prove the bona fides of his claim, if it is derived from the judgment debtor after the origin of the creditor's demand.⁸¹

N. Equities of Third Persons.—If the facts only show outstanding equities, in third persons, of such a character that a court of law cannot take notice of them, they must be availed of, if valid, by a bill brought by such third persons against the garnishor or by a bill of interpleader by the garnishees.⁸²

O. Limitation of Actions.—As to limitation of actions in garnishment proceedings, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION.**

P. Enforcement of Obligation of Garnishee.—1. **JURISDICTION.**—The obligation of the garnishee can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor.⁸³

2. **COMPENSATION OF GARNISHEE.**—The garnishee is entitled to a reasonable sum for the trouble which he may have taken in defending suits against him as garnishee.⁸⁴

3. **LIABILITY OF GARNISHEE FOR INTEREST.**—As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times.⁸⁵

4. **PROTECTION OF RIGHTS OF GARNISHEE.**—It is the duty of the court wherein the suit against the garnishee by his creditor may be pending, upon a proper representation of the facts, to take measures that no injustice shall grow out of the double vexation. The court should ascertain if the attachment is prosecuted for a bona fide debt, without collusion with the debtor, for an amount corresponding to the debt, that no mischief to the security of the debt will follow from a delay, and such other facts as may be necessary for the protection and security of the creditor. An order of the court to suspend, or to delay the creditor's suit, or his execution in whole or for a part, could be then made upon such conditions as would do no wrong to any one.⁸⁶

5. **JUDGMENT.**—The judgment condemning the amount in the bonds of the gar-

79. **Matters which might have been pleaded by principal defendant.**—*Milwaukee, etc., R. Co. v. Brooks Locomotive Works*, 121 U. S. 430, 440, 30 L. Ed. 995.

80. **Failure of consideration.**—"There is no principle upon which a court of chancery is required to imply that a proceeding by a defendant, through the intervention of his creditor, to subject a legal demand, unconnected with any equity, a demand which equity would not permit him to collect in his own name, in consequence of the failure of consideration, shall divest the garnishee of equitable claims and defenses." *Wanzer v. Truly*, 17 How. 584, 587, 15 L. Ed. 216.

81. **Evidence to prove bona fides of claim.**—*Williams v. Hill*, 19 How. 246, 15 L. Ed. 570.

The principle adopted by the courts of Alabama is that the adverse claimant for property or effects seized at the suit of a creditor by attachment or execution, must prove the bona fides of his claim, if it is derived from the debtor after the origin of the creditor's demand; and the declarations and acknowledgments of the

debtor will not be received to support the title. The recitals in a deed or mortgage executed by him, or admissions made at the time of its execution, will not be received. Nor is the consideration of a note in favor of the claimant shown by the production of the note itself. *Williams v. Hill*, 19 How. 246, 251, 15 L. Ed. 570.

82. **Equities of third persons.**—See ante, "Intervention," XII. *McLaughlin v. Swann*, 18 How. 217, 223, 15 L. Ed. 357. See, also, ante, "Evidence to Prove Bona Fides of Claim," XVI, M. 9.

83. **Jurisdiction to enforce obligation of garnishee.**—*Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023.

84. **Compensation of garnishee.**—*Mattingly v. Boyd*, 20 How. 128, 15 L. Ed. 845.

85. **Liability of garnishee for interest.**—See, generally, the title **INTEREST.** *Mattingly v. Boyd*, 20 How. 128, 132, 15 L. Ed. 845.

86. **Protection of rights of garnishee.**—*Early v. Rogers*, 16 How. 599, 609, 14 L. Ed. 1074.

nishee becomes a personal judgment against him.⁸⁷

Q. Garnishment as Satisfaction of Claim in Main Action.—The claim of the attaching creditor against the defendant is only extinguished by a satisfaction of his demand by the garnishee.⁸⁸

R. Garnishment as a Defense—1. **PROPRIETY OF ALLOWING.**—The practice of the states of the Union is not uniform as to how proceedings in garnishment may be availed of in defense, whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution, but it is obvious and necessary justice that such proceedings should be allowed as a defense in some way.⁸⁹

2. **AS BETWEEN DEFENDANT AND GARNISHEE.**—**Service of Writ.**—The mere levy of an attachment upon an existing debt, by a creditor, does not authorize the garnishee to claim an exemption from the pursuit of his creditor. The attachment acts make no such provision for his benefit.⁹⁰

Pendency of Suit.—Whilst the suit is pending, the money must be considered as in the custody of the court, and not liable to be sued for by the absent debtor against his garnishee.⁹¹

Judgment or Satisfaction.—The judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.⁹² An attachment commenced, and conducted to a conclusion, before the institution of a suit against the debtor in a court of the United States, may set up as a defense to the suit; and the defendant will be protected pro tanto, under a recovery had by virtue of the attachment.⁹³

Effect of Negligence of Garnishee.—If the garnishee is guilty of negligence in the attachment proceeding, to the damage of the defendant, he ought not to be permitted to set up the judgment as a defense.⁹⁴

Pleading in Abatement.—As to pleading garnishment proceedings in abatement, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 18.

Effect on Garnishee's Liability for Interest.—As a general rule, a garnishee is not liable for interest, while he is restrained from the payment of his debt, by the legal operation of a foreign attachment;⁹⁵ but if there is any fraud or collusion, or if there is any unreasonable delay occasioned by the conduct of the garnishee, such cases will form exceptions to the general rule.⁹⁶

3. **AS A DEFENSE TO ACTIONS ON APPEAL BONDS.**—As to garnishment as a defense to actions on appeal bonds, see the title **APPEAL AND ERROR**, vol. 1, p. 333.

S. Wrongful Sale of Property.—If the principal creditor consents to a sale by the garnishee of the property in dispute, he has, by his own act, aided the

^{87.} **Judgment.**—*Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023.

^{88.} **Garnishment as satisfaction of claim in main action.**—*Wanzer v. Truly*, 17 How. 584, 586, 15 L. Ed. 216.

^{89.} **Garnishment as a defense.**—*Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 713, 43 L. Ed. 1144.

^{90.} **Mere service of writ.**—*Early v. Rogers*, 16 How. 599, 609, 14 L. Ed. 1074.

^{91.} **Pendency of suit.**—*Mattingly v. Boyd*, 20 How. 128, 15 L. Ed. 845. See, also, *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95.

^{92.} **Judgment or satisfaction.**—*Harris v. Balk*, 198 U. S. 215, 223, 49 L. Ed. 1023.

^{93.} *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95.

^{94.} **Effect of negligence of garnishee.**—*Harris v. Balk*, 198 U. S. 215, 227, 49 L.

Ed. 1023. See ante, "Notice," XIII.

Generally, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice. *Harris v. Balk*, 198 U. S. 215, 226, 49 L. Ed. 1023.

^{95.} **Effect on garnishee's liability for interest.**—See, generally, the title **INTEREST**. *Fitzgerald v. Caldwell*, 2 Dall. 215, 1 L. Ed. 354. See, also, ante, "Liability of Garnishee for Interest," XVI, P. 3.

^{96.} *Fitzgerald v. Caldwell*, 2 Dall. 215, 1 L. Ed. 354.

garnishee in violating the confidence reposed in him by the law and the duty growing out of the confidence, and he is legally responsible for any loss sustained by the debtor as a result of such sale.⁹⁷

T. Costs.—If the plaintiff in a foreign attachment does not prove more in the hands of the garnishee, than he admits by his plea to the scire facias, or his answer upon interrogatories, the plaintiff must pay the costs. But if more is proved, then the costs shall be paid by the garnishee.⁹⁸

ATTAINDER.—As to bills of attainder, see the title CONSTITUTIONAL LAW.

ATTEMPTS AND SOLICITATIONS TO COMMIT CRIME.

CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63; CRIMINAL LAW; INSANITY; INTOXICATING LIQUORS.

As to attempts or solicitations to commit particular crimes, see the titles ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 195; ASSAULT AND BATTERY, ante, p. 546; BRIBERY; BURGLARY AND HOUSEBREAKING; ESCAPE; GAMING; HOMICIDE; LARCENY; MAYHEM; POISONS AND POISONING; RAPE; ROBBERY; SUICIDE; TREASON.

Definition of Attempt.—An attempt is the prosecution of an act which falls short of the thing intended.¹

Pleading.—It is laid down as a general rule that in an indictment for soliciting or inciting to the commission of a crime, it is not necessary to state the particulars of the incitement or solicitation.²

Failure to Charge Attempt.—Under an indictment charging an offense, the defendant may be found guilty of an attempt to commit the offense provided the attempt by itself is a separate offense.³

ATTENDANCE.—See the titles JURY; WITNESSES.

ATTESTATION.—See the title ACKNOWLEDGMENTS, vol. 1, p. 76, and the references given.

97. Wrongful sale of property.—Brash-ear v. West, 7 Pet. 608, 8 L. Ed. 801.

98. Costs.—Walker v. Wallace, 2 Dall. 113, 1 L. Ed. 311.

As to costs, generally, see the title COSTS.

1. 1 Bish. Crim. Law, § 728; Bouvier's Law Dict., vol. 1, p. 190.

To attempt to do an act does not imply a completion of the act, or any definite progress towards it; any effort or endeavor to effect it, will satisfy the terms of the law. United States v. Quincy, 6 Pet. 445, 8 L. Ed. 458.

An act immediately and directly tending to the execution of the principal crime is an attempt to commit the crime. United States v. Worrall, 2 Dall. 384, 1 L. Ed. 426.

Attempt to enter blockaded port.—Per-

sisting in an intention to enter a blockaded port, after warning, is not attempting to enter it. Fitzsimmons v. Newport Ins. Co., 4 Cranch 185, 2 L. Ed. 591.

"Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade, from the departure of the vessel." Fitzsimmons v. Newport Ins. Co., 4 Cranch 185, 198, 2 L. Ed. 591.

2. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; Coffin v. United States, 156 U. S. 432, 448, 39 L. Ed. 481.

3. **Failure to charge attempt.**—Section 1035, Rev. Stat.; Wallace v. United States, 162 U. S. 466, 476, 40 L. Ed. 1039.

ATTORNEY AND CLIENT.

BY S. BLAIR FISHER.

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I. Definitions and Distinctions.

An attorney at law is "an advocate, counsel, official agent employed in preparing, managing, and trying cases in the courts. An officer in a court of justice, who is employed by a party in a cause to manage the same for him."¹

An attorney in fact is a private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character. This authority is conferred by an instrument in writing, called a "letter of attorney," or more commonly a "power of attorney."²

A client is "a person who employs or retains an attorney or counsellor, to appear for him in courts, advise, assist and defend him in legal proceedings, and to act for him in any legal business."³

Distinction between Attorney or Solicitor and Counsel.—The distinction between attorney or solicitor and counsel is practically abolished in nearly all the states in this country. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot well be distinguished.⁴ By an early rule of the supreme court of the United States, however,

1. Attorney at law.—Bl. L. Dict., tit., Attorney at Law.

"It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import." Per Miller, J., diss. in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

"Persons acting professionally in legal formalities, negotiations, or proceedings

by the warrant or authority of their clients, may be regarded as attorneys at law within the meaning of that designation as used in this country." *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

2. Attorney in fact.—Bl. L. Dict., tit., Attorney in Fact. See the title **POWERS**.

3. Client.—Bl. L. Dict., tit., Client.

4. Abolition of distinction between attorney or solicitor, and counsel.—In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

it was ordered that counsellors should not practice as attorneys, nor attorneys as counsellors in such court,⁵ but, upon motion, transfer might be made from one roll to another.⁶

II. Admission.

A. Eligibility.—Right to Practice in State Courts Not a Privilege or Immunity of Citizen of United States.—It has been held that the right to practice law in the state courts is not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers that was not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.⁷

Eligibility of Females.—The question as to whether women are to be admitted to practice law in a state court under provisions of a state statute as to who may practice in such courts is for the determination of the supreme court of that state.⁸

5. Counsellors forbidden to practice as attorneys, etc.—Rules of Supreme Court Est. Feb. Term 1790, 2 Dall. 399.

6. Transfer of attorney of supreme court to roll of counsellors.—In *Ex parte Hallowell*, 3 Dall. 410, 1 L. Ed. 658, Mr. Hallowell had been admitted originally as an attorney of the supreme court, but upon motion his name was allowed to be taken from the roll of attorneys and placed on the list of counsellors, and he was qualified *de novo* as counsellor.

7. Not a privilege or immunity of citizen of United States.—In *re Lockwood*, 154 U. S. 116, 38 L. Ed. 929.

"The fourteenth amendment declares that citizens of the United States are citizens of the state within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the state of Illinois. We do not here mean to say that there may not be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a state as defined by the first section of the fourteenth amendment. In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state of a person who possesses the requisite learning and character is one of those which a state may not deny. In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. But the right to

admission to practice in the courts of a state is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any state, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the state and federal courts, who were not citizens of the United States or of any state. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a state, it would relate to citizenship of the state, and as to federal courts, it would relate to citizenship of the United States. The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license." *Bradwell v. Illinois*, 16 Wall. 130, 21 L. Ed. 442.

8. Eligibility of females.—As to whether the word "person," as used in the Virginia statute providing who may practice in the courts of that state, is confined to males, and whether women are admitted to practice in that state, is to be determined by the supreme court of Virginia. In *re Lockwood*, 154 U. S. 116, 38 L. Ed. 929.

The supreme court of Illinois having refused to grant to a woman a license to practice law in the courts of that state, on the ground that females are not eligible under the laws of that state; held, that such a decision violates no provision of

B. Qualifications for Admission—1. IN GENERAL.—Power of Court to Determine.—By the rules and practice of common-law courts, it rests exclusively with the court to determine who is qualified to become or continue one of its officers, as an attorney and counsellor,⁹ as well as for what cause he ought to be removed,¹⁰ and the admission or exclusion of parties applying for admission to practice as attorneys is the exercise of judicial and not of a mere ministerial power.¹¹

The legislature may, however, undoubtedly prescribe qualifications for the office, to which the attorney must conform, as it may, when it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.¹² It would seem however, that even where qualifications for admission and grounds for removal are prescribed in general terms by statute, it will still rest with the court to determine as to the existence of such qualification for admission or grounds for removal.¹³

2. REQUIREMENTS AS TO LEGAL LEARNING AND PRIVATE CHARACTER.—Persons desiring admission to practice as attorneys and counsellors must give satisfactory evidence that they possess sufficient legal learning,¹⁴ and that their private character is fair.¹⁵

3. MANNER OF DETERMINING.—In General.—It has been the general practice in this country to obtain evidence as to the qualification of applicants for admission to the bar by an examination of the parties.¹⁶

In the United States supreme court the fact of admission to the bar in the highest court of the states to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning,¹⁷ and the statement of counsel moving their admis-

the federal constitution. *Bradwell v. Illinois*, 16 Wall. 130, 21 L. Ed. 442. See, also, *In re Lockwood*, 154 U. S. 116, 38 L. Ed. 929.

9. Power of court to determine.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

"By the judiciary act of 1789, the supreme court has power to make rules and decide upon the qualifications of attorneys." Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

10. Cause for removal.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

11. Exercise of judicial power.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. "Both the admission and the removal of attorneys are judicial acts. It has been so decided in repeated instances. It was declared in Ex parte Secombe, 19 How. 9, 15 L. Ed. 565, and was affirmed in Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285. See the title JUDGES.

Power regulated by sound judicial discretion.—This power is regulated, however, by a sound and just judicial discretion—guarding the rights and independence of the bar as well as the dignity and authority of the court. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

12. Power of legislature to prescribe qualifications.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366, in which it is held, however, that the admitted power of congress to prescribe qualifications for the

office of attorney and counsellor in the federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the constitution. See the title CONSTITUTIONAL LAW.

The local law of the territory of Minnesota has regulated the relation between courts and attorneys and counsellors, but has not essentially changed the common-law principle. Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

13. Ex parte Secombe, 19 How. 9, 15 L. Ed. 565. See post, "Exercise of Power a Judicial Act," XIII, B, 2.

14. Possession of legal learning.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. And see dissenting opinion of Field, J., in Ex parte Wall, 107 U. S. 265, 303, 27 L. Ed. 552.

"Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for sureties." Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205.

15. Fair private character.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205. And see dissenting opinion of Field, J., in Ex parte Wall, 107 U. S. 265, 303, 27 L. Ed. 552.

Effect of disbarment by one court on right to admission.—See post, "Manner of Determining," II, B, 3.

16. Examination of applicants.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

17. Admission to state court as evidence

sion is regarded as sufficient evidence that their private and professional character is fair.¹⁸

C. Order of Admission.—The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein.¹⁹ From its entry the parties become officers of the court, and are responsible to it for professional misconduct.²⁰

III. Oath.

Oath of Officer.—After his admission to the bar the attorney is usually required, both in the United States courts and the state courts, to take a prescribed oath or affirmation of office.²¹

Test Oath.—It has been held that statutes requiring that those persons desiring admission to the bar should take oath that they had not been disloyal to the United States, voluntarily borne arms against, or voluntarily given aid to persons engaged in hostilities against such government, etc., are unconstitutional.²²

ing legal learning.—Rule 2 of supreme court rules, revised and corrected, December term, 1858. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

Effect of striking from roll of United States district court for contempt.—That a counsellor practising in the highest court of the state of New York, in which he resides, had been stricken from the roll of counsellors of the district court of the United States for the northern district of New York, by the order of the judge of that court, for a contempt, does not authorize the supreme court to refuse his admission as a counsellor of such supreme court. This court does not consider the circumstances upon which the order of the district judge was given within its cognizance; or that it is authorized to punish for a contempt, which may have been committed in the district court of the northern district of New York. Ex parte Tillinghast, 4 Pet. 108, 7 L. Ed. 799.

“The court has had under its consideration the application of Mr. Tillinghast for admission to this bar. The court finds that he comes within the rules established by this court. The circumstances of his having been stricken off the roll of counsellors of the district court of the northern district of New York, by the order of the judge of that court, for a contempt, is one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish here for contempts which may have been committed in that court. When, on a former occasion, a mandamus was applied for to restore Mr. Tillinghast to the roll of counsellors of the district court, this court refused to interfere with the matter; not considering the same within their cognizance. The rules of this court having been in every respect complied with, Mr. Tillinghast must be admitted a counsellor of this

court.” Ex parte Tillinghast, 4 Pet. 108, 7 L. Ed. 799.

18. Statement of counsel as showing good character.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

19. Order of admission.—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205.

20. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205.

21. Oath of office.—Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065.

In the United States supreme court the attorney or counsellor is required to take the following oath or affirmation, viz: “I do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the constitution of the United States.” Rule 2 of the Rules of the Supreme Court of the United States, Established February 1790, 2 Dall. 399; Rule 2 of same rules as revised and corrected at December term, 1858, 21 How. V.

In Minnesota, the attorney and counsellor, as part of his official oath swears to conduct himself with fidelity to the court. Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

22. Test oaths held unconstitutional.—Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356.

The act of congress of January 24th, 1865, providing that after its passage no person shall be admitted as an attorney and counsellor to the bar of the supreme court, and, after March 4th, 1865, to the bar of any circuit or district court of the United States, or court of claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in the act of July 2d, 1862—which latter act requires the affiant to swear or affirm that he has never voluntarily borne

IV. Nature and Tenure of Office.

A. Nature—Status as Officer.—Are Officers of Court.—Attorneys at law are officers of the court,²³ admitted as such by its order, upon satisfactory evidence as to their legal learning, and private character.²⁴

Are Not Officers of the United States.—They are not, however, officers of the United States;²⁵ they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers.²⁶

B. Tenure of Office.—Attorneys and counsellors hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.²⁷

V. Taxation.

As to the imposition, collection and payment of license taxes required by statute in the case of attorneys at law, see the title *LICENSES*.

VI. Duties, Privileges and Liabilities Arising from Office and Relations to Court.

A. Duties toward Court.—Duty to Maintain Respect and Fidelity to Court.—It is the duty of attorneys and counsellors to maintain the respect due to courts of justice and judicial officers,²⁸ and an attorney must conduct himself with fidelity to the court.²⁹

Relations, Rights and Duties of Attorneys in United States District Courts.—In a district court of the United States, exercising the powers of a circuit court, the relations between the court and the attorneys and counsellors

arms against the United States since he has been a citizen thereof; that he has voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; and that he has not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto—operates as a legislative decree excluding from the practice of the law in the courts of the United States all parties who have offended in any of the particulars enumerated. Exclusion from the practice of the law in the federal courts, or from any of the ordinary avocations of life for past conduct is punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate. The act being of this character partakes of the nature of a bill of pains and penalties, and is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included. *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366. See the title *CONSTITUTIONAL LAW*.

23. Are officers of court.—*Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

"They are officers of the law, as well as the agents of those by whom they are employed." *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

24. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

25. Not officers of United States.—*Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

26. Not elected as such officers.—*Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

27. Tenure during good behavior.—*Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. See post, "Notice and Opportunity of Explanation and Defense," XIII, D 2.

28. Duty to maintain respect due court, etc.—*Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565; *Bradley v. Fisher*, 13 Wall. 335, 355, 20 L. Ed. 646; *Kneeland v. American, etc., Co.*, 138 U. S. 509, 513, 34 L. Ed. 1052.

As to the duty of attorneys to use respectful language in arguments and briefs, see the titles *ARGUMENT OF COUNSEL*, ante, p. 489; *BRIEFS*.

29. Fidelity to court.—*Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

As to removal for violation of Code provisions requiring respect and fidelity to the court, see post, "Particular Grounds," XIII, C, 2.

who practice in it, and their respective rights and duties are regulated by the common law.²⁹

B. Privileges and Exemptions.—As to privilege from arrest, see the title **PRIVILEGE**.

C. Liability to Punishment for Contempt.—See, generally, the title **CONTEMPT**. As to contempt as ground for disbarment, see post, "Particular Grounds," XIII, C, 2.

D. Liability for Costs.—See the title **COSTS**.

VII. Employment or Appointment.

A. In General.—As to employment of attorneys in particular instances, and by particular persons or classes of persons, see the appropriate titles, as, for instance, the titles **CORPORATIONS**; **EXECUTORS AND ADMINISTRATORS**; **MUNICIPAL CORPORATIONS**; **TRUSTS AND TRUSTEES**; etc.

Employment by United States.—As to the special employment of attorneys and counsellors to render legal services for the United States, see the titles **ATTORNEY GENERAL**; **DISTRICT AND PROSECUTING ATTORNEY**.

The governor of a state may authorize, ratify or confirm the prosecution of a suit in the name of the state.³¹

As to assignment or appointment by court, see the titles **CONSTITUTIONAL LAW**; **CRIMINAL LAW**.

B. Termination of Relation.—Undoubtedly either party has the right to terminate the connection of attorney and client at any time, and if this is done, the other will have no right to complain.³²

VIII. Withdrawal and Substitution of Attorneys.

Withdrawal.—It may be stated as a general rule that an attorney or solicitor cannot withdraw his name after it has been entered on the record, without the leave of the court.³³

30. Relations, duties, etc., of attorneys in United States district courts.—*Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

31. Authorization by governor of state.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

32. Right of either party to terminate connection.—*Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

As to withdrawal and substitution, see post, "Withdrawal and Substitution of Attorneys," VIII.

33. May not withdraw without leave of court.—*United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 128, 36 L. Ed. 371, and see *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476.

"*United States v. Curry*, 6 How. 106, 12 L. Ed. 363, was a suit in equity which had passed to a final decree, and the defendant, desiring to appeal, issued a citation to the complainant, which citation was served on the person who had been attorney of record during the trial of the suit. The attorney subsequently by affidavit stated that he was not the attorney of the appellee at the time the citation was served on him; that he had been discharged from all duty as attorney, and had so informed the marshal at the time of the same. The validity of the appeal was therefore attacked on the ground that there had been no proper service of the

citation. This court said: 'The citation is undoubtedly good and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to withdraw his name after the case was finally decided. For if that could be done, it would be impossible to serve the citation where the party resided in a distant country or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke.'" *Rio Grande Irrigation, etc. Co. v. Gildersleeve*, 174 U. S. 603, 606, 607, 43 L. Ed. 1103, reaffirmed in *Copper King v. Johnson*, 195 U. S. 627, 49 L. Ed. 351.

Counsel who enter their appearance un-

Substitution.—A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements.³⁴

IX. Retainer and Authority.

A. Retainer as Commencement of Authority.—The authority of an attorney commences with his retainer.³⁵

B. Nature of Engagement under Retainer.—An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee.³⁶

der the requirements of Rule 9 will be held responsible for all that such an entry implies, until, by substitution or otherwise, they are relieved from the obligation they have assumed. *Alvord v. United States*, 99 U. S. 593, 25 L. Ed. 399. See the title APPEAL AND ERROR, vol. 1, p. 333.

34. Right of party to substitute another attorney.—In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992. See, also, note to *Texas v. White*, 131 U. S., appx. xcv, xcvi, 19 L. Ed. 532.

"The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them, the client's interests must necessarily suffer. Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire. In this case one of the states of this Union is the litigant, and moves to change its attorney for reasons which are deemed sufficient by its responsible officers. It is abundantly able, and it must be presumed will be willing, to compensate the respondent for any loss he may sustain in not being continued in the management of the cause. The court cannot hesitate in permitting the state to appear and conduct its causes by such counsel as it shall choose to represent it, leaving the respondent to such remedies for the redress of any injury he may sustain as may be within his power. Under the decision which we have just made in relation to the money in his hands, he will be able to retain that fund and any papers and documents belonging to his client until his claims shall be adjudicated in such action as the state may see fit to institute therefor." In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

35. Authority commences with retainer.—*Stone v. Bank of Commerce*, 174 U. S. 421, 43 L. Ed. 1028.

"An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing

upon which the authority of an attorney to act for his client can be based. If, before the commencement of any suit, an attorney assumes to act for his principal, it must be as agent and his actual authority must appear, and if it be not shown, it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer. He cannot, while acting generally as an attorney for an estate or a corporation, accept service of process which commences the action without any authority so to do from his principal. This was directly decided in *Starr v. Hall*, 87 N. C. 381, and *Reed v. Reed*, 19 S. C. 548, so far as regards a personal defendant, but the same rule would follow in case of a corporation unless authority to appear were specially given." *Stone v. Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028, affirmed in *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

"The power of an attorney to conduct an actually existing suit, and in its proper conduct to agree to certain modes or conditions of trial, cannot be enlarged by implication, so as to embrace a power on the part of an attorney, before litigation is existing and before he has been retained to conduct it, to enter into an agreement of the nature of this one. It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such facts exist." *Stone v. Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028, affirmed in *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

Employment to draw contract of sale as creating relation.—Employment to draw a contract for the sale and conveyance of premises, is sufficient to create the relation of attorney and client. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

36. Engagement that of contractor rather than employee.—*Louisville, etc., R.*

C. Presumption as to Authority.—Authority to Appear.—See the title APPEARANCES, ante, p. 429.

Authority to Act in Conduct of Suit.—Where a party is represented by counsel, the acts of such counsel in conducting the suit are presumed to be authorized by the party.³⁷

D. Scope and Extent of Authority—1. **AUTHORITY TO APPEAR.**—Generally, as to the right of persons, natural or artificial, to appear in court by attorney, see the titles APPEARANCES, ante, p. 429; CORPORATIONS; PARTNERSHIP.

2. **AUTHORITY TO ACCEPT SERVICE OF PROCESS, NOTICE, ETC.**—As to authority of attorney to accept service of process generally, see the title SUMMONS AND PROCESS.

As to authority of attorney to accept service of notice in particular proceedings, see the specific titles, as, for instance, DEPOSITIONS; REFERENCE; etc.

As to service on attorney of citation in case of appeal, see the title APPEAL AND ERROR, vol. 1, p. 333.

3. **IMPLIED POWERS TO ACT FOR AND BIND CLIENT IN CONDUCT OF CASE**—a. **In General.**—When an attorney has been retained he has certain implied powers to act for his client, in a suit actually commenced, in the due and orderly conduct of the case through the courts.³⁸ He is the agent of his client to conduct his suit to judgment.³⁹

b. **Authority to Bind Clients by Acts, Agreements, Declarations or Admissions.**—An attorney may bind his client by his acts done in good faith, in the course of the suit,⁴⁰ and this is the general rule as to all agreements,⁴¹ declarations or ad-

Co. v. Wilson, 138 U. S. 501, 34 L. Ed. 1023.

37. **Authority in conduct of suit presumed.**—Alexandria Canal Co. v. Swann, 5 How. 83, 12 L. Ed. 60.

38. **Implied powers to act for client in conduct of suit.**—Stone v. Bank of Commerce, 174 U. S. 412, 43 L. Ed. 1028, affirmed in Louisville v. Bank, 174 U. S. 439, 43 L. Ed. 1039.

39. Rogers v. The Marshal, 1 Wall. 644, 17 L. Ed. 714. And see Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065.

40. **Acts in good faith binding on client.**—Thompson v. Maxwell, etc., Co., 168 U. S. 451, 42 L. Ed. 539.

41. **Agreements as to reference or arbitration.**—An attorney may bind his client by an agreement to refer. Somers v. Balabrega, 1 Dall. 164, 1 L. Ed. 83; Alexandria Canal Co. v. Swann, 5 How. 83, 12 L. Ed. 60.

An attorney at law, as such, has authority to submit the cause to arbitration. Holker v. Parker, 7 Cranch 436, 3 L. Ed. 396. See the titles ARBITRATION AND AWARD, ante, p. 464; REFERENCE.

"Marshall, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows: On the part of the appellants, it is contended, that an attorney at law has no power, without the consent of his client, to transfer a cause to other judges than those appointed by the laws, and to place it before a tribunal distinct from that before which the party himself has chosen to place it. In this opinion, however, the majority of the court does not concur. It is believed to be the prac-

tice throughout the Union, for suits to be referred by consent of counsel, without special authority, and this universal practice must be founded on a general conviction, that the power of an attorney at law over the cause of his client extends to such a rule. Were it otherwise, courts could not justify the permission which they always grant, to enter a rule of reference, when consented to by counsel on both sides." Holker v. Parker, 7 Cranch 436, 3 L. Ed. 396. See the title COMPROMISE AND SETTLEMENT.

Agreement to abide event of another suit.—"In cases of suits actually pending, he may agree that one suit shall abide the event of another suit involving the same question, and his client will be bound by this agreement. Ohlquest v. Farwell, 71 Iowa 231; North Missouri Railroad Company v. Stephens, 36 Missouri 150; Eidam v. Finnegan, 48 Minnesota 53; Gilmore v. American Central Insurance Company, 67 California 366; 1 Lawson's Rights, Rem. & Pr., § 173, page 292; 1 Thompson on Trials, § 195. One case has gone to the extent of holding the attorney's authority to agree that the case of his client should abide that of another, included his right to agree that the case should abide that of another involving the same question, although his client was not a party to that case and had no power to interfere in its prosecution or defence. Searritt Furniture Company v. Moser, 48 Mo. App. 543, 548. There might perhaps be some doubt about the correctness of a decision which so extended the power of the attorney. It would be carrying the au-

missions, of the attorney within the scope of his general authority.⁴²

c. *Power to Confess Judgment or Consent to Decree against Client.*—An at-

thority of an attorney a good way to thus hold. It is not, however, in the least necessary for us to decide the question in this case. All the above cases relate to the authority of the attorney after the actual commencement of suit and after the jurisdiction of the court has attached and the agreements made were in the discharge of the duties owing as between attorney and client, and subject to the supervision and power of the court itself." *Stone v. Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028, affirmed in *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

Agreement as to sale pending appeal.—An agreement by the attorneys of both sides that, pending an appeal, taken without supersedeas, from a decree for sale in a suit in equity to enforce a lien on real estate, the property might be sold and the money paid into court, to await the result of the appeal was valid as being within the general authority of the attorneys, and was binding on their principals. *Halliday v. Stuart*, 151 U. S. 229, 38 L. Ed. 141.

"The agreement was made after Whitaker asked and was allowed an appeal. And it was one which the attorneys of appellees might well have made in the exercise of their general authority, and as incidental to the management of the interests entrusted to them. *Saleski v. Boyd*, 32 Arkansas 74; *Holker v. Parker*, 7 Cranch 436, 452, 3 L. Ed. 396; *Jeffries v. Mut. Life Ins. Co.*, 110 U. S. 305, 309, 28 L. Ed. 156; *Moulton v. Bowker*, 115 Mass. 36, 40; *Cox v. New York Central, etc., Railroad*, 63 N. Y. 414, 419. It was not, to use the words of Chief Justice Marshall in *Holker v. Parker*, 'so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised in the case.' It was simply an arrangement by which a sale that all the parties desired to take place at some time, should not be delayed by the pendency of Whitaker's appeal. And those who were parties to it, directly or indirectly, should not be permitted to disregard it to the injury of one, who purchased, in good faith, at a judicial sale." *Halliday v. Stuart*, 151 U. S. 229, 38 L. Ed. 141.

Remedy for fraud or unauthorized conduct.—The remedy for the fraud or unauthorized conduct of a solicitor is by an appropriate proceeding in the court, where the consent was received and acted on, and in which proof may be taken and the facts ascertained. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932. See, also, *Terry v. Commercial Bank*, 92 U. S. 454, 456, 23 L. Ed. 620.

42. Declarations or admissions binding on client.—*Oscanyan v. Arms Co.*, 103 U.

S. 261, 26 L. Ed. 539. See, generally, the title DECLARATIONS AND ADMISSIONS.

"In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case. If, on a trial for a homicide, to take an illustration suggested by counsel, it should appear from the opening statement that the accused had been pardoned for the offense charged, it would be a waste of time to listen to the evidence of his original criminality; for if established he would still be entitled to his discharge by force of the pardon. So in a civil action, if it should appear from the opening statement that it is brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action." *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. See the title DECLARATIONS AND ADMISSIONS.

The testimony of an attorney is admissible, reciting conversations between himself and the attorney of the other parties in their presence, which declarations of the attorney were binding on the last-mentioned parties. *Turner v. Yates*, 16 How. 14, 14 L. Ed. 824. See the title DECLARATIONS AND ADMISSIONS.

Statements of attorney after act done.—Where the decision of a question depends at all upon the fact, whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper enough to ask what the plaintiff's attorney said after the act was done;

torney may confess judgment,⁴³ or consent to a decree against his client.⁴⁴

d. *Authority to Compromise*.—Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise,⁴⁵ yet a court will be disinclined to disturb one which is not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed upon or not fairly exercised in the case.⁴⁶

the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy. *Rogers v. The Marshal*, 1 Wall. 614, 17 L. Ed. 714.

43. *Power to confess judgments*.—See the title JUDGMENTS AND DECREES.

44. *As to power to consent to judgment or decree*, see the title JUDGMENTS AND DECREES.

45. *Authority to compromise*.—*Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 393; *Jeffries v. Mut. Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156; *United States v. Beebe*, 180 U. S. 343, 45 L. Ed. 563. See the title COMPROMISE AND SETTLEMENT.

"A judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. *Prima facie*, the act of the attorney in making such compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with special authority, but when it is proved he had none, the judgment will be vacated on that ground. Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted." *United States v. Beebe*, 180 U. S. 343, 45 L. Ed. 563.

"In *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52, it was held that although the judgment was on its face valid and regular, yet inasmuch as the attorney who appeared on behalf of one of the defendants did so without the consent of his principal, the remedy of the principal, when the facts came to his knowledge, was in equity, where the judgment might be set aside as to him. So, if the judgment be in fact entered upon a compromise made by the attorney who had no authority to make it, the judgment may be attacked and set aside in an equitable action upon proof of the necessary facts. Although the judgment is not void for want of jurisdiction in the court, it will yet be set aside upon affirmative proof that the attorney had no right to consent to its entry." *United States v. Beebe*, 180 U. S. 343, 45 L. Ed. 563. See the title JUDGMENTS AND DECREES.

"We think there can be no serious question that a district attorney of the United States has no power to agree upon a compromise of a claim in suit except under circumstances not present in this case. There is no statute of the United States and no regulation has been called to our

attention giving a district attorney any such power, but, on the contrary, it is provided in paragraph 7 of the regulations established by the solicitor of the treasury, and approved by the attorney general, pursuant to § 377 of the Revised Statutes of the United States, that no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States, without express instructions from the solicitor of the treasury, unless circumstances exist which do not obtain in this case. The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party, and that such an attorney has no power to compromise a claim in suit has been frequently decided. *Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 396. In that case it was remarked by Marshall, Chief Justice, that: 'Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party.'" *United States v. Beebe*, 180 U. S. 343, 45 L. Ed. 563. See the title DISTRICT AND PROSECUTING ATTORNEY.

Attorney for municipality may not relinquish rights reserved by ordinance.—Whatever authority the attorney of a city and county may have to conduct its ordinary litigation, he has none to relinquish rights reserved for the benefit of the public by ordinance, in property claimed under such ordinance alone. *San Francisco v. Le Roy*, 138 U. S. 656, 34 L. Ed. 1096. See the title MUNICIPAL CORPORATIONS.

46. *Compromise not disturbed unless manifestly unreasonable*.—Per Marshall, C. J., in *Holker v. Parker*, 7 Cranch 436, 3 L. Ed. 396, quoted in *Jeffries v. Mut. Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156.

"But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a

4. **AUTHORITY TO ISSUE EXECUTION AND RECEIVE MONEY DUE THEREON.**—The general authority of the attorney does not cease with the entry of the judgment. He has, at least, a right to issue an execution,⁴⁷ and to receive money due thereon,⁴⁸ although he may not have the right to discharge such execution, with-

compromise could be fairly made, there can be no hesitation in saying, that the compromise, being unauthorized, and being, therefore, in itself void, ought not to bind the injured party. Though it may assume the form of an award, or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable, because it is scarcely possible, that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another, from a man who is not authorized to make it." Per Marshall, C. S., in *Holker v. Parker*, 7 Cranch 436, 453, 3 L. Ed. 396.

47. **Authority to issue and superintend execution.**—*Union Bank v. Geary*, 5 Pet. 99, 8 L. Ed. 60.

"The attorney is the agent of his client to conduct his suit to judgment, and to superintend the execution of final process. It is true that he cannot discharge the defendant from execution without the money is paid to him; but his authority is complete to control the remedy which the law gives him to secure or collect the debt of his client. And if the client suffers by the ignorance or indiscretion of the attorney, the officer shall not be prejudiced, for the attorney may give such directions to the officer as will excuse him from his general duty. The attorney can give such general instructions to the officer as he may deem best calculated to advance the interests of his client, and if followed (erroneous though they be) they will bind his client and exonerate the officer." *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714.

The attorney of the plaintiffs, in an action on a promissory note, agreed with the defendant whose intestate was indorser of the note, that if she would confess judgment, and not dispute her liability upon the note, he, the attorney, would immediately proceed by execution to make the amount from the maker of the note, the principal debtor; who, he assured her, had sufficient property to satisfy the same; upon the faith of this promise, she did confess the judgment. Held, that this agreement fell within the scope of the general authority of the attorney, and was binding on the plaintiffs in the suit. The plaintiffs in the suit having failed to proceed by execution against the maker of the note, and having suffered him to remove, with his property, out of

the reach of process of execution, the circuit court, on a bill filed, perpetually enjoined proceedings on the judgment confessed by the administratrix of the indorser, and the decree of the circuit court was, on appeal, affirmed by the supreme court. *Union Bank v. Geary*, 5 Pet. 99, 8 L. Ed. 60.

"The next inquiry is, whether the attorney had authority to make such agreement, so as to bind the bank? It is necessary, here, that it should be understood with precision, what this agreement was. It seems to have been considered at the bar, by the appellants' counsel, as an agreement to release and discharge the complainant from all responsibility, if she would confess judgment upon the note. But such is not the agreement set up in the bill. It is, that if the complainant would confess judgment, and not dispute her liability upon the note, he (the attorney) would immediately proceed, by execution, to make the amount thereof from Merrill, the principal debtor, who, he assured the complainant, had sufficient property to satisfy the same; upon the faith of which promise she did confess the judgment. It is not alleged nor pretended, that any special authority was given by the bank to their attorney, to make the agreement set up in the bill, and unless it fell within the scope of his general authority, as attorney in the suit, the bank cannot be held responsible. The general authority of the attorney does not cease with the entry of the judgment. He has, at least, a right to issue an execution, although he may not have the right to discharge such execution, without receiving satisfaction. 8 Johns. 366; 10 Ibid. 220. The suit does not terminate with the judgment. Proceedings on the execution are proceedings in the suit. It was, therefore, within the scope of the general authority of the attorney in the suits, to postpone the execution on the judgment against the indorser, and issue one on the judgment against the maker of the note; and this is the utmost extent of the alleged agreement. And, indeed, it does not go thus far. The attorney only stipulated to issue an execution immediately, upon the judgment against Merrill. And if he had authority to issue an execution, of which there can be no doubt, he had authority to enter into an agreement that such execution should be issued, and thereby to bind the bank to the performance thereof." *Union Bank v. Geary*, 5 Pet. 99, 8 L. Ed. 60.

48. "It is not denied that an attorney at law, in virtue of his general authority as

out receiving satisfaction.⁴⁹

5. **AUTHORITY TO COLLECT CLAIMS, RECEIVE PAYMENT, AND ENTER SATISFACTION OF JUDGMENT**—a. *In General*.—**Implied Authority to Collect and Receive Payment**.—As to the right to issue executions and receive money due thereon, see ante, "Authority to Issue Execution and Receive Money Due Thereon," IX, D, 4. Generally, as to who may receive payment, medium of payment, etc., see the title **PAYMENT**.

As to authority to compromise, see ante, "Authority to Compromise," IX, B, 3, d.

As to the effect of tender to an attorney, see the title **TENDER**.

Authority to Enter Satisfaction of Judgment.—See the title **JUDGMENTS AND DECREES**.

b. *May Not Receive Anything but Money*.—An attorney has, in the absence of special authority, no power to receive anything other than money on a claim placed in his hands for collection.⁵⁰

6. **AUTHORITY TO PURCHASE FOR CLIENT**.—An attorney at law has no power, *virtute officii*, to purchase property in the name of his client.⁵¹

E. Effect of Ratification by Client.—In accordance with the general rule of agency, an act by an attorney originally unauthorized may be ratified by his client.⁵²

F. Knowledge of Attorney as Notice to Client.—The knowledge of the attorney in a particular transaction is notice to his client.⁵³

X. Duties, Disabilities and Liabilities Arising from Relation of Attorney and Client.

A. Duties in General.—Exercise of Good Faith, Zeal and Diligence.—The relation of attorney and client involves a high degree of trust and confidence and it is the duty of the court to see that the confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.⁵⁴ Until the relation of attorney and client is terminated, the confidence manifested by the client gives him the right to expect a corresponding return of zeal,

such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands or otherwise, and to receive the money due on the execution; and thus to discharge the execution. And if the judgment debtor has a right to redeem the property sold under the execution, within a particular period of time, by payment of the amount to the judgment creditor who has become the purchaser of the property, there is certainly strong reason to contend, that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land. At least, if (as is asserted at the bar) this be the common course of practice in the state of Tennessee, it will furnish an unequivocal sanction for such an act." *Erwin v. Blake*, 8 Pet. 18, 8 L. Ed. 852.

49. *Union Bank v. Geary*, 5 Pet. 99, 8 L. Ed. 60. See, generally, the title **EXECUTIONS**.

50. *May not receive anything but money*.—See *Rader v. Maddox*, 150 U. S. 128, 37 L. Ed. 1025. See, generally, as to medium of payment, the title **PAYMENT**.

51. *No authority to purchase in name of client*.—*Savery v. Sypher*, 6 Wall. 157, 18

L. Ed. 822, in which it was held that the attorney had no such power to purchase for his client at judicial sale land sold under a mortgage held by the client, and the burden of proving that he had other authority rests on him.

52. *Subsequent ratification by client*.—*Erwin v. Blake*, 8 Pet. 18, 8 L. Ed. 852; *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52 (ratification of unauthorized appearance); *Stowe v. United States*, 19 Wall. 13, 22 L. Ed. 144; *Marsh v. Whitmore*, 21 Wall. 178, 184, 22 L. Ed. 482.

Generally, as to ratification by principal of agent's acts, see the title **PRINCIPAL AND AGENT**.

53. *Knowledge of counsel as notice to client*.—*May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Smith v. Ayer*, 101 U. S. 320, 325, 25 L. Ed. 955; *Rogers v. Palmer*, 102 U. S. 263, 268, 26 L. Ed. 164. See the titles **NOTICE**; **PRINCIPAL AND AGENT**.

As to imputation of attorney's knowledge of defendant's insolvency, see the title **BANKRUPTCY**.

54. *Duty to observe good faith and of court to see that confidence is not abused*.—There are few of the business relations of life involving a higher trust than confi-

diligence, and good faith on the part of the attorney;⁵⁵ whether the relation subsisted previously or was created only for the purpose of a particular transaction, it carries with it the same consequences.⁵⁶

Duty to Inform Client as to Matters within His Knowledge.—It is the duty of the attorney to advise his client promptly whenever he has any information to give which it is important the client should receive.⁵⁷

B. As to Privileged Communications.—See the title PRIVILEGED COMMUNICATIONS.

C. Right to Represent Diverse Interests.—In General.—It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interest are diverse. Such a case requires care and circumspection on his part.⁵⁸

Subsequent Appearance for Adverse Party.—The appearance of counsel specially for a corporation, and his moving to dismiss the petition of an individual creditor for the appointment of a receiver of its property, do not preclude him

dence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it. *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676.

55. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065. And see *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476.

"The legal profession is found wherever Christian civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients." *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

Obligation to client and not to third party.—"Beyond all doubt the general rule is that the obligation of the attorney is to his client and not to a third party." Sav-

ings *Bank v. Ward*, 100 U. S. 195, 200, 25 L. Ed. 621.

56. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

57. **Duty to inform client.**—*Baker v. Humphrey*, 101 U. S. 494, 500, 25 L. Ed. 1065.

An attorney employed by both parties to an agreement for the purchase of land for the sum of \$8,000, upon discovering a defect in the title, concealed the fact from one of the parties, and in accordance with a secret agreement with the other, procured a conveyance by quitclaim for the sum of \$25 to E., his own brother. Held, that his conduct was a gross breach of professional duty, and that E. should be decreed on receiving the purchase money, \$25, to convey to the injured party the premises, with covenant against the title of E. and all others claiming under him. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

"In *Taylor v. Blacklow* (3 Bing. N. C. 235) an attorney employed to raise money on a mortgage learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney and that the client was entitled to recover. In Com. Dig. tit. 'Action upon the case for a Deceit, A. 5.' it is said that such an action lies 'if a man, being entrusted in his profession, deceive him who entrusted him; as if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover the evidence or secrets of the cause. So if an attorney act deceptively to the prejudice of his client, as if by collusion with the demandant he make default in a real action whereby the land is lost.'" *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

58. **Right to represent diverse interests.**—*Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

from subsequently appearing for the trustee of the bondholders in proceedings to foreclose mortgages given by the corporation.⁵⁹

D. Validity of Dealings with Client.—1. **GENERAL RULE.**—In accordance with the rule already stated, that courts will be watchful and industrious to see that the confidence reposed by reason of the relation of attorney and client shall not be used to the detriment or prejudice of the rights of the party bestowing it;⁶⁰ all dealings between the attorney and client, for the benefit of the former, while not necessarily invalid, will be closely scrutinized.⁶¹

2. **AGREEMENTS FOR COMPENSATION.**—See post, "Under Express Contract," XI, A, 2.

3. **PURCHASE OF ADVERSE TITLE OR INTEREST.**—It may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.⁶² He cannot in such a way put himself in an ad-

59. Subsequent appearance for adverse party.—*Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

"It seems from the record, that, when the petition of Shaw for the appointment of a receiver was presented to the court, Mr. Hendricks, with others, appeared as special counsel for the company, and moved its dismissal. Subsequently, Mr. Hendricks appeared as counsel for the trustee in the proceedings on the supplemental bill for the foreclosure of the mortgages, and on his motion the default of the company was entered. This second appearance of counsel against the company is regarded by the appellant as exhibiting 'an anomaly in chancery practice' so great as to vitiate the decree. We do not perceive any anomaly or irregularity or impropriety in the conduct of the counsel. He might very well have appeared for the company to defeat a petition of a single creditor asking for the appointment of a receiver of its property, and yet subsequently have appeared for the trustee to foreclose its mortgages. There was nothing in the duties required on the motion which in any way conflicted with the duties required in the subsequent proceedings. There is not even a colorable pretext for calling in question the propriety of the action of counsel." *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

60. In general.—See ante, "Duties in General," X, A.

61. Dealings closely scrutinized.—*Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676; *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

62. Purchase of adverse title or interest.—*Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

Purchase of opposing title.—Thus it has been held that if counsel be retained to defend a particular title to real estate, he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

Purchase of judgment.—Where there was a judgment which had been recorded under the laws of Louisiana, and thus made equivalent to a mortgage upon the property of the debtor, and the plaintiff assigned this judgment, and was then himself sued and had an execution issued against him, his rights under the recorded judgment could not be sold under this execution, because he had previously transferred all those rights. It was not necessary for an assignee of this recorded judgment, who was defending himself in chancery, by claiming under the assignment, to notice in his pleading an allegation in the bill that a release of the judgment was improperly entered upon the record. His assignment was not charged as fraudulent. The attorney who had recovered the judgment which was thus recovered and assigned, was not at liberty to purchase it when his client became sued and execution was issued against him. *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676.

"There is another ground of defense set up in the pleadings, and supported by the proofs, which has not been satisfactorily answered. And that is, that the plaintiff was the attorney of Pryor in the judgment against N. W. Ford, employed to enforce its collection; and while holding this relation to him, and after the assignment of Jones to the latter, he became the purchaser in his own name, without communicating the fact to his client, and obtaining his consent. Holding this relation to Jones at the time of the purchase, it was his duty to have advised him of the seizure and sale, so as to have enabled him to prevent a sacrifice of the judgment on the sale; and having not only neglected to do this, but having purchased the judgment himself, a court of equity will fasten upon the purchase a trust for the benefit of the client. The defendant, therefore, standing in the place of Jones, would, upon clear principles of equity, have a right to demand of the plaintiff the title acquired at the sheriff's sale to the judicial mortgage, on paying the purchase money. And if the purchase was

versary position without this result.⁶³ The same principle is applied in cases other than those of attorney and client.⁶⁴

4. PURCHASE BY ATTORNEY AT SALE BY HIM OF CLIENT'S PROPERTY.—In General.—In accordance with the rule that the character of vendor and purchaser cannot be held by the same person, it has been held that where an attorney sells property of his client at a public sale and buys in such property himself, the sale is voidable.⁶⁵

Ratification by Client.—The client when aware of the sale may, however, by long acquiescence lose the right to impeach its validity.⁶⁶

made in bad faith, and with the intent to speculate at the expense of the rights and interests of the client, using the knowledge derived from that relation for this purpose, the remedy might not be too strong even to set aside the sale, and relieve the property from the encumbrance without the terms mentioned. It is true, this is not the case of an attorney purchasing property under an execution which he has issued on a judgment, the usual case in which a court of equity has interfered, and declared the purchase to have been made in trust for the client. But the principle is the same. He had the charge of the judgment, and was intrusted with the management of it for the purpose of collection; and can be allowed to do no act in the absence of the client, and without his consent concerning it, by which he may derive an advantage at the expense of the client. Instead of the judgment, suppose the plaintiff had the charge and management of a plantation and slaves for his client, and an execution should come against them under which they were seized and sold; can it be doubted, if purchased in by the attorney in the absence of the client, and without his consent, that he could not hold the property discharged of the trust growing out of the relation existing between the parties? We suppose not. A court of equity, from the mere fact of such relation, would fasten upon the purchase a trust, without any inquiry into the motives or intentions of the attorney in making the purchase, and compel him to give up its benefits and advantages on the reimbursement of the purchase money. Neither fraud nor imposition need be shown. The client may, at his election, treat the act as done for his benefit." *Stockton v. Ford*, 11 How. 232, 13 L. Ed. 676.

Purchase of interest in property after judgment.—A purchase of an interest in property by an attorney, made after judgment has been obtained, is not forbidden by the laws of Louisiana. And where money is borrowed to make the purchase, the lender of the money is estopped from pleading illegality in the purchase, and thus retaining the property which had been conveyed to himself as security for the loan. In the contract between him and the borrower there was no illegality. "It is objected in this court that the ar-

rangement between the heirs of Fletcher and his attorney (Perin), by which the latter became the purchaser of their interest in the subject of the litigation he had been conducting in their behalf, was illegal, and he could take no benefit from his contract. The articles of the code of Louisiana affecting this question are as follows: Art. 2623, 'a right is said to be litigious whenever there exists a suit and contestation about the same;' art. 3522, No. 22, 'litigious rights are those which cannot be exercised without undergoing a lawsuit;' art. 2624, 'public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity and of having to defray all costs, damages, and interest.' The courts of Louisiana have decided 'that where a judgment has been rendered litigation has ceased.' *Marshall v. McRae*, 2 Ann. 79. And when the thing ceded is not contested and is not the subject of a suit at the time of cession, the thing is not litigious. *Provost v. Johnson*, 9 Mart. 184. The bill charges that the purchase was made after a final judgment had been rendered, declaring the property to belong to the heirs of Fletcher. The subject of the sale was ascertained, the title recognized, and consequently none of the mischiefs which occasioned these articles could then follow. Such is the conclusion of the commentators and courts of France upon the corresponding articles in the code of Napoleon. *Trop. de Vente*, § 201; 39 Dall. part 2, 196." *McMicken v. Perin*, 18 How. 507, 15 L. Ed. 504. See the title CHAMPERTY AND MAINTENANCE.

63. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

64. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

65. Purchase by attorney at sale by him of client's property.—*Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482; *Hoyt v. Latham*, 113 U. S. 553, 36 L. Ed. 259.

66. Ratification by long acquiescence.—*Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482.

"So jealous is the law of dealings of this character by persons holding confidential relations to each other, that the *c'estui que trust* may avoid the transac-

5. **PURCHASE OF PROPERTY AT JUDICIAL SALE.**—It has been held that while purchases at judicial sales in the name of the solicitors and attorneys of parties whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to the parties they represent.⁶⁷

E. Liability to Client.—1. **FOR NEGLIGENCE IN PERFORMANCE OF DUTIES.**—*a. In General.*—**Liability Arising from Relation.**—As has been already seen, the confidence manifested by the client in his attorney gives him the right to expect a corresponding return of zeal, diligence and good faith on the part of the attorney.⁶⁸ When a person adopts the legal profession, and assumes to exercise

tion, even though the sale was without fraud, the property sold for its full value, and no actual injury to his interests be proven. It does not follow, however, that the sale is absolutely void in the sense that the purchaser takes no title, which he can convey to a third person—a bona fide purchaser without notice; nor that the cestui que trust may not, upon notice of all the facts, ratify and affirm the sale by his acquiescence or silent approval. Thus in *Marsh v. Whitmore*, 21 Wall. 178, 183, 184, 22 L. Ed. 482, where an attorney sold bonds of a client at a public sale, and bought them in himself, at their full value at the time, and the client was aware of the purchase and acquiesced in it for twelve years, it was held to be too late for him to attempt to impeach the validity of the sale. 'Most undoubtedly,' said the court, 'that sale was voidable. The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. * * * The complainant could have treated the purchase made by the defendant as a nullity. * * * But unfortunately for him there is more in the case. He has adopted and approved of the transaction. * * * Had he at once denied the validity of the transaction or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position.' *Hoyt v. Latham*, 143 U. S. 553, 36 L. Ed. 259.

67. Purchase at judicial sale.—*Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932.

The purchase by the solicitor of a railroad company of its property at a judicial sale, made pursuant to a decree in a foreclosure suit, is not of itself necessarily invalid. It will, however, be closely scrutinized, but until impeached must stand. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932.

"Here the company, whom Baker represented as solicitor, confessed its inability to pay the debt it owed, and consented that the property held as security be sold. In the decree which it assented to, special

provision was made for a purchase by or for the bondholders. We can see no harm which will result from permitting the solicitor of the company to take the title for the bondholders under such a purchase. No complaint was made below of actual wrong. The only objection was that such a purchase was inconsistent with the duties of the solicitor. There was no speculation by the solicitor in the purchase. All he did was to hold the title until the real purchasers were in a condition to take it themselves. If there had been any proof of collusion or improper conduct on the part of the solicitor, resulting in wrong to the company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of the solicitor of one whose property is sold is necessarily in and of itself invalid. We think it is not. It will be scrutinized closely, but until impeached must stand. Slight circumstances may impeach it, but it is not under all circumstances invalid." *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932. See the title **JUDICIAL SALES**.

68. In general.—See ante, "Duties in General," X. A.

Liability dependent on existence of relation of attorney and client.—The obligation of the attorney being, as a general rule, to his client and not to a third party, an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving in answer to a casual inquiry, erroneous information as to the contents of a deed. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

A., an attorney at law, employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate, "B.'s title to the lot" (describing it) "is good, and the property is unencumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing by way of security therefor a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable de-

its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care, prudence, diligence and skill in the performance of such duties,⁶⁹ and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond, in damages to the extent of the injury sustained.⁷⁰

Not Liable for Every Error or Mistake of Judgment.—It must not, however, be understood that an attorney is liable for every mistake that may occur in practice or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.⁷¹

Degree of Skill, Care and Diligence Required.—It may be stated generally that in case of injury to the client, the true rule is that the attorney is liable for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.⁷²

gree of care. The money loaned was not paid, and B. is insolvent. Held: 1. That there being neither fraud, collusion, or falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate. 2. That usage cannot make a contract where none was made by the parties. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

"Where the relation of attorney and client exists there is seldom any serious difficulty in determining whether the client has or has not a cause of action, or its nature and extent if one exists. Criteria of standard character are established in legal decisions by which every such controversy may be determined; but in the case before the court the defendant was never retained or employed by the plaintiffs, nor did they ever pay him anything for making the certificate, nor did he ever perform any service at their request or in their behalf." *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

69. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. And see *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

70. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. See, generally, the title NEGLIGENCE.

"Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the covenants in the instrument of conveyance, where the property is sold." *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

Negligence in investigation of title.—Attorneys employed by the purchasers

of real property to investigate the title of the grantor prior to the purchase impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. *Addison, Contr. (6th Ed.)* 400. Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. *Addison, Torts (Wood's Ed.)*, 615." *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. See, generally, the title NEGLIGENCE.

71. **No liability where proper degree of care exercised.**—*Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

"In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." *In re Watts*, 190 U. S. 1, 29, 47 L. Ed. 933.

An attorney cannot be charged with negligence when he accepts as a correct exposition of the law a decision of the supreme court of his state upon the question of the liability of stockholders of corporations of the state in advance of any decision thereon by this court. *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482.

72. **Degree of diligence, etc., required.**—*Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. See, generally, the title NEGLIGENCE.

Injury as Essential to Recovery of Damages.—Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages.⁷³

b. *Enforcement of Liability.*—**Form of Action.**—It seems that an action of assumpsit will lie to recover from an attorney at law the amount of a loss sustained by reason of such attorney's neglect or unskillful conduct.⁷⁴

Accrual of Right of Action.—When an attorney is chargeable with negligence or unskillfulness, his contract is violated, and an action, therefor may be sustained immediately,⁷⁵ and from that time the statute of limitations commences to run.⁷⁶

2. FOR MONEYS COLLECTED—*a. In General.*—If an attorney has collected money for his client, it is prima facie his duty, after deducting his own costs and disbursements, to pay it over to such client;⁷⁷ and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice.⁷⁸

b. *Procedure to Compel Payment.*—Where the refusal of the attorney to pay over funds collected by him, amounts to misconduct and dishonesty on his part, a summary proceeding by motion to compel such payment will be entertained.⁷⁹ If, however, the attorney is not guilty of any bad faith or improper conduct, and has a fair set-off against his client, which the latter refuses to allow, a motion

73. **Injury essential to right of action.**—*Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

74. **Recovery in assumpsit.**—*Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821. See the title ASSUMPSIT, ante, p. 636.

75. **Accrual of right of action.**—*Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

76. **When statute begins to run.**—*Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Action of assumpsit to recover from the defendant, in the character of an attorney at law, the amount of a loss sustained by reason of neglect or unskillful conduct. A promissory note was, by the plaintiff, placed in the hands of P. for collection; he instituted a suit in the state court thereon, against the maker, on the 7th of May, 1820, but neglected to do so against the indorser; the maker proved insolvent; on the 8th of February, 1821, he sued the indorser, but committed a fatal mistake by a misnomer of the plaintiffs; upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against the plaintiffs; before that time, the action against the indorser was barred by the statute of limitations, to wit, on the 9th of November, 1822; this suit was instituted on the 27th of January, 1825; the statute of limitations of North Carolina interposes a bar to actions of assumpsit after three years. *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

The questions in the case were, whether the statute of limitations commenced running when the error was committed in the commencement of the action against the indorser? or whether it commenced from the time the actual damage

was sustained by the plaintiffs by the judgment of nonsuit? whether the statute runs from the time the action accrued? or from the time that the damages was developed, or became definite? Held, that the statute began to run from the time of committing the error, by the misnomer in the action against the indorser. *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

"The opinion of this court will have to be certified in the language of the defendants' supposed bill of exceptions, to wit, 'that on the first count in the declaration, the cause of action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection, or at all events, after the failure to collect the money from the maker. And that on the second count, his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs.'" *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

77. **Payment to client of money collected.**—*In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

78. *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

As to withholding money collected from the United States for "pay and bounty," under acts 1864, and 1873, see the titles BOUNTIES; PENSIONS.

Summary proceeding by motion.—*In re Paschal*, 10 Wall. 483, 19 L. Ed. 992. See the titles MOTIONS; SUMMARY PROCEEDINGS.

79. **Nature of application.**—"The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a quasi criminal proceedings, in which the question is not merely whether the attorney has received the money, but whether he has acted improp-

to pay into court the moneys collected will not be granted, but the parties will be left to their action.⁸⁰

XI. Compensation for Services.

A. Right of Attorney to Compensation—1. **IN GENERAL**.—Whatever the practice in England, and the former rule in some states in this country, it is now well established in the United States that persons rendering professional services as attorneys or solicitors are entitled to charge and recover reasonable compensation for their services,⁸¹ and that an agreement, express or implied, between at-

terly and dishonestly in not paying it over." In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

80. Motion refused in absence of bad faith on part of attorney.—In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

"If no dishonesty appears the party will be left to his action the attorney may have cross demands against his client or there may be disputes between them on the subject proper for a jury or a court of law or equity to settle. If such appear to be the case, and any professional misconduct be shown to exist, the court will not exercise its summary jurisdiction. And as the proceeding is in the nature of an attachment for a contempt, the respondent ought to be permitted to purge himself by his oath." In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992. See the title **CONTEMPT**.

81. Right to charge and recover compensation.—In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Stanton v. Embry*, 93 U. S., 548, 557, 23 L. Ed. 983; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. And see *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352, 23 L. Ed. 950.

"As a general rule, counsel fees, as well as those of attorney or solicitor constitute a legal demand for which an action will lie." In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

"The change in the rule relative to fees and costs has been gradually going on for a long period. In Pennsylvania, counsel fees could not be recovered in an action so late as 1819, when the case of *Mooney v. Lloyd*, was decided. But, in the subsequent case of *Foster v. Jack*, decided in 1835, the contrary was held in a very able opinion delivered by Chief Justice Gibson. And in *Balsbaugh v. Frazer*, Chief Justice Black delivered the opinion of the court in a series of propositions which strongly commend themselves for their good sense and just discrimination. The court there held that in Pennsylvania an attorney or counsellor may recover whatever his services are reasonably worth; that such claim, like any other which arises out of a contract, express or implied, may be defalked against an adverse demand; that an attorney who has money in his hands, which he has recovered for his client, may deduct his fees from the amount; that if he retain the money with a fraudulent intent the court will inflict

summary punishment upon him; but if his answer to a rule against him convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial." In *re Paschal*, 10 Wall. 483, 494, 19 L. Ed. 992.

"In New York, counsel fees have always been recoverable on a quantum meruit. In the case of *Stevens & Casper v. Adams*, Stevens recovered \$300 for counsel fees and \$50 for maps made to be used in a cause. It was held by the court that the fee bill, which declares it unlawful to demand or charge more than therein limited, has reference only to the question of costs as between party and party, and not as between counsel and client. The arguments of Chancellor Walworth and Senators Lee and Verplank, in the court of Errors, on the general subject, were exceedingly lucid and able, going to show that in this country the counsellor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action either upon an express or implied contract. The code has since abolished the fee bill, and left attorneys and solicitors to make their own bargains with their clients. But the courts have held that this change has not affected the attorney's lien, even on the judgment recovered, for the amount which it has been agreed he shall receive. In one case he was to receive one-half the amount to be recovered. Judgment was obtained for \$1,179, and the court held that the attorney had a lien on this judgment for his half of it, and that the defendant could not safely settle with the plaintiff without paying him." In *re Paschal*, 10 Wall. 483, 494, 19 L. Ed. 992.

"In Texas the law has been held substantially the same. In the case of *Cassey v. March*, it was decided that an attorney has a lien on the papers and documents received from his client, and on money collected by him in the course of his profession, for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money." In *re Paschal*, 10 Wall. 483, 495, 19 L. Ed. 992.

Effect of repudiation of obligations by member of law firm upon right to share in fees.—Where an attorney at law refuses to act as a partner, or to perform the

torney or solicitor and client, for purely professional services is valid.⁸²

2. **UNDER EXPRESS CONTRACT**—a. *In General*.—The right of an attorney to recover compensation for his services, may, of course, arise from an express contract for such compensation.⁸³

b. *Contracts for Contingent Fees*.—A contract for an attorney for compensation is not void because the amount of it is made contingent upon success, or upon the sum recovered;⁸⁴ as, where it is for a percentage of the amount which shall be recovered.⁸⁵ Suspicion, however, naturally attaches to such contracts,

functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause. *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476. See the title PARTNER-SHIP.

82. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

Act of congress as to fees and costs.—“Fees and costs allowed to officers therein named are now regulated by the act of congress passed for that purpose (10 Stat. at Large, 161), which provides in its first section, that, in lieu of the compensation previously allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed. Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars in a trial before a jury, but they are restricted to a charge of ten dollars in cases at law, where judgment is rendered without a jury.” *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 203; *United States v. Waters*, 133 U. S. 208, 33 L. Ed. 594; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. See the title COSTS.

“As a general rule counsel fees, as well as those of attorney or solicitor, constitute a legal demand for which an action will lie. And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains. The claim of the attorney or solicitor in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered. The fee bill adopted by congress in 1853 recognizes this general rule, and in fact, adopts it. By the first section of that act it is expressly declared, that nothing therein shall be construed to prohibit attorneys, solicitors, and proctors from charging to, and receiving from,

their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.” *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

As to compensation of attorneys or counsels employed by the United States, see the titles ATTORNEY GENERAL; DISTRICT AND PROSECUTING ATTORNEY.

83. **Contracts for compensation.**—*In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Trist v. Child*, 21 Wall. 441, 450, 22 L. Ed. 623; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983. See the title CONTRACTS. And see post, “Contracts for Contingent Fees,” XI, A, 2, b.

As to stipulations in notes to pay attorney's fees, see the title BILLS, NOTES AND CHECKS.

As to stipulation in mortgages to pay attorneys' fees, see the title MORTGAGES AND DEEDS OF TRUST.

84. **Contract for contingent fee.**—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Ball v. Halsell*, 161 U. S. 72, 40 L. Ed. 622; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *Nutt v. Knut*, 200 U. S. 12, 50 L. Ed. 348; *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753.

85. **For percentage of amount recovered.**—*Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753; *Kendall v. United States*, 7 Wall. 113, 19 L. Ed. 85; *Bachman v. Lawson*, 109 U. S. 659, 27 L. Ed. 1067. And see *Peugh v. Porter*, 112 U. S. 737, 28 L. Ed. 859; *Mackall v. Willoughby*, 167 U. S. 681, 42 L. Ed. 323.

Allowance of proportion of claim recovered against United States.—“By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in cases of success, and nothing in case of failure, were held to be lawful and valid. *Wylie v. Cox* (1853), 15 How. 415, 14 L. Ed. 753; *Wright v. Tebbitts* (1875), 91 U. S. 252, 23 L. Ed. 320; *Stanton v. Embry* (1876), 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Bemiss* (1883), 110 U. S. 42, 28 L.

and where it can be shown that they are obtained from the client by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive so as to amount to extortion, the court will, in a proper case, protect the party agreed.⁸⁶

c. *Champerious Contracts.*—**In General.**—For a full treatment of the question of champertous contracts, see the title CHAMPERTY AND MAINTENANCE.

Champertous Contract No Bar to Recovery on Cause of Action to Which It Relates.—The making of a champertous contract between counsel and client cannot be set up in bar of a recovery on the cause of action to which the champertous contract relates.⁸⁷

d. *Validity as Dependent on Nature of Services Contemplated.*—Contracts between attorney and client as to compensation are valid, in the absence of fraud or unfairness, whether the services stipulated for are to be rendered in court, or in the preparation and advocacy of claims,⁸⁸ and such contracts will be en-

Ed. 64. The reason for upholding the validity of such contracts was first stated by Mr. Justice Miller, in *Taylor v. Bemiss*, as follows: 'The well-known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justify a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means, residing far from the seat of government, who can give neither money nor personal attention to securing their rights.' 110 U. S. 45. The proportion allowed to the attorneys, in *Wylie v. Cox*, was one-twentieth; in *Wright v. Tebbitts*, one-tenth; in *Stanton v. Embry*, one-fifth; and in *Taylor v. Bemiss*, one-half. Congress has evidently considered that, in some cases, at least, to permit contracts to be made for the payment to attorneys, by way of contingent fee, of a large proportion of the amount to be recovered, is in danger of leading to extortion and oppression. It was apparently owing to such considerations, that congress, in the act of March 3, 1891, c. 538, when conferring upon the court of claims jurisdiction of claims arising from Indian depredations, including such claims as had been examined and allowed by the department of the interior; and providing that the judgments of that court, unless reversed or modified on rehearing or appeal, should 'be a final determination of the causes decided, and of the rights and obligations of the parties thereto,' enacted, in § 9, that 'all sales, transfers or assignments of any such claims, heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void; and all warrants issued by the secretary of the treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors or administrators, or transferee under admin-

istrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys; and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case, and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent. of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent. of such judgment shall be allowed by the court.' 26 Stat. 851, 854." *Ball v. Halsell*, 161 U. S. 72, 40 L. Ed. 622. See the title UNITED STATES.

Agreement to await sale of land by client will not render agreement champertous.—In *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746, it was held that the single fact that the attorneys agreed to wait for their money until complainant could sell the land, and to receive a fixed sum out of the purchase money, did not under any definition of champerty, bring the agreement within that principle.

86. Effect of fraud, imposition or excessive charge.—*Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64.

Contract for fifty per cent. held not extortionate under the circumstances of the case. *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64.

87. No bar to recovery on cause of action to which it relates.—*Burnes v. Scott*, 117 U. S. 582, 29 L. Ed. 991.

88. Preparation and advocacy of claims.—*Stanton v. Embry*, 93 U. S. 545, 23 L. Ed. 983; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Nutt v. Kunt*, 200 U. S. 12, 50 L. Ed. 348; *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753. And see *Porter v. White*, 127 U. S. 235, 32 L. Ed. 112.

Prosecution of claims pending in executive departments of United States.—An

forced, so long as they are not tainted by fraud, misrepresentations or unfairness.⁸⁹ Contracts for lobbying stand upon a very different footing and are void, and no compensation can be recovered thereunder.⁹⁰

e. *Effect of Death of Client.*—See post, "Inception and Duration of Lien," XII, C.

f. *Right to Extra Compensation.*—Under a contract providing for a specific compensation for legal services to be rendered by an attorney, the presumption

agreement to pay a contingent compensation for professional services of a legitimate character, in prosecuting a claim against the United States pending in one of the executive departments, is not in violation of law or public policy. *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

Prosecution of claims before commissions for adjustment of disputed claims.—A commission called together, in pursuance of treaty stipulations or otherwise to settle and adjust disputed claims, with a view to their ultimate payment and satisfaction, is, for that purpose, a quasi court; and there is nothing illegal, immoral, or against public policy, in an agreement by an attorney at law to present and prosecute a claim before it, either at a fixed compensation, or for a reasonable percentage upon the amount recovered. *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320.

"Tebbitts has not engaged in any improper or illegal service. Wright had a claim against the Choctaw Indians, which they, by their treaty, had agreed to submit to an adjudication by commissioners to be appointed for that purpose. He employed Tebbitts to appear for him professionally before that commission, and enforce his claim. Tebbitts appeared, and presented an argument in behalf of his client. This is all he did, and all he engaged to do. It was legitimate service rendered in a legitimate employment. To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and enforcing his claim. In this case, so far as anything appears by the record, Wright neither contracted for nor received anything else than legitimate and honorable professional assistance. Such an agreement we held to be valid in *Trist v. Child*, 21 Wall. 441, 450, 22 L. Ed. 623; for we then said, speaking through Mr. Justice Swayne, 'We entertain no doubt * * * an agreement, express or implied, for purely professional services, is valid.' Such services, we say, 'rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable.' In fact, the commission acting on this claim was a quasi court. It was, in no material respect, for all the purposes of the present controversy, different from the 'Court of Commissioners of Alabama Claims,' or the 'Southern Claims Commission,' or the 'Mexican Claims Commis-

sion,' or 'Spanish Claims Commission,' which have been called together, in pursuance of treaty stipulations or otherwise, to settle and adjust disputed claims, for the purpose of their ultimate payment and satisfaction. There is nothing illegal immoral, or against public policy, in a professional engagement to present and prosecute such claims before such tribunals." *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320.

89. *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

"Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented or the defense set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation, or unfairness." *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

90. **Lobbying contracts void.**—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

A contract to take charge of a claim before congress, and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services"—that is to say, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of congress—the passage of a bill providing for the payment of the claim), is void. Such a contract is distinguishable from one for purely professional services, within which category are included, drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them either orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced. Though compensation can be recovered for these when they stand by themselves, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good. Compensation can be recovered for no part. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

is against allowing the recovery of any extra compensation for services within the general scope of those stipulated for.⁹¹

g. *Construction of Contract*.—The scope and effect of a contract between attorney and client, where dependent wholly upon written correspondence, and in no degree upon extrinsic circumstances, are to be determined by the court.⁹²

3. UNDER IMPLIED CONTRACT.—In **General**.—There may, unquestionably, be a state of facts from which an implied contract or promise to pay an attorney for services rendered may be justly inferred.⁹³

Under What Circumstances Implied.—It would seem, however, that such contract or promise can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.⁹⁴ An agreement to pay a retainer for services which are never performed is not to be implied.⁹⁵

B. Amount of Compensation—1. UNDER CONTRACT.—Where there is a specific agreement for compensation, this will fix the amount of compensation to which the attorney is entitled,⁹⁶ and will be enforced in the absence of fraud, misrepresentation, or unfairness.⁹⁷

2. IN ABSENCE OF CONTRACT.—a. *General Rule as to Reasonable Compensation*.—If there has been no specific agreement for compensation, the attorney is entitled to recover reasonable compensation for the services rendered.⁹⁸ What is such reasonable compensation is to be determined with reference to the nature of the services,⁹⁹ and the standing of the attorney in his profession for learning,

91. Presumption against allowance of extra compensation.—Thus, where the duties of a law agent of a foreign loan company embraced under the terms of his appointment, the performance of all work necessary to secure to the company valid first mortgages on real estate, for which his professional fees were not to exceed a prescribed sum, it was held that such duties included giving certificates of title to the company employing him; and that the fact that a successor of such agent was expressly required to give such certificate, and was also made general attorney and counsellor for the company, did not entitle such successor to extra compensation for furnishing such certificates.

Hughes v. Dundee Mortgage, etc., Co., 140 U. S. 98, 35 L. Ed. 354.

"The necessary conclusion is that, so far as the duty of investigating and certifying titles and preparing mortgages, and of being responsible to the company for the due execution and registration of the mortgages and for their validity as a first lien on the lands mortgaged—in other words, so far as his duties were substantially the same as those previously performed by Gibbs—he was to be compensated in the same manner, namely, by fees paid by borrowers; and this is clearly assumed in the plaintiff's subsequent letter of September 30, 1876, to a director of the company, and in the ensuing resolution of the company and letter of that director. The compensation to be received by the plaintiff for such duties was not increased or affected by the fact that by the rules by which he was governed he was also made general attorney and counsellor of the company, and might, for his

services as such (in regard to which no question arises in this case), be entitled to other compensation, as none had been specified in the contract between the parties." *Hughes v. Dundee Mortgage, etc., Co.*, 140 U. S. 98, 35 L. Ed. 354.

92. Construction by court.—*Hughes v. Dundee Mortgage, etc., Co.*, 140 U. S. 98, 35 L. Ed. 354. See the titles CONTRACTS; INTERPRETATION AND CONSTRUCTION.

93. Contract or promise inferred.—*Coleman v. United States*, 152 U. S. 96, 38 L. Ed. 368; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Trist v. Child*, 21 Wall. 441, 450, 22 L. Ed. 623; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

94. When contract or promise implied.—*Coleman v. United States*, 152 U. S. 96, 38 L. Ed. 368.

95. No implied agreement where services never performed.—*Windett v. Union, etc., Ins. Co.*, 114 U. S. 581, 36 L. Ed. 551.

96. Contract as fixing compensation.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

97. Enforcement of contract in the absence of fraud, etc.—See ante, "In General," XI, A, 2, a; "Contracts for Contingent Fees," XI, A, 2, b.

98. Recovery of reasonable compensation in the absence of contract.—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

99. Nature of services as determining.—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.

skill and proficiency.¹ Compensation of attorneys in negotiations for the sale of property and the like, dependent on the skill and tact of the attorney, is measured by the results obtained rather than by the time occupied or the labor bestowed.²

b. *How Determined.*—**Evidence as to Ordinary Charges in Similar Cases.**—Where the amount of compensation to be paid an attorney is not fixed, evidence of what is ordinarily charged by attorneys at law in cases of the same character is admissible.³

Effect of Opinions of Other Attorneys.—In determining the value of an attorney's services, the opinions of other attorneys as to such value will not control the judgment of the jury so as to preclude them from exercising their own knowledge or ideas upon the value of such services.⁴

1. **Standing of attorney, learning and skill.**—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

2. *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. Ed. 586.

"The services for which compensation is sought were not only those required of attorneys and counsellors at law, but were also those of negotiators seeking to accomplish the result desired, by consultation with proposed purchasers, and presentation to them of the advantages to be derived from the property, present and prospective. Varied as were the legal services of the plaintiffs, it is plain from the testimony that those rendered by negotiation and consultation, and presentation of the uses to which the property could be applied, were far more effective and important. This fact necessarily had a controlling weight in estimating the value of the services. It is difficult to apply to such services any fixed standard by which they can be measured, and their value determined, as can be done with reference to service purely professional. There is a tact and skill and a happy manner with some persons, which render them successful as negotiators, while others of equal learning, attainments, and intellectual ability, fail for the want of those qualities. The compensation to be made in such cases is, by the ordinary judgment of business men, measured by the results obtained. It is not limited by the time occupied or the labor bestowed. It is from over looking the difference in the rule by which compensation is measured in such cases, and that in cases where the services are strictly of a professional nature, that several objections are urged for reversal of the judgment recovered, which, if this difference were regarded, would not be seriously pressed." *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. Ed. 586.

3. **Evidence as to ordinary charges in similar cases.**—*Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

"Attorneys and solicitors are entitled to have allowed to them for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the serv-

ices and their own standing in the profession for learning, skill, and proficiency; and, for the purpose of aiding the jury in determining that matter, it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court." *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

4. **Opinions of other attorneys not binding on jury.**—*Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028. See the title EXPERT AND OPINION EVIDENCE.

"It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion." *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.

"In *Anthony v. Stinson*, a question similar to the one here presented came before the supreme court of Kansas, and a like decision was reached. The instruction given at the trial that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that they should be governed by it in finding the value of the services rendered, was held to be erroneous; the court observing that the jury were not to be instructed as to what part of the testimony before them should con-

C. Allowance from Funds in Court.—While it has been stated to be the settled rule in the United States supreme court never to allow counsel on either side to be paid out of the fund in dispute,⁵ yet it has been held by such court in a number of cases, that where property or funds have been brought under the control of the trial court by suit, the complainant in such suit is entitled to have counsel fees allowed out of such fund.⁶ Thus, under the general principle that a trust estate must bear the expenses of its administration, where one or more of many parties having a common interest in a trust fund, takes proper proceedings to save the fund from destruction and to restore it to the purposes of the trust, he is entitled to reasonable counsel fees incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust.⁷ The same rule is applicable to a creditor's

control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. 4 Kan. 211." *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.

5. Payment from fund in dispute.—*Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628.

6. Allowance from fund brought into court by suit.—*Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352, 23 L. Ed. 950; *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478.

7. Reclamation of trust fund.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478. See the title TRUSTS AND TRUSTEES.

"When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and *Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915. But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate." *Hobbs v. McLean*, 117 U. S. 567, 582, 29 L. Ed. 940.

Allowance from process of foreclosure of railroad mortgages.—Where an attorney and counselor at law, employed by trustees of certain mortgaged property to foreclose the mortgages, upon a stipulated retaining fee, entered upon such retainer, commenced the suit, prosecuted it until prevented by the outbreak of the civil war, and, after the termination of the war, offered to go on with the suit; but in the meantime, the trustees having died, a new suit was commenced and prosecuted, without his assistance, by the bondholders (for whose security the mortgages were executed), to foreclose the same mortgages, in which suit a receiver was appointed, held, that his claim for his fee was chargeable against the funds obtained by the receiver from the mortgaged property. *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352, 23 L. Ed. 950.

"This court, in the case of *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352, 23 L. Ed. 950, sustained an allowance of \$5,000 for counsel fees to be paid to counsel out of the proceeds of a railroad mortgage, foreclosed in the circuit court for the District of Texas, being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the circuit court in the same case for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review. In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the states, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and se-

suit where the fund has been realized by the diligence of the plaintiff.⁸

Power of Court to Fix Amount.—It has been held that the amount of such fee is in the discretion of the court, and in fixing such amount, the trial court may proceed upon its own knowledge of the value of the solicitors' services.⁹

To Whom Made.—When an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client.¹⁰

D. Recovery.—Right of Action.—As to the rule that counsel fees constitute a legal demand for which an action will lie, see ante, "In General," XI, A, 1.

Form of Action.—As to the proper form of action for the recovery of attorney's fees, see the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 70; ASSUMPSIT, ante, p. 636.

Evidence.—As to admissibility and effect of evidence as to proper amount of compensation, see ante, "How Determined," XI, B, 2, b.

XII. Lien of Attorney.

A. Right to Lien—1. ON PAPERS, DOCUMENTS AND MONEY OF CLIENT IN ATTORNEY'S POSSESSION.—An attorney or solicitor has a lien on papers and documents received from his client, and on money collected by him, for his fees and disbursements.¹¹

2. ON JUDGMENTS AND DECREES.—In General.—According to the law in a number of the states of this country, an attorney at law, or solicitor in chancery, has a lien upon a judgment or decree obtained by him for his client, for his compensation.¹² The attorney or solicitor is regarded as an assignee of the judgment or decree to the extent of his fees.¹³ A lien on such judgment or property as may be recovered, may be expressly given in the agreement as to compensation.¹⁴

Effect of Claim of Lien upon Dismissal of Writ of Error.—See the title APPEAL AND ERROR, vol. 1, p. 333.

3. ON PROPERTY OR FUNDS BROUGHT UNDER CONTROL OF COURT.—See ante, "Allowance from Funds in Court," XI, C.

B. Extent of Lien.—The lien of an attorney on the papers and documents of his client, and on money collected by such attorney, extends, it would seem, to all that is due him as attorney or counsellor.¹⁵ He has a lien on such papers, and documents, and on money collected by him in the course of his profession for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money.¹⁶

curing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticisms." *Trustees v. Greenough*, 105 U. S. 527, 536, 26 L. Ed. 1157.

8. Rule applicable to creditor's suit.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. See the title CREDITORS' SUITS.

9. Amount fixed by court.—*Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478, citing *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, and *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 35 L. Ed. 794.

10. To whom made.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

11. Lien on papers and money of client

in attorney's possession.—*In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746.

As to lien on money recovered on claim against foreign government, after death of owner of claim, see post, "Effect of Death of Owner of Claim," XII, C, 2.

12. Lien on judgment or decree.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Platt v. Jerome*, 19 How. 384, 15 L. Ed. 623.

13. Solicitor regarded as assignee of judgment or decree.—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

14. Provision as to lien in agreement.—See *Mackall v. Willoughby*, 167 U. S. 681, 42 L. Ed. 323.

15. Extent of lien on papers, etc.—*McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746.

16. In re Paschal, 10 Wall. 483, 19 L. Ed. 992.

The attorney or solicitor, who is also counsel in a cause, has a lien on moneys

The attorney or solicitor has a lien upon the judgment or decree obtained by him for his client, to the extent the latter has agreed to pay him;¹⁷ or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover, viz, reasonable compensation, for the services rendered.¹⁸

C. Inception and Duration of Lien—1. **WHEN LIEN ATTACHES.**—The right of an attorney to his lien on a judgment or decree as an assignee thereof, is deemed to exist from the date of the rendition of such judgment or decree.¹⁹

2. **EFFECT OF DEATH OF OWNER OF CLAIM.**—Where a contract is made with an attorney for the prosecution of a claim for a stipulated proportion of the amount recovered, and services are rendered by such attorney, the death of the owner of the claim will not dissolve the contract, but the compensation remains a lien upon the money when recovered.²⁰

3. **EFFECT OF SUBSTITUTION OF ATTORNEY.**—When a rule is granted giving the party a right to change his attorney, the latter will be allowed to retain the advantage of any lien he may have on papers or money in his hands as security for his fees and disbursements.²¹

D. By What Law Governed.—The question as to the existence and extent of the attorney's lien is to be determined according to the law of the state by whose court the original judgment or decree was rendered.²²

E. Priority of Lien.—As has been seen already, the lien of an attorney on a judgment or decree attaches from the rendition of such judgment or decree;²³ and the right of the attorney, by virtue of such lien, is superior to rights acquired subsequent to the judgment or decree.²⁴

collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer. In *re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

"In England, and in several of the states, it is held that an attorney or solicitor's lien on papers or money of his client in possession extends to the whole balance of his account for professional services. But whether that be or be not the better rule, it can hardly be contended that, in this case, it does not extend to all the fees and disbursements incurred in relation to all of these indemnity bonds." In *re Paschal*, 10 Wall. 483, 493, 19 L. Ed. 992.

"It is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee bill. This difference is pointed out in the case of *In re Paschal*, 10 Wall. 483, 493, 19 L. Ed. 992." *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157.

Generally, as to the rule relative to counsel fees and costs, see ante, "In General," XI, A, 1. And see the title COSTS.

17. **For agreed amount.**—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

18. **In absence of agreement.**—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

19. **Attaches from rendition of judgment or decree.**—*Central Railroad v. Pet-*

tus, 113 U. S. 116, 28 L. Ed. 915.

20. **Compensation remains a lien upon amount recovered.**—*Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753.

21. **Retention of lien.**—See ante, "Withdrawal and Substitution of Attorneys," VIII.

22. **By what law governed.**—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

23. See ante, "When Lien Attaches," XII, C, 1.

24. **Superior to subsequently-acquired claims.**—*Central Railroad v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

Thus where an attorney secures for the receiver of a railroad the return of property belonging to the railroad, and payment of rent due for such property, his services in so doing have priority, on a sale of the road under foreclosure of the mortgage upon it, for the secured liens. *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023.

"The first matter is this: Prior to the appointment of a receiver, the railway company leased to the Illinois Midland Railway Company certain engines. When the latter road passed into the hands of a receiver intervenor was employed to get the engines back, and rental for their use. In this service he secured an allowance against its receiver for \$1,500, upon which \$1,340.13 was paid, and paid after the receiver in this case was in possession. The only testimony as to the value of such service fixed it at \$300. Part of such service was rendered more than six months prior to the appoint-

XIII. Disbarment or Suspension of Attorneys.

A. Definition, Nature and Purpose.—Definition.—In England, to disbar is to deprive a barrister permanently of the privileges of his position; it is analogous to striking an attorney off the rolls. In America, the word describes the act of a court in withdrawing from an attorney the right to practice at its bar.²⁵

Purpose.—It has been said that the purpose of striking an attorney from the rolls is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.²⁶

B. Power of Court—1. IN GENERAL.—Summary Jurisdiction of All Courts Having Power to Admit Attorneys.—The court has the power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts,²⁷ and, in cases of gross misconduct, to strike their names from the roll.²⁸ This power is possessed by all courts which have authority to admit attorneys to practice.²⁹ One court has, however, no power to disbar an attorney for offenses committed before another court.³⁰

ment of a receiver in this case; but, apparently, the important part within such time. This recovery enured to the benefit of the security holders, as placing so much more money in the hands of the receiver for the purpose of discharging obligations against the company payable before the bonds. We think it may fairly be held that the party who takes the benefit of such a service ought to pay for it; and that equity may properly decree payment therefor. As justly remarked by Lord Kenyon in *Read v. Dupper*, 6 T. R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained.' In *Renick v. Ludington*, 16 W. Virginia 378, 392, it is said: "The lien (even in cases of quantum meruit) is in the nature of an equitable lien (3 Cooper's Tenn. Ch. 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.' See, also, *Mahone v. Southern Tel. Co.*, 33 Fed. Rep. 702, and *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992. We think, therefore, there was no impropriety in allowing intervenor three hundred dollars for these services." *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023.

25. Disbarment defined.—Black Law Dict. titles, "Disbar;" "Striking Off the Roll."

As to power of court to temporarily suspend attorneys from practice, instead of disbarring them, see post, "In General," XIII, B, 1.

As to exercise of power to disbar as a judicial act, see post, "Exercise of Power a Judicial Act," XIII, B, 2.

26. Purpose.—Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002.

27. Power to punish for misconduct and contempts.—Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552; *In re Paschal*, 10 Wall. 483, 484, 19 L. Ed. 992. See generally, the title CONTEMPT.

28. Power to strike from roll.—Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552.

29. Power possessed by all courts having power of admission.—*Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552. And see Ex parte Burr, 9 Wheat. 529, 6 L. Ed. 152. See ante, "Qualifications for Admissions," II, B.

The criminal court of the district, as a court of general criminal jurisdiction, possesses the power to strike from its rolls the name of a practicing attorney. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

30. Disbarment for contempt of another court.—The supreme court of the District of Columbia, as organized by the act of March 3, 1863, is a different court from the criminal court as fixed by the same act, though the latter court is held by a judge of the former. Hence the former court has no power to disbar an attorney for a contempt of the latter. Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214. And see *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

An order of the criminal court of the District of Columbia, made in 1867, striking the name of an attorney from its roll, did not remove the attorney from the bar of the supreme court of the district, the criminal court being at that time a separate and independent court; and in an action by the attorney against the judgment of the criminal court, that order was inadmissible to show a removal by order of the defendant, or by order of the court held by him, from the supreme court, notwithstanding that an act of congress, passed in 1870, changed the independent character of the criminal court, and de-

Power to Be Exercised with Care and Discretion.—The power of removal should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect to the court for itself, or a proper regard for the integrity of the profession;³¹ and should never be decreed where any punishment less severe—such as reprimand, temporary suspension or fine—will accomplish the end desired.³²

2. **EXERCISE OF POWER A JUDICIAL ACT**—a. *In General.*—The removal of attorneys, as well as their admission, is a judicial act.³³ Even though statutes may attempt to prescribe rules for the removal of attorneys and counsellors, yet these would seem not to have materially narrowed the discretion of common-law courts as to removal.³⁴

b. *Liability of Judge for Exercise of Power.*—The exercise of the power to disbar, being judicial, comes within the general rule that judges of courts of rec-

clared that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the supreme court of the district. The act of congress, in enlarging the operation of the order, did not alter its original character. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

31. **Power to be exercised only for most weighty reasons.**—*Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

The right of an attorney and counsellor, acquired by his admission, to appear for suitors, and to argue causes, is not a mere indulgence—a matter of grace and favor—revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

32. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

33. **Removal a judicial act.**—*Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285; *Ex parte Garland*, 4 Wall. 333, 378, 18 L. Ed. 366; *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565; *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152. See ante, "In General," XIII, B, 1.

34. "The revised code of Minnesota (ch. 93, § 7, subdivision 2), makes it the duty of the attorney and counsellor 'to maintain the respect due to courts of justice and judicial officers.' The 19th section of the same chapter enumerates certain offenses for which an attorney or counsellor may be removed; and, among others, enacts that he may be removed for a willful violation of any of the provisions of § 7, above mentioned. And, in its sentence of removal, the court say that the relator, being one of the attorneys and counsellors of the court, had, by his acts as such, in open court, at the term at which he was removed, been guilty of a willful violation of the provision above mentioned, and also of a violation of that part of his official oath by which he was sworn to conduct himself with fidelity to the court. The statutes, it will be observed, does not attempt to specify the

acts which shall be deemed disrespectful to the court or the judicial officers. It must therefore rest with the court to determine what acts amount to a violation of this provision; and this is a judicial power vested in the court by the legislature." *Ex parte Schombe*, 19 How. 9, 15 L. Ed. 565.

"It has, however, been urged at the bar, that a much broader discretionary power is exercised in courts acting upon the rules of the common law than can be lawfully exercised in the territorial court of Minnesota; because the legislature of the territory has, by statute, prescribed the conditions upon which a person may entitle himself to admission as an attorney and counsellor in its courts, and also enumerated the offenses for which he may be removed, and prescribed the mode of proceeding against him. And the relator complains that it appears by the transcript from the record, and the certificate of the clerk, which he filed with his petition for a mandamus, that in the sentence of removal he is not found guilty of any specific offense which would, under the statute of the territory, justify his removal, and had no notice of any charge against him, and no opportunity of being heard in his defense. It is true that, in the statutes of Minnesota, rules are prescribed for the admission of attorneys and counsellors, and also for their removal. But it will appear, upon examination, that, in describing some of the offenses for which they may be removed, the statute has done but little, if anything, more than enact the general rules upon which the courts of common law have always acted; and have not, in any material degree, narrowed the discretion they exercised. Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed. And the legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice as cases may arise." *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

ord of superior or general jurisdiction are not liable to civil actions for their judicial acts.³⁵

C. When Proper.—1. IN GENERAL.—It may be stated, as a general rule, that a court has the power to disbar an attorney in any case of gross misconduct, showing the offender to be unfit to be a member of the profession.³⁶

2. PARTICULAR GROUNDS.—If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous.³⁷ If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken,³⁸ and, according to some decisions, it would seem that a previous conviction is not always essential.³⁹ An attorney

35. Not liable to civil action.—Judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction as to their liability made between acts done by them in excess of their jurisdiction and acts done by them in the clear absence of all jurisdiction over the subject matter. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

An action for damages does not lie against a judge of a court of general jurisdiction, for removing, whilst holding court, an attorney at law, from the bar, for malpractice and misconduct in his office, the court being empowered by statute to remove attorneys for "any deceit, malpractice, or other gross misconduct;" and having heard the attorney removed, in explanation of his conduct in the transaction which was the subject of complaint. And such action will not lie against the judge, even if the court, in making the removal, exceeds its jurisdiction, unless perhaps in the case where the act is done maliciously or corruptly. *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285. See the titles JUDGES; JURISDICTION.

36. In general.—Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552. See ante, "In General," XIII, B, 1.

37. Conviction of felony.—Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552.

38. Conviction of misdemeanor.—Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552.

39. Necessity for previous conviction.—"The rule to be deduced from all the English authorities seems to be this: that an attorney will be struck off the roll if convicted of felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without a previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been convicted by

a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted. This rule has, in the main, been adopted by the courts of this country; though special proceedings are provided for by statute in some of the states, requiring a formal information under oath to be filed, with regular proceedings and a trial by jury. The cases are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts which showed them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceedings without any previous conviction of a criminal charge. See, amongst others, the case of *Niven*, 1 Wheeler, Crim. Cas. 337, note; Ex parte Burr, Id. 503; S. C., 2 Cranch C. C. 379; In the Matter of Peterson, 3 Paige (N. Y.) 510; Ex parte Brown, 1 How. (Miss.) 303; In the Matter of Mills, 1 Mich. 392; Ex parte Secombe, 19 How. 9; In re John Percy, 36 N. Y. 651; *Dicken's Case*, 67 Pa. St. 169; In re Hirst and Ingersol, 9 Phil. (Pa.) 216; *Baker v. Commonwealth*, 10 Bush (Ky.), 592; *Penobscot Bar v. Kimball*, 64 Me. 410; Matter of George W. Wool, 36 Mich. 299; *People v. Goodrich*, 79 Ill. 148; *Delano's Case*, 58 N. H. 5; Ex parte Walls, 64 Ind. 461; In the Matter of Eldridge, 82 N. Y. 161. But where the acts charged against an attorney are not done in his official character, and are indictable, and not confessed, there has been a diversity of practice on the subject: in some cases it being laid down that there must be a regular indictment and conviction before the court will proceed to strike him from the roll; in others, such previous conviction being deemed unnecessary." Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552.

"From this review of the authorities in this country it is apparent, that whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll for an indictable offense, committed by him when not acting in his character of an attorney, yet that the rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to practice as attorneys, who ought, on every ground of propriety and respect for the administration of the law, to be excluded

will also be struck off the roll for gross malpractice or dishonesty in his profession,⁴⁰ or for conduct gravely affecting his professional character.⁴¹ An attorney may be struck from the rolls for gross violation of his obligation as attorney to maintain at all times the respect due the courts of justice and judicial officers,⁴² as, for instance, for insulting language or offensive conduct towards the judges personally, for their judicial acts, even though not at the time in court.⁴³ It has been held that the judgment of a court disbarring an attorney, treated as a punishment for a contempt, is unauthorized and void.⁴⁴

from such practice. A criminal prosecution may fail by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceedings to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be—a prevailing popular excitement; powerful influences brought to bear on the public mind, or on the mind of the jury; and many other causes which might be suggested; and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether, and when it is proper to dispense with a preliminary conviction. If, as Lord Chief Justice Cockburn said, the evidence is conflicting, and any doubt of the party's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear, and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority." *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

Participating in lynching of a prisoner before the courthouse door, during a temporary recess of court, is sufficient ground for striking the name of an attorney from the roll. *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

40. Malpractice or dishonesty in profession.—*Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552; *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285.

41. Conduct affecting professional character.—*Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

"In Archbold's Practice, edition by Chitty, p. 148, it is said: 'The court will, in general, interfere in this summary way to strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or in-

trusted with it in consequence of that character.' And it is laid down by Tidd that 'where an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offense which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, as and for the signature of a barrister, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll.' 1 Tidd's Practice, 89, ed. 9. Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. * * * It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.'" *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

42. Disrespect to court.—*Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646. And see *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565. See ante, "Duties towards Court," VI. A.

The Minnesota statute authorizes the court to dismiss an attorney or counsellor if he does not maintain the respect due to courts of justice and judicial officers, or for not conducting himself with fidelity to the court. *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

43. Offensive language or conduct to judge out of court.—*Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214.

A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls of attorneys practicing in the court. Such an order is a judicial act, for which the judge is not liable to the attorney in a civil action. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

44. Contempt.—*Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. See the title CONTEMPT.

"The law happily prescribes the punish-

D. Procedure—1. HOW INSTITUTED AND CONDUCTED.—It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation.⁴⁵ Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion.⁴⁶ The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.⁴⁷

2. NOTICE AND OPPORTUNITY OF EXPLANATION AND DEFENSE.—As a general rule, before a judgment disbarring an attorney can be rendered, he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense,⁴⁸ except, perhaps, where matters occurring in open court, in

ment which the court can impose for contempts. The seventeenth section of the judiciary act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void. The power to disbar an attorney proceeds upon very different grounds." *Ex parte Robinson*, 19 Wall. 505, 512, 22 L. Ed. 205.

5. Formal allegations unnecessary.—*Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285.

46. On motion of third party or court's own motion.—*Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285.

The statute of Minnesota directs that the proceedings to remove an attorney or counsellor must be taken by the court on its own motion, for matter within its knowledge; or may be taken on the information of another. And, in the latter case, it requires that the information should be in writing. *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

Waiver of preliminary affidavit—Investigation at instance of attorney.—In a regular complaint against an attorney, charges cannot be received, and acted on, unless made on oath; but he may himself waive the preliminary affidavit, and the court may proceed, at his instance, to investigate the charges upon testimony, which must be on oath, and regularly taken. *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152.

"In the case at bar, the proceedings were supposed to be irregular, because Mr. Burr was put to answer charges not made on oath. That the charges, in a regular complaint against an attorney ought not to be received and acted on, unless made on oath, is admitted. It is a course of proceeding which is recommended by considerations, too obvious to require that they should be urged. But this is not a

proceeding of that description. The court did not call on Mr. Burr to answer an accusation in the nature of an information against him. The inquiry was invited by himself; the charges were made at his instance; and the court proceeded on them at his request. Mr. Burr himself, then, dispensed with the preliminary step of an affidavit to the charges which were to constitute the subject of that inquiry; he waived this preliminary. The testimony on which the court proceeded was all on oath, and obtained in a manner which is not exceptionable. There is, then, no irregularity in the mode of proceeding which would justify the interposition of this court." *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152.

47. Conduct of proceeding matter of judicial regulation.—*Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285.

48. Necessity for notice and opportunity of defense.—*Bradley v. Fisher*, 13 Wall. 335, 345, 20 L. Ed. 646; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

"This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession, as it is when the proceeding is taken to reach his real or personal property." *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646. See the titles JUDGMENTS AND DECREES; JURISDICTION; SUMMONS AND PROCESS.

An attorney cannot be disbarred for misbehavior in his office of an attorney general, upon the return of a rule issued against him for contempt of court, and without opportunity of defense or explanation to the first-named charge. *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214.

In Minnesota the statute requires that where proceedings to remove an attorney or counsellor are taken on the written information of another, notice must be given to the party, and a day given to him to answer and deny the sufficiency of the accusation, or deny its truth. *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

the presence of the judges, constitute the grounds of the court's action.⁴⁹ Even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, it has been held that the attorney should ordinarily be heard before the order of removal is made;⁵⁰ for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation.⁵¹

3. **MODE OF TRIAL.**—A proceeding to strike an attorney from the rolls of the court not being a criminal proceeding, does not violate the constitutional requirement as to indictment and jury trial in criminal cases.⁵² The constitutional privilege of trial by jury does not apply to prevent a court from punishing its officers for contempt, or from removing them in proper cases.⁵³

E. Review and Reinstatement—1. **APPEAL.**—An appeal does not lie to the United States supreme court from an order of the district court disbarring an attorney.⁵⁴

2. **MANDAMUS.**—Although it was formerly questioned whether a superior or appellate court would interfere by mandamus in case of the removal or suspension of an attorney of an inferior court,⁵⁵ it is now well established that manda-

49. **When unnecessary.**—*Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. And see cases cited in preceding note.

50. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

"There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged." *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

51. *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646.

52. **Not within constitutional provision as to procedure in criminal cases.**—*Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

53. *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552. See the titles **CONSTITUTIONAL LAW; JURY.**

54. **Appeal will not lie.**—*Ex parte Robinson*, 19 Wall. 505, 513, 22 L. Ed. 205. See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 333.

55. **Propriety of writ questioned.**—*Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152, it was queried as to the authority of the United States supreme court to interfere, by mandamus, in the case of a removal or suspension of an attorney of the district and circuit courts, and it was held that whatever might be the authority of the court in that respect, it would not be exercised, unless where the conduct of the court below had been grossly irregular and unjust. See, also, *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 799.

In *Ex parte Secombe*, 19 How. 9, 15

L. Ed. 565, the supreme court of the territory dismissed the relator from the office of counsellor and attorney of the court, stating in the sentence of dismissal that he was guilty of the offenses above mentioned, but not specifying the act or acts which, in the opinion of the court, constituted the offense. It was held, that the order of dismissal was a judicial act done in the exercise of a judicial discretion vested in the court by law; and a mandamus could not be issued by a superior or appellate court, commanding it to reverse its decision and restore the relator to the office he has lost.

"A mandamus has been moved for, by David A. Secombe, to be directed to the judges of the supreme court of the territory of Minnesota, commanding them to vacate and set aside an order of the court, passed at January term, 1856, whereby the said Secombe was removed from his office as an attorney and counsellor of that court. In the case of *Tillinghast v. Conkling*, which came before this court at January term, 1829, a similar motion was overruled by this court. The case is not reported; but a brief written opinion remains on the files of the court, in which the court says that the motion is overruled, upon the ground that it had not jurisdiction in the case. The removal of the attorney and counsellor, in that case, took place in a district court of the United States, exercising the powers of a circuit court; and, in a court of that character, the relations between the court and the attorneys and counsellors who practice in it, and their respective rights and duties, are regulated by the common law. And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be

mus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter.⁵⁶

removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

"It is not necessary to inquire whether this decision of the territorial court can be reviewed here in any other form of proceeding. But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate be issued, commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be. And we are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion. These principles apply with equal force to the proceedings adopted by the court in making the removal." *Ex parte Secombe*, 19 How. 9, 15 L. Ed. 565.

56. Mandamus the proper remedy.—*Ex parte Robinson*, 9 Wall. 505, 22 L. Ed. 205; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214. See, generally, the title **MANDAMUS**.

Mandamus lies from the United States supreme court to an inferior court to restore an attorney at law disbarred by the latter court when it had no jurisdiction in the matter, as (ex. gr.) for a contempt committed by him before another court. *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214.

"That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was decided in *Ex parte Bradley*, reported in the 17th of Wallace. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory." *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

Will not lie to judges of state supreme court.—In *In re Green*, 141 U. S. 325, 35 L. Ed. 765, the United States Supreme court held that mandamus would not lie from that court directing the judges of the supreme court of Colorado to restore an attorney and counsellor of that court to his office, and to vacate the order of disbarment.

ATTORNEY GENERAL.

BY R. E. MAXWELL.

I. United States Attorney General, 739.

- A. As Head of Department of Justice, 739.
- B. Supervision over Accounts of United States Officers, 739.
- C. Powers and Duties as to Suits by or against United States, 740.
- D. Right to Be Heard in Suits between Individuals, 741.
- E. Cannot Review Action of Court Allowing Attorney's Fees, 741.
- F. Assistant Attorneys, 741.

II. State Attorney General, 742.

CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; APPEARANCES, ante, p. 429; CERTIORARI; CONSTITUTIONAL LAW; COURTS; DISTRICT AND PROSECUTING ATTORNEY; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; MANDAMUS; PARTIES; PUBLIC LANDS; PUBLIC OFFICERS; QUO WARRANTO; REWARDS; STATES; SUMMONS AND PROCESS; TERRITORIES; UNITED STATES.

I. United States Attorney General.

A. As Head of Department of Justice.—By statute regulating the department of justice, it is provided that there shall be an attorney general at the head thereof.¹

Duty to Advise President and Heads of Other Departments of the Government.—It is the duty of attorney general acting as the head of one of the executive departments,² to advise the president and the heads of the other departments of the government.³

B. Supervision over Accounts of United States Officers.—The attorney general has general supervision over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States.⁴

1. Attorney general as head of the department of justice.—"The revised statutes, in the title which establishes and regulates the department of justice, simply declares, in § 346, that 'there shall be at the seat of government an executive department to be known as the department of justice, and an attorney general who shall be the head thereof.'" United States v. San Jacinto Tin Co., 125 U. S. 273, 278, 31 L. Ed. 747.

"The judiciary act of 1789, in its third section, which first created the office of attorney general, without any very accurate definition of his powers, in using the words that 'there shall be appointed a meet person, learned in the law, to act as attorney general for the United States,' 1 Stat. 93, c. 21, § 35, must have had reference to the similar office with the same designation existing under the English law." United States v. San Jacinto Tin Co., 125 U. S. 273, 280, 31 L. Ed. 747.

2. "The attorney general acts as the head of one of the executive departments,

representing the authority of the president in the class of subjects within the domain of that department and under his control." United States v. San Jacinto Tin Co., 125 U. S. 273, 280, 31 L. Ed. 747.

3. Duty.—United States v. San Jacinto Tin Co., 125 U. S. 273, 278, 31 L. Ed. 747.

4. Supervision over accounts of the United States officers.—Section 368 of the Revised Statutes, provides as follows: "The attorney general shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States." The supervisory powers given in this section are precisely those which were exercised by the secretary of the interior before the department of justice was established, and which were transferred from the secretary of the interior to the attorney general by the 15th section of the act of June 22, 1870, c. 150, 16 Stat. 164. United States v. Waters, 133 U. S. 208, 214, 33 L. Ed. 594. See the title PUBLIC OFFICERS.

C. Powers and Duties as to Suits by or against United States.—Authority and Duty in General.—There is no specific statement of the general duties of the attorney general, but he has the authority, and it is his duty to determine when and for what suit shall be brought,⁵ and supervise the conduct of all suits brought by or against the United States.⁶

Proof of Authority.—Where the authority of the attorney general of the United States to commence a suit does not appear on the face of the bill, it may be proven if the bill is objected to for want of authority.⁷

Presumption That Attorney General Will Not Stipulate Away Any Rights of Prosecution.—It is to be presumed that the attorney general will do his duty to the government and not stipulate away the rights of the prosecution.⁸

Appearance.—The practice has uniformly been, for the clerk of the court to enter, at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the attorney general of the United States; this practice has never been objected to. The practice would not be conclusive against the attorney general, if he should, at the first term, withdraw his appearance, or move to strike it off; but if he lets it pass for one term, it is conclusive upon him, as to an appearance.⁹

Waiver of Exemption of United States from Suit.—The exemption of the United States from suit cannot be waived by the attorney general.¹⁰

Control of Suits in Circuit Courts.—Though suits in the circuit court belong to the district attorney, they are under the general superintendence and direction of the attorney general.¹¹

Attorney General's Views Conclusive.—As a general rule, where the United States is a party to a cause and is represented by the attorney general, or the assistant attorney general, or by special counsel employed by the attorney

5. Institution of suit.—"There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the attorney general." *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 279, 31 L. Ed. 747.

There is no express authority vested in the attorney general to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits. *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 278, 31 L. Ed. 747.

6. Power and duty as to suits by and against United States.—*United States v. Estudillo*, 1 Wall. 710, 17 L. Ed. 702; *Hackfeld v. United States*, 197 U. S. 442, 49 L. Ed. 826; *Mullan v. United States*, 118 U. S. 271, 30 L. Ed. 170; *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196; *The Gray Jacket*, 5 Wall. 370, 18 L. Ed. 646; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 278, 31 L. Ed. 747; *Snow v. United States*, 18 Wall. 317, 21 L. Ed. 784; *Florida v. Georgia*, 17 How. 478, 495, 15 L. Ed. 181.

The attorney general is the proper officer to represent the United States in this court. *Florida v. Georgia*, 17 How. 478, 495, 15 L. Ed. 181.

The thirty-fifth section of the judiciary act provides, that it shall be the duty of the attorney general to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196.

The attorney general has control of a suit brought by the United States to set aside a patent for land on the ground that it was obtained by fraud or mistake. *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747.

7. Proof of authority.—*Mullan v. United States*, 118 U. S. 271, 30 L. Ed. 170.

8. Presumption that attorney general will not stipulate away any rights.—*Hackfeld v. United States*, 197 U. S. 442, 49 L. Ed. 826.

9. Appearance.—*Farrar v. United States*, 3 Pet. 459, 7 L. Ed. 741. See the title APPEARANCES, ante, p. 429.

10. Waiver of exemption of United States from suit.—*Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960. See the title UNITED STATES.

11. Control of suits in circuit court.—*Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196.

general, no counsel can be heard in opposition on behalf of any other of the departments of the government;¹² but an exception is made in favor of the counsel for the treasury department.¹³

Power to Dismiss Suits.—In cases where it appears that the United States is a party, the cases are within the control of the attorney general, and may be dismissed by him.¹⁴

D. Right to Be Heard in Suits between Individuals.—It is the familiar practice of the court to hear the attorney general in suits between individuals, when he suggests that the public interests are involved in the decision.¹⁵

E. Cannot Review Action of Court Allowing Attorney's Fees.—An attorney general cannot review an action of a court allowing a district attorney a council fee for a trial before a jury of a person indicted for a crime. The allowance of such fee is discretionary with the court.¹⁶

F. Assistant Attorneys.—The attorney general may when he thinks necessary, employ, in the name of the United States, assistant attorneys and counsellors at law to assist the district attorneys in the discharge of their duty, and has supervision of their conduct and proceedings, and may stipulate for the amount of compensation to be paid them.¹⁷

Compensation.—An attorney or counsellor retained under the authority of the department of justice, to assist in any trial in which the government is interested, shall receive a commission from the head of such department, as a special assistant to the attorney general.¹⁸

12. Attorney general's views conclusive.—In the case of *The Gray Jacket*, 5 Wall. 370, 18 L. Ed. 646, this court decided that in such suits no counsel will be heard for the United States in opposition to the views of the attorney general, not even when employed in behalf of another of the executive departments of the government. *Confiscation Cases*, 7 Wall. 454, 458, 19 L. Ed. 196.

13. Exception.—The counsel for the treasury department may be heard in opposition to the attorney general. *The Gray Jacket*, 5 Wall. 370, 18 L. Ed. 646.

14. Power to dismiss suit.—*United States v. Estudillo*, 1 Wall. 710, 17 L. Ed. 702.

Dismissal of an appeal.—The attorney general may properly, and against the interest and objection of the informer in confiscation cases, ask a dismissal of an appeal to this court in cases where the decree below, having been against it, the government has appealed; and in the same way ask, upon agreement to that effect with the counsel of the claimants, for a reversal of a decree, where, on decree against them, the appeal has been by the other side, and for a remand of the cause to the court below, with directions to it to dismiss the libel. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196. See the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**.

15. Right to be heard in suits between individuals.—"This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain pre-

vious to the cession to this country." *Florida v. Georgia*, 17 How. 478, 490, 15 L. Ed. 181.

Between two states.—The attorney general having filed an information, stating that the interests of the United States are involved in the establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument. *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181.

Heard only on behalf of United States.—"He is heard, not as counsel for one of the parties on the record, but on behalf of the United States, and as representing their interests." *Florida v. Georgia*, 17 How. 478, 490, 15 L. Ed. 181.

16. In the case of *United States v. Waters*, 133 U. S. 208, 33 L. Ed. 594, it was held that an attorney general had no authority to review the allowance of a counsel fee by the court to a district attorney for prosecuting a criminal case. The court said: "It was never claimed by the secretary of the interior, nor considered by the officers of the treasury department, that those supervisory powers (given by § 368, Rev. Stat.), over accounts gave him any authority to make an allowance of fees under § 824 of the Revised Statutes, or to review and reverse a judicial order allowing such fees."

17. Assistant attorneys.—Sections 363, 364, Revised Statutes, *United States v. Crosthwaite*, 168 U. S. 375, 42 L. Ed. 507.

18. Compensation.—*United States v. Crosthwaite*, 168 U. S. 375, 42 L. Ed. 507.

Certificate of Attorney General as a Prerequisite to Right to Compensation.—A certificate of the attorney general is a prerequisite to the allowance of compensation to an attorney specially employed to render service for the United States. A special assistant to a district attorney, for particular cases or for a limited time cannot be compensated in the absence of such certificate from the attorney general.¹⁹

II. State Attorney General.

Definition.—The attorney general of a state is its legal representative.²⁰

Presumption of Authority to Commence Suit.—Where a suit is commenced by the attorney general of a state in the name of the state, the court cannot, without proof, presume against his authority.²¹

Prosecution of Crimes in a Territory.—It is the duty of the attorney general of a territory to prosecute individuals accused of crime in the judicial district in which he shall keep his office, in cases arising under the laws of the territory.²²

Power to Bind Successor in Office.—Agreements made by an attorney general of a state may be binding upon his successors in office.²³

ATTORNEY'S FEES.—See the titles ADMIRALTY, vol. 1, p. 181; APPEAL AND ERROR, vol. 1, p. 989; COSTS; DAMAGES.

ATTORNMENr.—See the title LANDLORD AND TENANT.

19. Certificate of attorney general as a prerequisite to right to compensation.—United States *v.* Crosthwaite, 168 U. S. 375, 42 L. Ed. 507. See the title ATTORNEY AND CLIENT, ante, p. 701.

20. Definition.—Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249.

21. Presumption of authority to commence suit.—Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249.

22. Prosecution of crimes in a territory.—Under the organic act of September 9th, 1850, organizing the territory of Utah, the attorney general of the territory, elected by the legislature thereof, and not the district attorney of the United States, appointed by the president, is entitled to prosecute persons accused of offenses against the laws of the territory. Snow

v. United States, 18 Wall. 317, 21 L. Ed. 784.

By an act of the legislature of Utah, passed March 3d, 1852, it is, amongst other things, provided that an attorney general shall prosecute individuals accused of crime in the judicial district in which he shall keep his office, in cases arising under the laws of the territory. Snow *v.* United States, 18 Wall. 317, 321, 21 L. Ed. 784. See the title TERRITORIES.

23. Power to bind successor in office.—An agreement to dispense with taking evidence and to accept evidence taken in other cases, made by the attorney general of a state as a party to an action is binding upon his successors in office, who have been substituted as parties to the action in his place. Prout *v.* Starr, 188 U. S. 537, 47 L. Ed. 584.

AUCTIONS AND AUCTIONEERS.

BY WALTER CARRINGTON.

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- A. Power of Municipalities to License and Regulate, 743.
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CROSS REFERENCES.

See the titles CONTRACTS; FRAUDS, STATUTE OF; JUDICIAL SALES; LACHES; LICENSES; MUNICIPAL CORPORATIONS; PRINCIPAL AND AGENT; SALES; SHERIFFS' CONSTABLES' AND MARSHALS' SALES; TAXATION; WARRANTY.

As to power of an executor to sell at public auction, see the title EXECUTORS AND ADMINISTRATORS.

I. License, Regulation and Taxation.

A. Power of Municipalities to License and Regulate.—The power to license auctioneers, and to take bonds for their good behavior in office, not being one of the incidents to a municipal corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act.¹ An auctioneer is not the officer or agent of the municipality, but is understood to act for himself as entirely as a tavern keeper, or any other person who may

1. Power to license and take bonds must be conferred by statute.—*Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

Power to grant licenses or take bonds not conferred.—The act of congress of 1804, "an act to amend the charter of Alexandria," did not transfer generally to the common council the powers of the mayor and commonalty, but only such powers as were specially enumerated, which did not include the power to grant licenses to auctioneers, or to take bonds for their good behavior. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

Limitation on power to license.—The

legislature of Virginia by the act of 1796, conferred the power to license auctioneers, and to take bonds for their good behavior, on the mayor, aldermen and commonalty of the several corporate towns within that commonwealth, of which Alexandria was then one; "provided, that no such license should be granted, until the person or persons requesting the same should enter into bond, with one or more sufficient sureties, payable to the mayor, aldermen and commonalty of such corporation." It was held that this was a limitation on the power. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

carry on any business, under a license from the corporate body, and therefore the municipality is not responsible for losses sustained by individuals, from the fraudulent conduct of the auctioneer.²

B. Taxation.—Auction sales are a proper subject of taxation by the state;³ and this power may be delegated to a municipal corporation.⁴ But in exercising the power, the legislature must not violate any constitutional inhibition.⁵

II. Agency and Powers of Auctioneers.

A. Agency.—An auctioneer is solely the agent of the seller of the goods until the sale is effected,⁶ and then he becomes also the agent of the purchaser, for certain purposes.⁷

If an auctioneer were regarded as a public officer, it would seem that that fact would not change the liability of his principal for his acts, if taking the benefit of them.⁸

B. Power to Purchase at Auction.—An auctioneer cannot legally purchase on his own account that which his duty requires him to sell on account of another. He is not allowed to unite the two opposite characters of buyer and seller.⁹

2. Municipality not liable for fraud of auctioneer.—*Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

Municipality not liable for omission to take bond from auctioneer.—The plaintiff placed goods in the hands of an auctioneer, in the city of Alexandria, who sold the same, and became insolvent, having neglected to pay over the proceeds of the sales to the plaintiff. The auctioneer was licensed by the corporation of Alexandria, and the corporation had omitted to take from him a bond, with surety, for the faithful performance of his duties as auctioneer. Suit was instituted to recover from the corporation the amount of the sales of the plaintiff's goods, lost by the insolvency of the auctioneer, on an alleged liability, in consequence of the corporation having omitted to take a bond from the auctioneer. It was held, that though the common council had granted a license to carry on the trade of an auctioneer, it was a license which that body had no power to grant, and the corporation was not liable for the omission to take the bond. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719. See the title MUNICIPAL CORPORATIONS.

3. A uniform tax imposed by a state on all auction sales made in it, whether they be made by one of its citizens or a citizen of some other state, and whether the goods sold are the products of the state enacting the law or of some other state, is valid. *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382.

4. Delegation of power to municipality.—*Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382.

5. Imported goods sold in original packages.—The statute of Pennsylvania of May 20, 1853, modified by that of April, 1859, requiring every auctioneer to collect and pay into the state treasury, a tax on his sales, is, when applied to imported

goods in the original packages, by him sold for the importer, in conflict with §§ 8 and 10, art. 1, of the constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

A tax laid by a state on the amount of sales of goods made by an auctioneer is a tax on the goods so sold. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015. see the titles INTERSTATE COMMERCE; CONSTITUTIONAL LAW; TAXATION.

6. Only agent of seller until sale is effected.—*Blossom v. Milwaukee, etc.*, R. Co., 3 Wall. 196, 209, 18 L. Ed. 43; *Veazie v. Williams*, 8 How. 134, 152, 12 L. Ed. 1018.

Auctioneer selling for marshal at judicial sale.—An auctioneer, in the ordinary discharge of his duty, is only an agent to sell, and when selling for the marshal at a judicial sale, he acts only as special agent of the marshal, without any authority to warrant the goods, or to go beyond the single act of selling them. *The Monte Allegre*, 9 Wheat. 616, 644, 6 L. Ed. 174.

7. Agent for purchaser after sale.—*Blossom v. Milwaukee, etc.*, R. Co., 3 Wall. 196, 209, 18 L. Ed. 43; *Veazie v. Williams*, 8 How. 134, 152, 12 L. Ed. 1018.

8. Liability of principal not changed by regarding auctioneer as public officer.—*Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

9. Auctioneer cannot purchase on his own account.—*Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076.

If the auctioneer purchase or be interested in the purchase of property which he is selling, the sale will be invalid. *Kearney v. Taylor*, 15 How. 494, 523, 14 L. Ed. 787.

A purchase, per interpositam personam,

Purchase by Auctioneer for a Creditor.—But a creditor for whose benefit a sale is made has a right to request the auctioneer to make a bid for him, and if it appears that by the exercise of such right, bidding was not prevented or a sale procured for less than the property would have otherwise brought, the sale will be valid.¹⁰

If an auctioneer is a member of an association which becomes the purchaser at his sale, such sale will be invalid; but the mere fact that the auctioneer was aware at the time of the sale, he could have an interest in the company if he wished, and afterwards did become a member, will not affect the validity of the sale.¹¹

C. Power to Adjourn Sale.—A power to sell at public auction, after a certain public notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in the auctioneer's discretion fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property.¹²

III. Liability of Auctioneers on Their Bonds.

An auctioneer's bond is intended, by law, for the benefit of his private customers, therefore, if the auctioneer fail to pay over to his employer, money received from the sale, he becomes liable on his bond.¹³ The bond also secures

by an agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it. *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076.

In *Veazie v. Williams*, 8 How. 134, 151, 12 L. Ed. 1018, the court said: "It would be very questionable whether, in point of law or equity, an auctioneer can be allowed to bid off for himself the very property he is selling. It has been laid down that he cannot. *Hughes' Case*, 6 Ves. 617; *Oliver v. Court*, 8 Price 126; 9 Ves. 234; 8 Id. 337; *Long on Sales*, 228; *Babington on Auctions*, 164. The principles against it are stronger, if possible, and certainly were enforced earlier in courts of equity than of law. An opposite course would give to an auctioneer many undue advantages. It would tend, also, to weaken his fidelity in the execution of his duties for the owner. He would be allowed to act in double and inconsistent capacities, as agent for the seller and as buyer also; and the precedents are numerous holding such sales voidable, if not void, and at all events unlawful, as opposed to the soundest public policy."

10. Bid by auctioneer for creditor.—*Richards v. Holmes*, 18 How. 143, 148, 15 L. Ed. 304.

An auctioneer should not undertake an agency of the creditor to purchase the property for him at the least price at which it could be obtained; but an agency simply to bid a particular sum for the purchaser, amounting to no more than receiving from a purchaser, before the auction, a bid which is to be treated as if made there by the purchaser himself, is not necessarily inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale. *Richards v. Holmes*, 18 How. 143, 148, 15 L. Ed. 304.

11. Purchase by association.—*Membership of auctioneer.*—*Kearney v. Taylor*, 15 How. 494, 523, 14 L. Ed. 787.

12. Power to adjourn sale.—*Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304. See, also, *Kearney v. Taylor*, 15 How. 494, 524, 14 L. Ed. 787.

"A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale of which previous public notice was given." *Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304.

The marshal, or other officer, who makes a sale of real property under a decree of foreclosure, possesses the power, for good cause shown, in the exercise of a sound discretion, and in subordination to the superior control of the court over the whole matter of the sale, to adjourn the sale from time to time. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 18 L. Ed. 43.

In a case where the decree was that the sale should be made unless the mortgagors should previously pay the mortgage debt, a few short adjournments for the purpose of enabling the mortgagors to make an arrangement to pay it, are adjournments for sufficient cause, although such adjournments have been made by direction of the complainant's solicitor. And if, prior to the day to which the sale stands adjourned, the mortgagors come in and pay the complainants the amount of the decree, etc., the sale may properly be discontinued altogether. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 18 L. Ed. 43. See the title MORTGAGES AND DEEDS OF TRUST.

13. Private customers entitled to benefit of bond.—*Lea v. Yard*, 4 Dall. 95, 1 L. Ed. 756.

the duties payable to the government.¹⁴

IV. Auction Sales.

A. When Sale Is Perfected.—Contracts for the purchase and sale of goods or lands at public auction are contracts founded upon mutual promises and a mutuality of obligation, and consequently they cannot be regarded as having been perfected and made binding unless they have received the consent of the parties.¹⁵ Therefore, in ordinary sales at an auction, the seller may withdraw the goods or the bidder may retract his bid at any time before they are struck off;¹⁶ and the auctioneer has no right to prescribe conditions which will deprive the bidder of such a right.¹⁷

B. Validity of Sale—1. **BARGAIN BETWEEN AUCTIONEER AND PURCHASER.**—When the law requires a sale of property real and personal, to be made at public auction, after due notice, it is for the purpose of inviting competition among bidders that the highest price may be obtained for what is sold. A private bargain beforehand between the auctioneer and a person who wishes to buy, as to the price and other incidents of the contract, will render the subsequent public sale voidable at the instance of heirs, devisees or creditors interested in having the property bring its full value.¹⁸ But it may be doubted whether such a sale will be set aside at the instance of one who was purchaser at both the public and private sale. And it is still more questionable whether such purchaser after having received and used personal property, so purchased, for a long time, can set up such a defense to a suit for the purchase money.¹⁹

2. **COMBINATION BY PURCHASERS TO PREVENT COMPETITION—PUBLIC SALE REQUIRED BY LAW.**—A combination by the purchasers, at a public auction required by law, to prevent competition, will render the sale invalid.²⁰ The ques-

14. **Bond secures duties payable to government.**—*Dallas v. Chaloner*, 3 Dall. 500, 1 L. Ed. 696; *Lea v. Yard*, 4 Dall. 95, 1 L. Ed. 756. See the titles **BONDS; PUBLIC OFFICERS.**

Though the Pennsylvania statute (1 Dall. Laws 865; 2 Dall. Laws 777), directed auctioneers to be displaced, and their bonds to be put in suit, if they did not, once in three months, pay the duties into the treasury, there was no provision for annulling the bonds, or forfeiting the remedy of the state upon them, in case that direction should not be complied with; and, therefore, the commonwealth was entitled to recover all arrears of duties, though accruing more than three months previously. *Dallas v. Chaloner*, 3 Dall. 500, 1 L. Ed. 696.

15. **When sale perfected.**—*Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 205, 18 L. Ed. 43.

16. **The reason for the rule** is that so long as the final consent of both parties is not signified by the blow of the hammer, there is no mutual agreement to a definite proposition. But as soon as the hammer is struck down, the bargain is considered as concluded, and the seller has no right afterward to accept a higher bid nor the buyer to withdraw from the contract. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 206, 18 L. Ed. 43.

A bidder at a judicial sale at public auction, whose bid has not been accepted—the sale being adjourned for sufficient cause and finality discontinued—cannot

insist, even though he has been the highest and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale to him. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 18 L. Ed. 43.

17. **Auctioneer cannot prescribe conditions depriving bidder of right to retract.**—*Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. 196, 206, 18 L. Ed. 43.

18. **Effect of bargain between auctioneer and purchaser.**—*Porter v. Graves*, 104 U. S. 171, 174, 26 L. Ed. 691.

19. *Porter v. Graves*, 104 U. S. 171, 174, 26 L. Ed. 691.

20. **Combination to prevent competition.**—*Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787.

Where an association was formed for the purpose of improving land, and became the purchaser at an auction sale; and it was plain that the association was not for the purpose of preventing competition, it was held a valid sale. *Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787. *Nelson, J.*, who delivered the opinion of the court, said: "It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to

tion as to whether an agreement existed which tended to stifle competition, is one of fact for the jury.²¹ That the price obtained was greater than any previous estimate of the value of the property is a fact to show that competition in bidding was not prevented.²²

3. **BY-BIDDING OR PUFFING.**—By-bidding or puffing at an auction sale by the owner or at his instigation is a fraud and avoids the sale. The sale may also be avoided where the by-bidding or puffing is by the auctioneer without the sanction or knowledge of the owner, if the owner afterwards ratifies the sale and takes the benefit of it. An exception to these rules is where the owner fixes a minimum price or gives notice of by-bids; and also, perhaps, where by-bids are made merely to prevent a sacrifice of the property, or where real bids besides those of the vendee occurred after the by-bidding.²³

A release given by the purchaser to the auctioneer, for the purpose of making him a competent witness, does not operate as a bar to a recovery against the vendors, in an action to set aside the sale and recover the purchase money on the ground of fraudulent by-bidding.²⁴

C. Action for Breach of Contract—Condition Precedent.—Upon a sale of land at auction, if the terms be that the purchaser shall, within thirty days, give his notes, with two good indorsers, and if he shall fail to comply, within that time, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee, for a breach of the contract, until a resale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser.²⁵

bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest in the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. * * * These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the civil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders. We must, therefore, look beyond the mere fact of an association of persons formed for the purpose of bidding * * *, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it; and if, upon such examination, it is found, that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the

property at a sacrifice. Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each."

Agreement to prevent competition at sale of government lands.—Where the land department of the government, denying an unfounded pre-emption claim in the government lands set up by a person indebted to several persons, proceeds to sell the lands at public auction, as part of the public lands, and the debtor and several of his creditors enter into an agreement that the land shall not be bid up, but on the contrary shall be struck off at as low a price as possible to one of the creditors, who shall divide it among such creditors as will come into an agreement to receive it in satisfaction of their debts, and the land is thus sold at an under price, creditors who have not come into the arrangement cannot set the arrangement aside. The government alone can interpose. *Easley v. Kellom*, 14 Wall. 279, 20 L. Ed. 890.

21. **Existence of agreement a question of fact.**—*Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787.

22. **Evidence to show that competition was not prevented.**—*Kearney v. Taylor*, 15 How. 494, 518, 14 L. Ed. 787.

23. **By-bidding or puffing.**—*Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

24. *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

25. **Resale condition precedent to action.**—*Webster v. Hoban*, 7 Cranch 399, 3 L. Ed. 384.

D. Actions to Set Aside Informal or Fraudulent Sales—1. **LACHES AND PRESCRIPTION.**—The right to maintain a suit in equity to set aside an auction sale on the ground of fraud may be lost by laches.²⁶ Under the Civil Code of Louisiana, "all informalities connected with or growing out of any public sale, made by any person authorized to sell by public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."²⁷

2. **PARTIES TO ACTION.**—**Auctioneer Not a Necessary Party.**—In an action to set aside an auction sale, which was ratified by the owner of the property sold, on account of fictitious bidding by the auctioneer, the auctioneer is not a necessary party to the bill.²⁸

3. **WITNESSES.**—**The auctioneer is a competent witness** to show that he was employed by the vendor to make fictitious bids, to enhance the price of the property sold.²⁹

4. **JUDGMENT OR DECREE.**—Where fraudulent by-bidding has been practiced, a court of equity will either set aside unconditionally the whole sale and order a reconveyance of the property and a return of the purchase money, or will treat as void only so much of the proceedings as was fraudulent and require so much of the purchase price as was obtained by the fictitious bidding to be refunded.³⁰

26. **Facts not showing laches.**—The sale being made on the 1st of January, 1836, but the fraud not discovered until 1840, and the bill being filed in 1841, there is no sufficient objection to relief owing to lapse of time. *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018. Generally, as to laches, see the title **LACHES**.

27. **Prescription in Louisiana.**—Civil Code of Louisiana, art. 3543. *Davis v. Gaines*, 104 U. S. 386, 26 L. Ed. 757; *New Orleans Bank v. Le Breton*, 120 U. S. 765, 773, 30 L. Ed. 821.

A purchaser in good faith at the sale of an executor or register of wills, and who holds by a just title, may plead the statutory prescription against all informalities connected with or growing out of a public sale by a person authorized to sell at auction. *Davis v. Gaines*, 104 U. S. 386, 402, 26 L. Ed. 757. See the title **EXECUTORS AND ADMINISTRATORS**.

28. **Auctioneer not a necessary party to bill.**—*Veazie v. Williams*, 8 How. 134, 159, 12 L. Ed. 1018.

29. **Auctioneer competent witness to prove fictitious bidding.**—*Veazie v. Williams*, 8 How. 134, 159, 12 L. Ed. 1018. See the title **WITNESSES**.

30. **Judgment or decree where fraudulent by-bidding practiced.**—*Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

The owners had instructed the auctioneer to take \$14,500 for the property to be sold, and the real bids stopped at \$20,000, when the auctioneer without the consent or knowledge of the owner made fictitious bids until the property was finally sold for \$40,000. In an action for the rescission of the sale and the return of part of the purchase money, the court decreed a restoration of the excess of consideration obtained by the fictitious bidding. *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

AUDITA QUERELA.

CROSS REFERENCES.

As to when an infant may avoid his contract by a writ of audita querela, see the title *INFANTS*.

Definition.—A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise.¹

Nature.—An audita querela is a writ of a remedial nature, invented to prevent an oppressive defect of justice; and although it is said to be in the nature of a bill in equity, yet in modern practice, courts of law usually afford the same remedy on motion in a summary way.²

When It Will Lie.—It is a proper form of action where an award of execution has been made in a manner that it would not be enforced in court,³ or where a judgment is voidable for want of notice, and a false statement on its face,⁴ or in any case where relief should be allowed, if the case is difficult or dubious.⁵

When It Will Not Lie.—Audita querela does not lie where the party has had a legal opportunity of defense and neglected it;⁶ nor does it lie against the United States.⁷

AUDITING.—See note 8.

1. **Definition.**—Bouvier's Law Dict.

2. **Nature.**—Humphreys v. Leggett, 9 How. 297, 312, 13 L. Ed. 145.

3. **When it will lie.**—New Orleans, etc., R. Co. v. Morgan, 10 Wall. 256, 19 L. Ed. 892.

4. If a judgment is voidable for want of notice, and a false statement on its face, "that the parties appeared by their attorneys and dispensed with a jury, and submitted the facts to the court," it may be set aside by an audita querela. Landes v. Brant, 10 How. 348, 371, 13 L. Ed. 449. See, also, Thompson v. Whitman, 18 Wall. 457, 464, 21 L. Ed. 897.

5. Boyle v. Zacharie, 6 Pet. 648, 656, 8 L. Ed. 532; Humphreys v. Leggett, 9 How. 297, 312, 13 L. Ed. 145.

"In Brooks v. Hunt, 17 Johns. 484, Mr. Chancellor Kent, in delivering the opinion of the court of errors, alluding to this practice, said, 'it is not an uncommon thing for a court of law, if the case be difficult or dubious, to refuse to relieve a party, after judgment and execution, in a summary way, by motion, and to put him to his audita querela.' * * * And in the close of his opinion, he emphatically observed, if the case 'is to be carried from this court to the supreme court of the United States, I should hope, for the credit of our practice, it might be on the audita querela, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit.'" Boyle v. Zacharie, 6 Pet. 648, 656, 8 L. Ed. 532.

6. During the rebellion, the United States took possession of A.'s house in a rebel town as "captured and abandoned property," rented it from 1862 to 1865, and received rents, \$7,000, which were in the federal treasury. After the suppression of the rebellion, A. having returned home, the government sued him, and in March, 1867, got judgment and issued execution against him, he not pleading as a set-off the \$7,000 received by the United States. In May, 1869, he moved for a writ of audita querela; assigning as a reason for not having pleaded a set-off, that he did not know until just before he filed his petition and made his present motion, that the money was in the treasury of the United States. Held, that the motion was rightly denied; for that if A. had a claim on the United States, he was in fault in not having discovered and pleaded it. He could easily have inquired by communicating with the bureau of the treasury department where the accounts of the leases and sales of abandoned property were kept, and this inquiry would have resulted in obtaining evidence available for his purpose. Avery v. United States, 12 Wall. 304, 20 L. Ed. 405.

7. Audita querela does not lie in any case against the United States. Avery v. United States, 12 Wall. 304, 20 L. Ed. 405.

8. **Auditing.**—In Sanborn v. United States, 135 U. S. 271, 284, 34 L. Ed. 112, it is said: "The statute fixes the amount to be allowed for attendance and mileage

AUDITOR.—See note 1.

AUTHENTICATION.—See the titles **ACKNOWLEDGMENTS**, vol. 1, p. 76; **DEEDS**; **DOCUMENTARY EVIDENCE**.

As to authentication of records, see the titles **APPEAL AND ERROR**, ante, p. 243; **RECORDS**.

AUTHOR.—See the title **COPYRIGHT**.

An author is: "He to whom anything owes its origin; originator; maker; one who completes a work of science or literature."²

AUTHORITY.—See post, **LAWFUL AUTHORITY**. See note.³

AUTHORIZE.—To authorize is to clothe with authority; to give legal power to.⁴

to witnesses entitled to claim therefor, and no auditing in respect to such claims is required; whereas, the items that enter into the account of a clerk or other officer, sent away from his place of business as a witness for the government, for his necessary expenses in going, returning, and attendance on the court, cannot well be known to the court or its clerk, and must be furnished by the witness himself. Those items are to be examined, looked over, and adjusted; in other words, they must be audited."

1. **Auditor.**—In *Field v. Hoiland*, 6 Cranch 8, 21, 3 L. Ed. 136, it is said: "The order in question bears no resemblance to a rule of court referring a cause to arbitrers. It is a reference to auditors, a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. The order in this case, so far from implying that the decision of the auditors shall be made the decree of the court, does not even require, in terms, that the auditors shall form any opinion whatever." See, generally, the titles **ARBITRATION AND AWARD**, ante, p. 464; **REFERENCE**.

2. **Burrow-Giles Lithographic Co. v. Sarony**, 111 U. S. 53, 58, 28 L. Ed. 349.

3. **Authority of.**—Where a bond recites that it is issued by authority of a statute there is a presumption in favor of a bona fide purchaser for value, that the statute has been fully complied with and precludes inquiry as to whether the precedent conditions have been performed before the bonds have been issued. *Independent School District v. Stone*, 106 U. S. 183, 187, 27 L. Ed. 90.

Authority of the United States.—In *Baldwin v. Franks*, 120 U. S. 678, 693, 30 L. Ed. 766, it is said: "All, therefore, depends on that part of the section which provides a punishment for 'opposing' by force the authority of the United States, or for preventing, hindering, or delaying the 'execution' of any law of the United States. This evidently implies force against the government as a government. To constitute an offense under the first clause, the authority of the government

must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority.

Authority exercised under any state—authority exercised under the United States.—See the title **APPEAL AND ERROR**, vol. 1, p. 550.

4. **Authorize.**—Blair & Chicago, 201 U. S. 400, 457, 50 L. Ed. 801, and in that case it is said: "A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be authorized by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority,' Webster's Dict.: 'To give legal power to,' Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets."

A charter of a corporation provided that the corporation should have full power and authority to authorize the drawing of lotteries. Upon the meaning of authorize in this connection, the court said: "Some doubt has been expressed whether this power is to be exercised by drawing the lottery, on account and at the risk of the corporation, or by selling the privilege to individuals, and authorizing them to draw it on their own account. This doubt is founded on the word authorize. Congress, we are told, has not granted the power to draw lotteries, but to authorize their being drawn. We cannot admit the correctness of this criticism. We do not admit the justice of that construction, which denies to the corporation the power of causing the lottery to be drawn on its own account. A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents. Any legislative act directing a lottery to be drawn, is literally an act to authorize the drawing of lotteries." *Clark v. Washington*, 12 Wheat. 40, 52, 6 L. Ed. 544.

AUTREFOIS, ACQUIT AND CONVICT.

BY R. E. MAXWELL.

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See the titles CONSTITUTIONAL LAW; CRIMINAL LAW; DISMISSAL, DISCONTINUANCE AND NONSUIT; FORMER ADJUDICATION OR RES ADJUDICATA; INDICT-

MENTS, INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES; JURISDICTION; JURY; JUSTICE OF THE PEACE; NEW TRIALS; PLEADING; VERDICT.

As to whether an acquittal or conviction in a criminal prosecution is a bar to subsequent civil proceedings upon the same facts, see the title FORMER ADJUDICATION OR RES ADJUDICATA.

I. Definitions and General Consideration.

A. Definitions.—"Jeopardy, in the constitutional sense, arises when the accused is put to trial before a court of competent jurisdiction upon a sufficient indictment, and the prisoner has been legally convicted or acquitted by the verdict of a jury, as appears by the record thereof remaining in the court where the verdict was returned.¹

Autrefois Acquit.—A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offense.²

Autrefois Convict.—A plea made by the defendant indicted for a crime or a misdemeanor, that he has formerly been tried and convicted of the same offense. It is grounded upon the same principle as the plea of autrefois acquit, viz: That no man's life or liberty shall be twice put in jeopardy for the same offense.³

B. Statement of Rule.—If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice put in jeopardy for the same offense.⁴ At common law one conviction or acquittal of a crime was a bar to a subsequent prosecution for the same offense.⁵ And by article five of

1. **Jeopardy.**—*Coleman v. Tennessee*, 97 U. S. 509, 520, 24 L. Ed. 1118.

2. **Autrefois acquit.**—*Bouvier's Law Dict.*

3. **Autrefois convict.**—*Bouvier's Law Dict.*; *Whart. Cr. Pl.*, § 435; 1 *Bish. Cr. Law*, §§ 651, 680.

4. **Statement of rule.**—*Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Kepner v. United States*, 195 U. S. 100, 120, 49 L. Ed. 114; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *Grafton v. United States*, 206 U. S. 333, 51 L. Ed. 1084; *Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057; *Ex parte Bigelow*, 113 U. S. 328, 28 L. Ed. 1005; *Coleman v. Tennessee*, 97 U. S. 509, 520, 24 L. Ed. 1118; *Coffey v. United States*, 116 U. S. 436, 443, 29 L. Ed. 684.

To every indictment or information charging a party with a known and defined crime or misdemeanor, whether at common law or by statute, a plea of autrefois acquit or autrefois convict is a good defense. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872.

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." *In re Nielsen*, 131 U. S. 176, 188, 33 L. Ed. 118. See, also, *Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114.

5. **At common-law.**—*Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Kepner v. United States*, 195 U. S. 100, 120, 49 L. Ed. 114.

"At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the

offense. The rule is thus stated by Hawkins in his *Pleas of the Crown*, quoted by Mr. Justice Story in *United States v. Gilbert et al.*, 2 Sumner, 19, 39: 'The plea (says he) of autrefois acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime.' In this court it was said by Mr. Justice Miller, in *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872: 'The common law not only prohibited a second punishment for the same offense, but went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'" *Kepner v. United States*, 195 U. S. 100, 120, 49 L. Ed. 114.

As a bar to other crimes not capital.—"In the case of *Crenshaw v. The State of Tennessee*, 1 M. & Y. 122, it was held by the supreme court of that state that the common-law principle went still further, namely, that an indictment, conviction, and punishment in a case of felony not capital was a bar to a prosecution for all other felonies not capital committed before such conviction, judgment, and execution." *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872.

"In Spanish law the doctrine found expression in the *Fuero Real* (A. D. 1255)

the amendments to the constitution of the United States, it is provided that no person shall for the same offense be twice put in jeopardy of life or limb.⁶

C. Purpose of Doctrine.—The provision of the constitution is against being twice put in jeopardy,⁷ but the main purpose is to prevent a second punishment for the same crime.⁸

D. Doctrine Applicable to Philippine Islands.—The doctrine that "no person for the same offense shall be twice put in jeopardy or punishment" is equally applicable to all criminal prosecutions in the Philippine Islands.⁹

and the *Siete Partidas* (A. D. 1263). "After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases). *Fuero Real*, lib. iv, tit. xxi, 1, 13: 'If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of the offense (except in certain cases). *Siete Partidas*, Part VII, tit. i, 1, xii.' In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola in 1848, it is said, in considering the persons who may be accused of crime: 'It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the same crime, since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo, I, p. 511.' Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort." *Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114.

6. Constitutional provision.—Ex parte Bigelow, 113 U. S. 328, 329, 28 L. Ed. 1005; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; *Coleman v. Tennessee*, 97 U. S. 509, 520, 24 L. Ed. 1118; *Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057; *Grafton v. United States*, 206 U. S. 333, 51 L. Ed. 1084; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114; *United States v. Ball*, 163 U. S. 662, 669, 41 L. Ed. 300.

"Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*." Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

"State constitutions, as well as the constitution of the United States, provide, in substance and effect, that no person shall be subject to be twice put in jeopardy of life for the same offense." *Coleman*

v. Tennessee, 97 U. S. 509, 520, 24 L. Ed. 1118, dissenting opinion of Clifford J.

Provision applicable to misdemeanors.—"Mr Bishop, in the latest edition of his work on criminal law, §§ 990, 991, 5 edition speaking of this constitutional provision, says the construction of these words is that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with the crime he cannot well see how courts can refuse to apply this constitutional guarantee in cases of misdemeanor." Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

7. Kepner v. United States, 195 U. S. 100, 129, 49 L. Ed. 114; *United States v. Ball*, 163 U. S. 662, 669, 41 L. Ed. 300.

"The constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy." *Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114. See, also, *In re Nielsen*, 131 U. S. 176, 188, 33 L. Ed. 118.

8. "Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value?" Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

Purpose of doctrine.—The provisions of the common law of the federal constitution, that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

9. Doctrine applicable to Philippine Islands.—The act of congress of July 1st, 1902, provided, that "no person for the same offense shall be twice put in jeopardy of punishment." 32 Stat. 691. That the prohibition of double jeopardy is ap-

E. Denies Government Right of Appeal.—The state or the United States have no right of appeal in a criminal case.¹⁰

Statutory Right to Review.—Statutes giving the state the right to appeal when the accused has been acquitted are invalid as in violation of the constitution;¹¹ but this is not true of statutes giving the state the right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy.¹²

II. Essential Elements of Jeopardy.

A. Jurisdiction of Court.—Jurisdiction is essential to the validity of every conviction or acquittal, as the rule is universal that a former conviction or acquittal in a court having no jurisdiction of the offense is a mere nullity, and constitutes no bar to a second prosecution.¹³

B. Validity of Indictment.—Although the indictment is fatally defective, yet if the defendant is tried and acquitted upon it, such acquittal is a bar to a further prosecution for the same offense.¹⁴

applicable to all criminal prosecutions in the Philippines was settled upon full consideration in the recent case of *Kepner v. United States*, 195 U. S. 100, 124, 126, 129, 130, 49 L. Ed. 114, in which it was held that by force of the above act of congress such prohibition was carried to the Philippines and became the law of those islands. *Grafton v. United States*, 206 U. S. 333, 51 L. Ed. 1084.

10. Appeal by government.—See the title *APPEAL AND ERROR*, ante, p. 59, et seq.

11. Statutory right to review.—Mr. Bishop, in his work upon Criminal Law, sums up the scope and authority of such statutes as follows: 'A legislative provision for the rehearing of criminal causes cannot be interpreted—or, at least, it cannot have force—to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. Such a statute will be interpreted with the constitution, and be held to apply only to cases where it constitutionally may. And if it undertakes to give to the state the right of appeal, to retry the party charged, after acquittal, it is invalid. And so the writ of error, or the like, allowed to the state, can authorize the state to procure the reversal of erroneous proceedings and commence anew, only in those cases in which the first proceeding did not create legal jeopardy.' 1 Bishop Criminal Law (5th Ed.), § 1026." *Kepner v. United States*, 195 U. S. 100, 131, 49 L. Ed. 114.

12. Qualification to rule.—We are not here dealing with those statutes which give to the government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been

quite generally sustained in jurisdiction which deny the right of second trial where a competent court has convicted or acquitted the accused. *People v. Webb*, 38 California 467." *Kepner v. United States*, 195 U. S. 100, 130, 49 L. Ed. 114.

13. Jurisdiction essential to jeopardy.—*Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114; *Grafton v. United States*, 206 U. S. 333, 345, 51 L. Ed. 1084; *Murphy v. Massachusetts*, 117 U. S. 155, 159, 44 L. Ed. 711; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *United States v. Ball*, 163 U. S. 662, 41 L. Ed. 300; *Coleman v. Tennessee*, 97 U. S. 509, 521, 24 L. Ed. 1118.

Pleading jurisdiction.—See post, "Averments," V, B.

14. Validity of indictment.—*Kepner v. United States*, 195 U. S. 100, 130, 49 L. Ed. 114; *United States v. Ball*, 163 U. S. 662, 669, 41 L. Ed. 300.

An acquittal to an indictment undertaking to charge murder is a bar to a subsequent prosecution for the same offense, if the indictment is not objected to before verdict as insufficient. *United States v. Ball*, 163 U. S. 662, 41 L. Ed. 300.

"Millard F. Ball, John C. Ball and Robert E. Boutwell had been indicted, in the circuit court of the United States for the Eastern District of Texas, for the murder of one Box, and on trial Millard F. Ball had been acquitted and discharged, and John C. Ball and Boutwell convicted and sentenced to death. The condemned having brought the case here on error, it was held that the indictment was fatally defective, and the judgment was reversed and the cause remanded with a direction to quash the indictment. *Ball v. United States*, 140 U. S. 118. The mandate went down, the indictment was dismissed, and a new indictment was returned against all three defendants. To this Millard F. Ball filed a plea of former jeopardy and former acquittal, and John C. Ball and Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon the former indictment, and of the dismissal of

Indictment Describing No Offense Known to the Law.—But where the indictment describes no offense known to the law, a second trial may be had without violating this principal.¹⁵

Where Defendant Has Judgment Set Aside because Indictment Defective.—It is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.¹⁶

III. Identity of Offenses.

A. Rule as to Identity.—It must appear that the offense charged was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.¹⁷

B. Rule to Determine Identity.—To be identical, it is not necessary that the two charges should be precisely the same in point of degree,¹⁸ nor that they be the same in name.¹⁹

C. Single Act Involving More than One Offense.—Greater and Lesser Offense.—It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one.²⁰

that indictment. Both these pleas were overruled, defendants pleaded not guilty, were convicted and sentenced to death. On their writ of error this court held that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." *Murphy v. Massachusetts*, 177 U. S. 155, 158, 44 L. Ed. 711, commenting on *United States v. Ball*, 163 U. S. 662, 41 L. Ed. 300.

Contra.—But see the authorities holding the contrary, cited by Clifford, J. in the dissenting opinion of *Coleman v. Tennessee*, 97 U. S. 509, 521, 24 L. Ed. 1118.

"A party is not put in legal jeopardy if it appears that the first indictment was clearly insufficient and invalid. *Commonwealth v. Bakeman*, 105 Mass. 53; *Gerard v. The People*, 3 Ill. 362; *The People v. Cook*, 10 Mich. 164; *Mount v. Commonwealth*, 2 Duv. (Ky.) 93." *Coleman v. Tennessee*, 97 U. S. 509, 521, 24 L. Ed. 1118, dissenting opinion of Clifford, J.

15. Indictment describing no offense known to the law.—Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

16. Where judgment is set aside.—*Hopt v. Utah*, 104 U. S. 631, 26 L. Ed. 813; S. C., 110 U. S. 574, 28 L. Ed. 262; S. C., 114 U. S. 488, 29 L. Ed. 183; S. C., 120 U. S. 430, 30 L. Ed. 708; *Murphy v. Massachusetts*, 177 U. S. 155, 159, 44 L. Ed. 711. See post, "Waiver of Right to Plea of Former Jeopardy," VI.

Where sentence partly served.—The plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence, reversed or vacated on the prisoner's own application

Murphy v. Massachusetts, 177 U. S. 155, 162, 44 L. Ed. 711.

17. Rule as to identity.—*Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057.

A defendant who has been acquitted of a charge in an indictment of having received, in violation of the statute, compensation from a company, cannot plead former jeopardy to an indictment for having received the compensation from a certain named officer of the company. *Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057.

18. Same in point of degree.—"In Chitty's Criminal Law, vol. 1, pp. 452, 455, 462, the author says: 'It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other.'" *Grafton v. United States*, 206 U. S. 333, 350, 51 L. Ed. 1084.

Identity determined by their nature, not by their grade.—"The identity of the offenses is determined, not by their grade, but by their nature." *Grafton v. United States*, 206 U. S. 333, 350, 51 L. Ed. 1084.

19. Same in name.—"Mr. Bishop, in his treatise on Criminal Law (7th Ed.), § 1050, says: 'It is not necessary to establish the defense "autrefois acquit" or "convict" that the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense.'" *Grafton v. United States*, 206 U. S. 333, 350, 51 L. Ed. 1084.

20. Single act involving more than one offense.—In re Nielsen, 131 U. S. 176, 189, 33 L. Ed. 118; *Grafton v. United States*, 206 U. S. 333, 351, 51 L. Ed. 1084.

Acquittal or Conviction of Greater as Bar to Indictment for Lesser.—An acquittal or conviction for a greater offense is a bar to a subsequent indictment for a minor offense included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less.²¹

Arson and Murder.—It has been held that one convicted for arson cannot afterwards be tried for murder of persons who were in the house when it was burned.²²

Robbing Mail and Putting Life of Driver in Jeopardy.—The defendant was indicted for robbing the mail of the United States, and putting the life of the driver in jeopardy, and the conviction and judgment pronounced upon it extended to both offenses. After this judgment, no prosecution could be maintained for the same offense, or for any part of it, provided the former conviction was pleaded.²³

Unlawful Cohabitation and Adultery.—The conviction of a person of the crime of unlawful cohabitation is a bar to his subsequent prosecution for the crime of adultery.²⁴

D. Continuous Acts Constituting One Offense.—Unlawful Cohabitation.—The crime of unlawful cohabitation being a continuous, and a single one,

21. "An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of larceny." In re Nielsen, 131 U. S. 176, 189, 33 L. Ed. 118.

Murder and manslaughter.—"In Commonwealth v. Roby, 12 Pick. 503, the court said: 'Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, e converso, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.' 1 Stark. Cr. Pl. (3d Ed.) 322." Grafton v. United States, 206 U. S. 333, 351, 51 L. Ed. 1084; In re Nielsen, 131 U. S. 176, 189, 33 L. Ed. 118. See the title HOMICIDE.

Murder and burglary.—"If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of a burglary with violence, under 7 Wm. IV and 1 Vic., c. 86, 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence." In re Nielsen, 131 U. S. 176, 189, 33 L. Ed. 118.

Common sale of liquors and single sales within same time.—"A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser of-

fense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect. Commonwealth v. Jenks, 1 Gray 490, 492; Commonwealth v. Hudson, 14 Gray 11; Commonwealth v. Mead, 10 Allen 396." In re Nielsen, 131 U. S. 176, 187, 33 L. Ed. 118.

22. **Arson and murder.**—"In the case of Cooper v. The State, 1 Green 361, in the supreme court of New Jersey, the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding, he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the constitution of New Jersey, which embodies the precise language of the federal constitution. After referring to the common-law maxim, the court says: 'The constitution of New Jersey declares this important principle in this form: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."'" Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; In re Nielsen, 131 U. S. 176, 190, 33 L. Ed. 118. See the title HOMICIDE.

23. **Robbing mail and putting life of driver in jeopardy.**—United States v. Wilson, 7 Pet. 150, 8 L. Ed. 640. See the title ROBBERY.

24. **Unlawful cohabitation and adultery.**—In re Nielsen, 131 U. S. 176, 190, 33 L. Ed. 118. See the title ADULTERY. FORNICATION AND LEWDNESS, vol. 1, p. 195.

but one conviction can be had for the time preceding the finding of the indictment.²⁵

E. Passing Different Counterfeit Notes.—A defendant tried and acquitted for passing a counterfeit note may be tried for passing a different counterfeit note of like denomination.²⁶

F. Counterfeiting Coins and Passing Counterfeit Money.—The two offenses of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offense directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached.

G. Possession of Different Plates for Printing Counterfeit Notes.—A prisoner having been tried and acquitted on a charge of having possession of a plate for printing counterfeit notes, may plead the same in bar to a second indictment, for having, at the same time, possession of another such plate; the act of possession is a single one.²⁸

H. Where Same Evidence Will Support Both Indictments.—If the evidence necessary to support an indictment might have been admitted in support of the former indictment, under which the defendant was acquitted, he may successfully plead former acquittal.²⁹

25. Unlawful cohabitation and single act within same time.—"In the case of *In re Snow*, 120 U. S. 274, 30 L. Ed. 658, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of the district court of Utah." *In re Nielsen*, 131 U. S. 176, 182, 33 L. Ed. 118. See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 195.

26. Passing different counterfeit notes.—The defendant was indicted, in April, 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note, of the denomination of ten dollars, purporting to be a note of the bank of the United States, with intent to defraud the bank, etc.; he pleaded that the note described in the indictment had been heretofore given in evidence on the trial of the defendant, upon a former indictment found against him for passing another counterfeit ten dollar note, upon which indictment he had been acquitted. The offense for which the defendant was indicted, and to which indictment he pleaded the plea of a former acquittal, was entirely a distinct offense from that on which the verdict of acquittal was found; the plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offense. The matter pleaded is no bar to the indictment. *United States v. Randenbush*, 8 Pet. 288, 8 L. Ed. 948. See the title FORGERY AND COUNTERFEITING.

27. Counterfeiting coins and passing counterfeit money.—The power conferred

upon congress by the fifth and sixth clauses of the eighth section of the first article of the constitution of the United States, viz: "To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;" "To provide for the punishment of counterfeiting the securities and current coin of the United States;"—does not prevent a state from passing a law to punish the offense of circulating counterfeit coin of the United States. *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213. See the titles CONFLICT OF LAWS; FORGERY AND COUNTERFEITING.

28. Possession of different plates for printing counterfeit notes.—*United States v. Randenbush*, 8 Pet. 288, 8 L. Ed. 948. See the title FORGERY AND COUNTERFEITING.

29. Where same evidence will support both indictments.—The act of congress passed on the 29th of July, 1813 (3 Stat. at L. 49), enacts that the owner of every fishing vessel shall, previous to receiving the allowance mentioned in the act, produce to the collector the original agreement which may have been made with the fishermen, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector. A person was indicted, in the district court of Massachusetts, for perjury, in swearing falsely to the agreement with the fishermen, and in swearing falsely that three-fourths of the crew were citizens of the United States. As the district judge held that the act of congress only required the owner to swear to the certificate of sailing, and not to the agreement with the fishermen, the person was acquitted. Afterwards, when indicted in the circuit court, this person pleaded his former acquittal. This was a good plea; because the evidence necessary to sustain the indictment, with respect to the fishermen's

I. Where Same Evidence Will Not Support Both Indictments.—It is well settled that the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.³⁰

J. Same Act as a Distinct Offense against Different Sovereigns—

1. UNITED STATES AND A STATE.—General Rule.—It is an established doctrine that the same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government,³¹ and whether a particular act is an offense against both governments is a question which the state court of original jurisdiction is competent to decide in the first instance.³²

Assault upon United States' Marshal.—An assault upon a United States' marshal is an offense against the United States, and also a breach of the peace of the state.³³

Uttering or Passing False Coins.—Uttering or passing false coins is an offense equally against the United States and a state, for which the guilty party

agreement, might have been given by the United States in the first trial. *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219.

30. Where same evidence will not support both indictments.—*Burton v. United States*, 202 U. S. 344, 50 L. Ed. 1057.

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *In re Nielsen*, 131 U. S. 176, 188, 33 L. Ed. 118.

31. Same act as a distinct offense against different sovereigns.—*United States v. Marigold*, 9 How. 560, 569, 13 L. Ed. 257; *Fox v. Ohio*, 5 How. 410, 433, 12 L. Ed. 213; *Moore v. Illinois*, 14 How. 13, 19, 14 L. Ed. 306; *Ex parte Siebold*, 100 U. S. 371, 390, 25 L. Ed. 717; *Cross v. North Carolina*, 132 U. S. 131, 139, 33 L. Ed. 287; *Grafton v. United States*, 206 U. S. 333, 353, 51 L. Ed. 1084; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Coleman v. Tennessee*, 97 U. S. 509, 518, 24 L. Ed. 1118; *In re Chapman*, 166 U. S. 661, 41 L. Ed. 1154.

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." *Fox v. Ohio*, 5 How. 410, 435, 12 L. Ed. 213; *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257; *Moore v. Illinois*, 14 How. 13, 19, 20, 14 L. Ed. 306. *Grafton v. United States*, 206 U. S. 333, 353, 51 L. Ed. 1084.

In United States v. Marigold, 9 How.

560, 569, 13 L. Ed. 257, it was said that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." *Cross v. North Carolina*, 132 U. S. 131, 139, 33 L. Ed. 287.

32. By whom determined.—Whether the same acts, upon the part of the accused, may be offenses against both the national and state governments and punishable in the judicial tribunals of each government, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offense; is a question which the state court of original jurisdiction is competent to decide in the first instance; and its obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused is the same that rests upon the courts of the United States. *New York v. Eno*, 155 U. S. 89, 39 L. Ed. 80.

33. Assault upon United States marshal.—"An assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other." *Grafton v. United States*, 206 U. S. 333, 353, 51 L. Ed. 1084; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588.

may be punished under the laws of each government.³⁴

Harboring Slaves.—The harboring and secreting a negro slave may be punished by a state, though the right to legislate on this subject may also be in congress.³⁵

2. **UNITED STATES AND THE PHILIPPINE ISLANDS.**—The doctrine that an act may be an offense against two different sovereigns is not applicable between the Philippine Islands and the United States. The Philippine Islands, not like a state, owes its existence wholly to the United States and derives and exerts its powers under and by authority of the United States.³⁶

K. Severer Punishment for Second Offense.—A statute imposing a severer sentence upon conviction of the second offense is not putting a person twice in jeopardy for the same offense.³⁷

L. Contempt of the Senate.—A witness for refusing to testify before a committee of the United States senate may be punished for contempt by the

34. Uttering or passing false coins.—

"This court has decided, in the case of *Fox v. Ohio*, 5 How. 410, 432, 12 L. Ed. 213, that a state may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257, that congress, in the proper exercise of its authority, may punish the same act as an offense against the United States." *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

If one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state; the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588.

35. Harboring slaves.—"In *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306, the defendant was fined four hundred dollars under the criminal code of that state for harboring and secreting a negro slave. The case came to this court under the twenty-fifth section of the judiciary act, on the ground that the right to legislate on that subject was exclusively in congress. The court did not concur in that view of the question. But it was also argued that the party might be subjected twice to punishment for the same offense if liable to be prosecuted under statutes of both state and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that 'the exercise of such a power by the states would, in effect, be a violation of the constitution of the United States and of the respective states. They all provide against a second punishment for the same act.' 'It is con-

trary,' said he, 'to the nature and genius of our government to permit an individual to be twice punished for the same act.'" *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872. See the title SLAVES.

36. United States and Philippine Islands.

—"These things cannot be predicated of the relations between the United States and the Philippines. The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

37. Severer punishment for second offense.

—The reason for holding that the accused is not again punished for the first offense is given in *Ross's Case*, 86 Tenn. 165, by Chief Justice Parker, that "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." *Moore v. Missouri*, 159 U. S. 673, 677, 40 L. Ed. 301.

A severer punishment imposed for the third offense upon one who has been twice before convicted of a crime and sentenced to imprisonment not less than three years, does not punish for the first offense, and is not unconstitutional in that it puts the prisoner twice in jeopardy for the same offense. *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

senate, and also indicted under the statute for a misdemeanor without being twice put in jeopardy.³⁸

IV. What Constitutes a Jeopardy.

A. Instances Constituting Jeopardy—1. **ACCUSED CHARGED BEFORE COMPETENT TRIBUNAL.**—It is true that some of the definitions given by the text-book writers, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him.³⁹

2. **IMPANELING AND SWEARING JURY, AND STATEMENT OF CASE BY DISTRICT ATTORNEY.**—The impaneling and swearing the jury, and the statement of his case by the district attorney in a trial where indictments are consolidated, to be tried together, puts the prisoner in jeopardy with regard to all the offenses charged in the consolidated indictments, within the meaning of the fifth amendment of the constitution, so that he cannot be again tried for any of those offenses.⁴⁰

3. **VERDICT OF ACQUITTAL NOT FOLLOWED BY JUDGMENT.**—A verdict of acquittal not followed by judgment is a bar to a subsequent prosecution.⁴¹

4. **TRIAL WITHOUT JURY.**—Protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal, without a jury, it is a bar to a second prosecution.⁴²

5. **EXECUTION OF JUDGMENT AS TO ONE ALTERNATIVE PUNISHMENT.**—When a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment in-

23. **Contempt of the senate.**—In *re Chapman*, 166 U. S. 661, 41 L. Ed. 1154; United States, Rev. Stat., § 102. See the title **CONTEMPT**.

39. **Accused charged before tribunal competent to try him.**—*Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118; *Kepner v. United States*, 195 U. S. 100, 128, 49 L. Ed. 114.

40. **Impaneling and swearing jury and statement of case by district attorney.**—*Ex parte Bigelow*, 113 U. S. 328, 329, 28 L. Ed. 1005.

41. **Verdict of acquittal not followed by judgment.**—"However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States v. Sanges*, 144 U. S. 310, 36 L. Ed. 445; *Commonwealth v. Tuck*, 20 Pick. 356, 365; *West v. State*, 2 *Zabriskie* (22 N. J. Law), 212, 231; 1 *Lead. Crim. Cas.* 532." *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114.

"The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it. *People v. Corning*, 2 N. Y. 9; 49 Am. Dec. 374, and note; 48 Am. St. Rep. 213, 214." *Kepner v. United States*, 195 U. S. 100, 133, 49 L. Ed. 114.

42. **Trial without jury.**—*Kepner v. United States*, 195 U. S. 100, 128, 49 L. Ed. 114.

Summarily convicted before a magistrate.—"In a case where the appellant had

been summarily convicted before a magistrate for negligently and by willful misconduct driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault, it was held, that the first conviction was a bar to the second. In the course of the opinion, it was said by Blackburn, J.: 'I think the fact that the appellant had been convicted by justices under one act of parliament for what amounted to an assault is a bar to a conviction under another act of parliament for the same assault. The defense does not arise on a plea of *autrefois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offense by a court of competent jurisdiction, transit in rem judicatum, that is, the conviction shall be a bar to all further proceedings for the same offense, and he shall not be punished again for the same matter; otherwise, there might be two different punishments for the same offense. The only point raised is whether a defense in the nature of a plea of *autrefois convict* would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury.' *Kepner v. United States*, 195 U. S. 100, 127, 49 L. Ed. 114.

stead of the former sentence. The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end.⁴³

6. TRIAL BEFORE COURT MARTIAL.—Congress has chosen, in its discretion, to confer upon general courts martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that is done the judgment of such military court is placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb.⁴⁴

B. Instances Not Constituting Jeopardy—1. DISCHARGE OF JURY FROM NECESSITY.—When it appears from all the circumstances there is a manifest necessity for discharging the jury, it may be done, and the defendant is not thereby put in jeopardy within the meaning of the fifth amendment to the constitution of the United States.⁴⁵

2. TERM OF COURT ENDING BEFORE TRIAL FINISHED.—If the term of court, as fixed by law, comes to an end before the trial is finished the defendant is not put in legal jeopardy.⁴⁶

3. JUDGMENT ARRESTED UPON MOTION OF DEFENDANT.—One is not put in jeopardy in a case where the judgment is arrested on a motion of the defendant.⁴⁷

43. Execution of judgment as to one alternative punishment.—Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Bigelow, 113 U. S. 328, 331, 28 L. Ed. 1005; Murphy v. Massachusetts, 117 U. S. 155, 160, 44 L. Ed. 711.

"In Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, Lange had been found guilty of an offense which was punishable by imprisonment or fine, but the circuit court sentenced him to imprisonment and fine. He paid the fine, and thereafter the circuit court vacated the former judgment, and sentenced him again to imprisonment only. It was held that it was a fundamental principle that no man could be twice punished by judicial judgments for the same offense, and that when a judgment had been executed by full satisfaction of one of the alternative penalties of the law, the court could not change the judgment so as to impose another." Murphy v. Massachusetts, 117 U. S. 155, 160, 44 L. Ed. 711.

44. Trial before court martial.—Grafton v. United States, 206 U. S. 333, 352, 51 L. Ed. 1084. See the title MILITARY LAW.

45. Discharge of jury from necessity.—United States v. Perez, 9 Wheat. 579, 6 L. Ed. 165; Simmons v. United States, 142 U. S. 148, 35 L. Ed. 968; Logan v. United States, 144 U. S. 263, 36 L. Ed. 429; Thompson v. United States, 155 U. S. 271, 39 L. Ed. 146; Ex parte Lange, 18 Wall. 163, 175, 21 L. Ed. 872; Dreyer v. Illinois, 187 U. S. 71, 47 L. Ed. 79.

Where jury unable to agree.—"The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict

upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense.' Simmons v. United States, 142 U. S. 148, 153, 35 L. Ed. 968; United States v. Perez, 9 Wheat. 579, 6 L. Ed. 165.

Where bias or prejudice exists.—When it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused, the jury may be discharged, and the accused will not be thereby put twice in jeopardy. Simmons v. United States, 142 U. S. 148, 154, 35 L. Ed. 968.

"In England a recent decision of the court of Queen's Bench, made upon a full review of the English authorities, and affirmed in the Exchequer Chamber, is to the same effect. Winsor v. The Queen, L. R. 1 Q. B. 289, 390; S. C., 6 B. & S. 143, and 7 B. & S. 490." Simmons v. United States, 142 U. S. 148, 154, 35 L. Ed. 968.

46. Term of court ending before trial finished.—"A party (is not) put in legal jeopardy if the term of the court, as fixed by law, comes to an end before the trial is finished. State v. Brooks, 3 Humph. (Tenn.) 70; State v. Mahala, 10 Yerg. (Tenn.) 532; State v. Battle, 7 Ala. 259; In the matter of Robert Spier, 1 Dev. (N. C.) L. 491; Wright v. State, 5 Ind. 290; Cooley, Const. Lim. (4th Ed.) 404." Coleman v. Tennessee, 97 U. S. 509, 521, 24 L. Ed. 1118, dissenting opinion of Clifford, J.

47. Judgment arrested upon motion of defendant.—Ex parte Lange, 18 Wall. 163,

4. **CONFINEMENT UNTIL EXECUTION OF SENTENCE.**—A person confined until execution of the sentence of death and pending an appeal from the sentence, cannot claim a discharge on the ground of previous punishment.⁴⁸

5. **ACQUITTAL UPON PLEA OF INSANITY.**—Under an indictment for murder, a plea of former jeopardy cannot be supported upon the fact that the defendant was acquitted on two consolidated indictments, on the defense of insanity, the defense set up in this case, of two other murders committed by defendant on the same day.⁴⁹

6. **DISCHARGE BECAUSE ILLEGALLY ARRESTED.**—A discharge of defendant from imprisonment because the writ of *capias* upon which he was arrested was improperly issued, does not prevent a further confinement for the same offense.⁵⁰

C. Sentence Void.—The court in one case was unprepared to say if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held, so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force, whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction.⁵¹

V. Pleading.

A. Necessity for Plea.—Former conviction must be pleaded before it can be set up as a defense.⁵²

B. Averments.—The plea must aver that the former trial was in a court having jurisdiction of the case, that the person and the offense are the same,⁵³ and must set forth the former records.⁵⁴

C. Reply or Replication.—To a plea of former conviction to proceedings kindred to those in a suit in admiralty in rem, so far as the pleadings are concerned, no reply or replication to the answer is necessary to raise an issue of fact on the matters averred in it.⁵⁵

VI. Waiver of Right to Plea of Former Jeopardy.

A waiver of objection to being again put in jeopardy will be implied, if, on

21 L. Ed. 872; *Coleman v. Tennessee*, 97 U. S. 509, 521, 24 L. Ed. 1118, dissenting opinion of Clifford, J. See post, "Waiver of Right to Plea of Former Jeopardy," VI.

48. **Confinement until execution of sentence.**—*Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974.

49. **Acquittal upon plea of insanity.**—*Hotema v. United States*, 186 U. S. 413, 46 L. Ed. 1225.

50. **Discharge because illegally arrested.**—*Ex parte Milburn*, 9 Pet. 704, 9 L. Ed. 280. See the title **ARREST**, ante, p. 541.

51. **Sentence void.**—*Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872.

52. **Necessity for plea.**—*United States v. Wilson*, 7 Pet. 150, 8 L. Ed. 640.

53. **Averment of jurisdiction.**—*Coleman v. Tennessee*, 97 U. S. 509, 529, 24 L. Ed. 1118, dissenting opinion of Clifford, J. See ante, "Jurisdiction of Court," II. A.

54. **Setting out former record.**—Defenses of the kind are often set up; and in order to avoid false pretenses, the established rule is, that the accused is required not only to show the nature of the former prosecution and the conviction or acquittal with certainty in his plea, but also to show the record or its substance

to the court, by producing or vouching it at the time he pleads, for otherwise it would be in his power to delay the trial when he pleased by pleading a former conviction or acquittal in another jurisdiction; and in order to prevent such false pretenses in pleading, the requirement is, that the plea shall show the record, or vouch it if it be in the same court in the first instance, and that he is not allowed to wait until *nul tiel record* is pleaded by the prosecutor. 2 Stark. Cr. Pl. 350." *Coleman v. Tennessee*, 97 U. S. 509, 526, 24 L. Ed. 1118, dissenting opinion of Clifford, J.

Must show conviction or acquittal legal, and was based on verdict of a jury.—And it must be alleged and proved by the former record that the conviction or acquittal was legal, and that it was based on the verdict of a jury duly impaneled and sworn, else the plea will be subject to demurrer. *Coleman v. Tennessee*, 97 U. S. 509, 526, 24 L. Ed. 1118, dissenting opinion of Clifford, J. See the title **CRIMINAL LAW**.

55. **Reply or replication.**—*Coffey v. United States*, 116 U. S. 436, 29 L. Ed. 684.

defendant's motion, the judgment is arrested, verdict is set aside, and a new trial granted;⁵⁶ or he appeals from a judgment against him;⁵⁷ and this is so though defendant has served part of his term.⁵⁸

Extent of Waiver.—Where upon a trial for the greater offense, the accused is found guilty only of the lower offense and he appeals from that judgment and a new trial is granted, he may be again tried for the greater offense without being twice put in jeopardy.⁵⁹

AVERAGE.—See the title **GENERAL AVERAGE**.

AVOWRY.—See the title **REPLEVIN**.

AVULSION.—See the titles **ACCESSION**, **ACCRETION** AND **RELICION**, vol. 1. p. 55.

AWAITING.—See note 1.

56. Waiver of right to plea of former jeopardy.—*Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165; *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971; *United States v. Ball*, 163 U. S. 662, 672, 41 L. Ed. 300; *Murphy v. Massachusetts*, 177 U. S. 155, 44 L. Ed. 711. See ante, "Judgment Arrested upon Motion of Defendant," IV, B. 3.

Judgment set aside because indictment defective.—See ante, "Validity of Indictment," II, B.

57. By appeal.—*Hopt v. Utah*, 114 U. S. 488, 29 L. Ed. 183; *Trono v. United States*, 199 U. S. 521, 50 L. Ed. 292; *United States v. Ball*, 163 U. S. 662, 41 L. Ed. 300.

Where a person is tried and convicted of homicide in the supreme court of the Philippine Islands, on an appeal by the accused from a judgment acquitting of murder but convicting of assault, the appeal amounted to a waiver to the plea of second jeopardy. *Trono v. United States*, 199 U. S. 521, 50 L. Ed. 292.

"It is urged, however, that he has no power to waive such a right, and the case of *Hopt v. Utah*, 110 U. S. 574, 28 L. Ed. 262, is cited as authority for that view. We do not so regard it. This court held in that case that in the territory of Utah the accused was bound, by provisions of the Utah statute, to be present at all times during the trial, and that it was not within the power of the accused or his counsel to dispense with such statutory requirement. But on an appeal from a judgment of this nature there must be a waiver to some extent on the part of the accused when he appeals from such judgment." *Trono v. United States*, 199 U. S. 521, 533, 50 L. Ed. 292.

58. Murphy v. Massachusetts, 117 U. S. 155, 44 L. Ed. 711; *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971.

59. Extent of waiver.—*Trono v. United States*, 199 U. S. 521, 50 L. Ed. 292.

"In our opinion the better doctrine is that it does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of

the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed." *Trono v. United States*, 199 U. S. 521, 533, 50 L. Ed. 292.

1. Awaiting delivery.—See the title **CARRIERS**.

In *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 327, 21 L. Ed. 297, it was held that the term **awaiting delivery** did not include goods in a depot awaiting transportation but referred to such goods alone as had reached their final destination. The court said: "It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage. That in both cases, as soon as they are 'ready to be delivered' over, they are **awaiting delivery**. This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be **awaiting delivery**; in the latter, to be **awaiting transportation**."

In *Texas, etc., R. Co. v. Reiss*, 183 U. S. 621, 631, 46 L. Ed. 358, it is said: "Goods do not **await delivery** within the

AWARD.—See the title **ARBITRATION AND AWARD**, ante, p. 464.

AYUNTAMIENTO.—See note 1.

BADGES OF FRAUD.—See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

BAGGAGE.—See the title **CARRIERS**.

meaning of that term as used in the bill of lading until notice of their arrival has been given the consignee, and it seems to us that the same reasoning holds here, and that goods are not **awaiting** further conveyance by a connecting carrier until the preceding carrier has given him no-

tice of their existence at the place where further conveyance is to be continued."

1. **Ayuntamiento.**—See *Castillero v. United States*, 2 Black 1, 17, 194, 17 L. Ed. 360; *Strother v. Lucas*, 12 Pet. 410, 442, note, 9 L. Ed. 1137.

BAIL AND RECOGNIZANCE.

BY CLAUDE R. YARDLEY.

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CROSS REFERENCES.

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I. Scope of Title.

It is the purpose of this title to treat the general principles pertaining to bail, both in civil cases and criminal prosecutions, but to exclude all questions relating to the allowance of bail in particular offenses which are cross referred to the specific titles.

II. Definitions and Distinctions.

Bail are those persons who become sureties for the appearance of a defendant in court.¹

In Admiralty Cases.—Bail in a prize case pending in the district court of the United States in the exercise of its admiralty jurisdiction, is a pledge or substitute for the property as regards all claims that may be made against it by the promotor of the suit. It is to be considered as a security, not for the amount of the claim, but simply for the value of the property arrested, to the extent of the claim and costs of suit, if any, beyond the preliminary stipulation.²

Recognizance.—A recognizance is an obligation of record entered into before a court or officer, duly authorized for that purpose, to do some act required by law which is therein specified.³

A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense.⁴

Nature of Judgment.—A recognizance is a matter of record, it is in the nature of a judgment.⁵

Distinguished from Bonds.—It has been held that the word bonds as used in § 3468, Rev. Stat., does not include recognizances in criminal proceedings.⁶

Object and Purpose of Bail.—The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; while the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice.⁷

III. Bail in Civil Cases.

A. Common Bail—1. **DEFINED.**—Common bail are fictitious sureties formally entered in the proper office of the court.⁸

2. **WHEN ALLOWED**—a. *When Cause of Action Exists.*—It has been held that whenever there was a probable cause of action, the defendant would not be discharged on his giving common bail but special bail would be required.⁹

Scope of Inquiry.—Where a motion was made that a defendant in a civil case be discharged on common bail, it was held, that a court will not inquire into the merits of the controversy, but will limit the scope of its inquiry to ascertaining whether a probable cause of action exists.¹⁰

b. *After Discharge in State Court.*—It has been held that a defendant who had been discharged by the insolvent laws of one state and was afterwards arrested

1. **Defined.**—Bouvier's Law Dict., vol. 2, p. 209.

2. **Admiralty proceedings.**—United States v. Ames, 99 U. S. 35, 47, 25 L. Ed. 295, 297.

3. **Recognizance defined.**—Bouvier's Law Dict., vol. 2, p. 847.

4. **Purpose and object.**—Ex parte Milburn, 9 Pet. 704, 710, 9 L. Ed. 280.

5. **Nature of judgment.**—Respublica v. Cobbet, 3 Dall. 467, 475, 1 L. Ed. 683.

6. **Not included in term bonds.**—United States v. Ryder, 110 U. S. 729, 739, 28 L. Ed. 308.

"Had it been intended to include sureties for appearance in criminal cases, the word 'recognizance,' or some other appropriate term, or some general word adapted to the purpose, would naturally have been used." United States v. Ryder, 110 U. S. 729, 739, 28 L. Ed. 308.

7. United States v. Ryder, 110 U. S. 729, 739, 28 L. Ed. 308.

8. **Common bail defined.**—Bouvier's Law Dict., vol. 2, p. 210.

9. **Probable cause of action.**—Paraset v. Gautier, 2 Dall. 330, 331, 1 L. Ed. 402; Waters v. Collet, 2 Dall. 247, 1 L. Ed. 367.

10. **No inquiry as to merits of case.**—Paraset v. Gautier, 2 Dall. 330, 331, 1 L. Ed. 402; Waters v. Collet, 2 Dall. 247, 1 L. Ed. 367.

Fraud in original contract.—The defendant was arrested in a civil action; he made a motion that he be discharged upon giving common bail upon the ground that there was fraud in the original contract, upon which the action was based. It was held, that the court would not inquire into the question of fraud in the original contract, as this would be in effect a pre-adjudication of the action. Paraset v. Gautier, 2 Dall. 330, 1 L. Ed. 402.

on the same cause of action in another state, should be allowed to give common bail.¹¹

c. Time of Application.—It was held in an early case that an application for bail should be made on the first day, or at least within a reasonable time after the commencement of the term, and where a motion was made, that defendant be discharged on common bail on the last day of the term, it would not be granted.¹²

B. Special Bail—1. **AFTER DISCHARGE ON COMMON BAIL.**—The discharge of a person on common bail by a state court, will not prevent his being compelled to give special bail for the same cause, where he lost his appeal in the state court through the negligence of the person who was conducting his case.¹³

2. **WAIVER OF SPECIAL BAIL.—Filing Declaration.**—It has been held, that the plaintiff did not waive his right to demand special bail by filing his declaration.¹⁴

By Application for Special Court.—It was held that where a plaintiff made application for a special court on the ground that one of the defendants was about to depart from the country, that this did not act as a waiver of his right to demand special bail and amount to an acceptance of a common appearance.¹⁵

C. Authority to Receive Bail.—Single Judge.—It was held in an early case that before the return of the *capias*, a question of bail might be brought before a single judge.¹⁶

Application to Court.—But, that after the return of the *capias*, the question of bail must be decided upon an application to the court.¹⁷

Clerk of United States Court.—Clerks of United States circuit and district courts have authority to take recognizance of bail in civil cases in absence or disability of the judge of their court.¹⁸

Justices of the Peace and Marshals.—Justices of the peace and in some cases United States marshals had authority to admit the defendant to bail in civil cases.¹⁹

D. Affidavit.—Necessity and Sufficiency.—By an act of congress passed in 1842, no person could be arrested and held to bail in a civil case in the District of Columbia, unless an affidavit had been previously filed by the plaintiff, and it was made the duty of the court in term time, or of a single judge in vacation, to decide as to the sufficiency of the affidavit.²⁰

11. **Discharge under insolvent laws of another state.**—*Donaldson v. Chambers*, 2 Dall. 100, 1 L. Ed. 306; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

12. *Borger v. Searle*, 2 Dall. 110, 1 L. Ed. 310.

13. **Defendant released on common bail.**—*Parasset v. Gautier*, 2 Dall. 330, 1 L. Ed. 402. See ante, "When Cause of Action Exists," III, A, 2, a.

14. **Filing a declaration does not constitute a waiver.**—*Caton v. McCarty*, 2 Dall. 141, 1 L. Ed. 323.

The court in *Caton v. McCarty*, 2 Dall. 141, 1 L. Ed. 323, said: "It has been the practice in Pennsylvania to file declarations before appearance. In the case of summons, the act requires that it should be filed—days before the return day. It has never yet been determined that the filing a declaration is a waiver of bail. We have no such rule; and unless some substantial benefit is to be derived from adopting the practice contended for, the court will not alter the usual course."

15. **Application for special court.**—*Kunkel v. Baker*, 1 Dall. 169, 1 L. Ed. 85.

16. **Judge.**—*Borger v. Searle*, 2 Dall. 110, 1 L. Ed. 310.

17. **Court.**—*Borger v. Searle*, 2 Dall. 110, 1 L. Ed. 310.

18. *Fed. Stat. Anno.* vol. 1, p. 521, § 947; *In re Kaine*, 14 How. 103, 142, 14 L. Ed. 345.

19. **Authority to take bail.**—*Morsell v. Hall*, 13 How. 212, 14 L. Ed. 117; *Palmer v. Allen*, 7 Cranch 550, 3 L. Ed. 436.

Two justices of the peace.—In Maryland, it is correct to take a recognizance of bail before two justices of the peace. *Morsell v. Hall*, 13 How. 212, 14 L. Ed. 117.

Marshal.—In the district of Connecticut, the marshal may, upon an attachment for debt, without a mittimus, commit the defendant to prison, for want of bail. *Palmer v. Allen*, 7 Cranch 550, 3 L. Ed. 436.

20. *Ex parte Taylor*, 14 How. 3, 12, 14 L. Ed. 302.

An action was instituted by plaintiff against defendant in the circuit court of the District of Columbia to recover a sum of money. The debt upon which the action was brought was contracted in the District of Columbia, and an affidavit was filed stating that defendant was about to remove his property, rights and credits

E. Discharge of Bail—1. **IN GENERAL**.—By an act of congress passed in 1789, the forms and modes of procedure in the state courts were adopted as the mode of proceeding in the federal courts sitting in these states. It was held, that this act included all regulations of state law as to bail. It was further held, that the discharge of a recognizance of special bail being governed by the rules and principles of the court where given, as well as the terms of the instrument itself, that a state law which operated to discharge the sureties from a bail bond in a civil case would be binding upon a United States court in that state.²¹

2. **BY PRINCIPAL'S DEATH**.—The death of the principal after the return of the *ca. sa.* and before the return of the *scire facias* did not entitle the bail to an *exoneretur* as the liability had already become fixed.²²

3. **DISCHARGE OF PRINCIPAL**.—a. *Under State Insolvent Laws*.—The discharge of the principal under the operation of the insolvent laws of a state as a general rule entitled the bail to a discharge.²³

out of the District, to avoid payment of the debt. He was thereupon arrested, and asked leave to be discharged because the affidavit did not conform to the provisions of the statutes governing the affidavit in such cases. This was refused and the defendant applied for writ of mandamus to compel the circuit court to grant his request. This was also refused, the supreme court holding that it was within the discretion of the circuit court to judge as to the sufficiency of the affidavit. *Ex parte Taylor*, 14 How. 3, 14 L. Ed. 302.

21. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *Duncan v. Darst*, 1 How. 301, 307, 11 L. Ed. 139.

The process act of 1798 expressly adopted the *mesne process*, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws; which, of course, included all the regulations of the state laws as to bail. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

The recognizance of special bail being a part of proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

22. **Death of principal**.—*Davidson v. Taylor*, 12 Wheat. 604, 6 L. Ed. 743.

The court in *Davidson v. Taylor*, 12 Wheat. 604, 6 L. Ed. 743, use the following language: "This is a case of bail, and is to be decided by the principles of English law, which the case finds constitute also the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender

the principal, after the return of a *ca. sa.* is considered as a matter of favor and indulgence, and not of right, and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed, by the return of the *ca. sa.* But the courts allowed the bail to surrender the principal, within a limited period after the return of the *scire facias* against them, as matter of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an *exoneretur* would be entered, and the principal discharged, immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the *scire facias*. In such a case, the bail is considered as fixed by the return of the *ca. sa.*, and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur*."

23. **Operation of state insolvency laws**.—*Donaldson v. Chambers*, 2 Dall. 100, 1 L. Ed. 366; *Millar v. Hall*, 1 Dall. 229, 1 L. Ed. 113; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *Lyon v. Auchincloss*, 12 Pet. 234, 9 L. Ed. 1068; *Duncan v. Darst*, 1 How. 301, 307, 11 L. Ed. 139.

In June, 1830, Beers and others brought an action of assumpsit, in the circuit court of Ohio, against J. Harris and C. Harris, and obtained judgment against them for \$2818 and costs, at December term; Haughton became special bail in this action, by recognizing, viz, that the defendants in the action should pay and satisfy the judgment recovered against them, or render themselves to the custody of the marshal of the district of Ohio; in October, 1831, a writ of *capias ad satisfaciendum* was issued upon the judgment, and returned to December term, 1831; that the Harris's were not found; in February, 1831, C. Harris was discharged from imprisonment for all his debts, under the insolvent law of Ohio; J. Harris was in like manner discharged in February, 1832. In December, 1832, Beers et al. com-

Dismissal in State Court.—But where the bail had become fixed and the proceedings in the state court were dismissed before discharge, the sureties could claim no exemption from such proceedings.²⁴

b. *Taking Common Bail.*—And it has been held that the discharge of a defendant on common bail would operate to release the sureties on special bail taken without the defendant's knowledge.²⁵

4. **SURRENDER OF PRINCIPAL.**—Persons who were bail for the appearance of another in a civil action, could be released from their obligation by surrendering their principal either before or after judgment.²⁶

Where Principal Was Entitled to Discharge.—And the doctrine was established, that where the principal would be clearly entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail were entitled to relief, by entering an exoneretur, without any surrender. And this doctrine applied where the law prohibited the party from being imprisoned at all, or where, by the positive operation of law, a surrender was prevented.²⁷

menced an action of debt, on the recognizance of bail, against Haughton; the defendant pleaded the discharge of J. & C. Harris under the insolvent law of Ohio of 1831, and a rule of the circuit court, adopted at December term, 1831. The rule of court was as follows: 'If the defendant on a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law; but under neither *mesne* nor final process shall any individual be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment.' The plaintiffs demurred to the plea; and upon joinder in demurrer, the circuit court gave judgment for the defendant. The judgment of the circuit court was affirmed. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

24. *Lyon v. Auchincloss*, 12 Pet. 234, 9 L. Ed. 1068.

Bail was entered in the district court of the United States for the eastern district of Louisiana, for a defendant, against whom a suit was brought on certain promissory notes; the bail having been fixed, proceedings were afterwards commenced against them; and defense was taken, on the ground, that the plaintiff had made himself a party to a proceeding under the insolvent laws of Louisiana, which the principal had instituted against his creditors, and in which he had failed to obtain the relief allowed by those laws; a judgment having been given against him on his petition, in the district court in which they were instituted, and in the supreme court of Louisiana, to which he carried them by appeal: It was held, that if the benefit of the insolvent laws had been extended to the principal, before the bail was fixed by proceedings against him, it might have become a question, whether they were not discharged, under the rule laid down by the court, in the case of *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; but as the proceedings of the principal, for the benefit of those laws, were

dismissed, on objections of the creditors, both in the district and supreme court of Louisiana, the bail can claim no exemption from the obligations of their bond, on account of those proceedings. *Lyon v. Auchincloss*, 12 Pet. 234, 9 L. Ed. 1068.

25. **Receiving common bail.**—*Myers v. Young*, 2 Dall. 79, 1 L. Ed. 297.

26. **Surrender of principal.**—*Beers v. Haughton*, 9 Pet. 329, 356, 9 L. Ed. 145; *Duncan v. Darst*, 1 How. 301, 307, 11 L. Ed. 139.

It is not strictly true, that on the return of "non est inventus" to a *capias* ad satisfaciendum against the principal, the bail is "fixed," in courts, acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an exoneretur to be entered, in cases, by the indulgence of the court, by giving them time to render the principal, until the appearance day of the last *scire facias* against them, as in cases of strict right. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

27. By the rules of the circuit court of Ohio, adopted as early as January, 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "nihil," against the bail; and this, in fact, constituted a part of the law of Ohio, at the time the present recognizance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May, 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed a part of the "modes of proceeding in suits," and to have been adopted

5. **BY PAYMENT.**—Payment by the bail in a civil case discharged the obligation of the principal to his creditor, and was only required to the extent of that obligation, whatever might be the penalty of the bond or recognizance.²⁸

6. **DISCHARGE OF APPEARANCE BAIL.**—Under an act of assembly of Virginia, the defendant could enter special bail, and defend the suit at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharged the appearance bail.²⁹

7. **REFUSAL TO ENTER AN EXONERETUR AS A GROUND OF ERROR.**—As to the allowance of a writ of error from a refusal to enter an exoneretur, see the title *APPEAL AND ERROR*, vol. 1, p. 926.

F. Enforcement of Bail Bonds.—1. **NATURE OF ACTION.**—It has been held, that a suit on a recognizance of bail is an original proceeding; a scire facias upon a judgment, is, to some purposes, only a continuation of the former suit, but that an action of debt on a judgment is an original suit.³⁰

2. **JURISDICTION.**—**Different Court from First Proceedings.**—It seems to have been the rule that an action of debt on a recognizance of bail could be brought in a different court from that in which the original proceedings were commenced.³¹

3. **PARTIES.**—The special bail could appear and defend an action upon the bond where the defendant failed to appear.³²

4. **AMENDMENT OF SCIRE FACIAS.**—It has been held, that where a proceeding by scire facias is brought against the bail, the scire facias may be amended even after the bringing of proceedings in error.³³

5. **DEFENSES.**—**Right to Discharge.**—Where the principal would be entitled to an unconditional discharge if surrendered, the bail are entitled to their discharge as a matter of right and this may be alleged as a defense to an action upon the bail bond.³⁴

by it, so that the surrender of the principal within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of a legal right. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

Principal entitled to discharge.—*Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *Duncan v. Darst*, 1 How. 301, 307, 11 L. Ed. 139.

"When the party is, by the practice of the court, entitled to an exoneretur, without a positive surrender of the principal, according to the terms of the recognizance; he is, a fortiori, entitled to insist on it by way of defense, when he is entitled, ex debito justitiæ, to surrender the principal." *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

28. **Payment.**—*United States v. Ryder*, 110 U. S. 729, 736, 28 L. Ed. 309.

29. **Discharge of appearance bail.**—*Bartle v. Coleman*, 6 Wheat. 474, 5 L. Ed. 309.

30. **Nature of proceedings.**—*Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684.

"It is laid down in the books, that a scire facias upon a recognizance of bail is an original proceeding; and if so, an action of debt upon the recognizance is clearly so. A scire facias upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit." *Davis v. Packard*, 7 Pet. 276, 285, 8 L. Ed. 684.

31. **Different court from original proceedings.**—*Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684.

When brought in different court.—"It is argued that debt on recognizance of bail is a continuation of the original suit, because, as a general rule, the action must be brought in the same court. Although this is the general rule, because that court is supposed to be more competent to relieve the bail, when entitled to relief, yet whenever, from any cause, the action cannot be brought in the same court, the plaintiff is never deprived of his remedy, but allowed to bring his action in a different court; as, where the bail moves out of the jurisdiction of the court. This is the settled rule in the state of New York; and it is surely a good reason for bringing the suit in another court, when the law expressly forbids it to be brought in the same court where the original action was brought." *Davis v. Packard*, 7 Pet. 276, 285, 8 L. Ed. 684.

32. **Parties.**—*Bartle v. Coleman*, 6 Wheat. 475, 5 L. Ed. 309.

If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to. *Bartle v. Coleman*, 6 Wheat. 475, 5 L. Ed. 309.

33. **Amendment of scire facias.**—*Burrows v. Heysham*, 1 Dall. 133, 1 L. Ed. 69.

34. **Discharge as a matter of right.**—When bail is entitled to be discharged,

Motion to Enter an Exoneretur.—But a motion to enter an exoneretur of bail is not a defense to a proceedings by scire facias.³⁵

6. **STAY OF PROCEEDINGS.**—In an early case the defendant was allowed a stay of proceedings upon his paying the costs, pleading usually in the original action and consenting that the judgment upon the bail bond should stand as security.³⁶

7. **JUDGMENTS.**—In a proceedings by scire facias a general judgment may be rendered, notwithstanding the fact that the defendant interposed two pleas to one of which an issue was joined, while the second was demurred to by plaintiff without joinder in demurrer by defendant.³⁷

Judgment against Appearance Bail.—Where the appearance bail appears and defends an action on the bail bond, the same judgment may be taken against them as would have been taken against the defendant had he appeared and defended in the original action.³⁸

By Consent.—A defendant could not by consent allow judgment to be taken which will bind the appearance bail.³⁹

Lien of Judgment.—It has been held, that the plaintiff in an action of scire facias took preference over other creditors only from the date of the judgment.⁴⁰

ex debito justitiæ, they may not only apply for an exoneretur by way of summary proceeding, but they may plead the matter as bar to a suit, in their defense; but when the discharge is matter of indulgence only, the application is to the discretion of the court; and an exoneretur cannot be insisted on, except by way of motion. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

"And this leads us to the remark, that where the party is, by the practice of the court, entitled to an exoneretur, without a positive surrender of the principal; according to the terms of the recognizance, he is, a fortiori, entitled to insist on it by way of defense, where he is entitled, ex debito justitiæ, to surrender the principal. Now, the doctrine is clearly established, that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an exoneretur, without any surrender. This was decided in *Mannin v. Partridge*, 14 East 599; *Boggs v. Teackle*, 5 Binn. 332; and *Olcott v. Lilly*, 4 Johns. 407. And, a fortiori, this doctrine must apply where the law prohibits the party from being imprisoned at all; or where by the positive operation of law, a surrender is prevented. So that there can be no doubt, that the present plea is a good bar to the suit, notwithstanding there has been no surrender, if by law the principal could not, upon such surrender, have been imprisoned at all." *Beers v. Haughton*, 9 Pet. 329, 358, 9 L. Ed. 145.

35. **Motion to enter exoneretur.**—*Morsell v. Hall*, 13 How. 212, 215, 14 L. Ed. 117.

A motion to enter an exoneretur of the bail is no defense to a scire facias even if sufficient grounds were shown to support the motion (which we do not mean to say was the case in the present instance). It is a collateral proceeding, not

forming a legal defense to the scire facias, but addressing itself to the equitable discretion of the court, and founded upon its rules and practice. *Chit. Pl. (Am. Ed. 1847)*, 469. *Morsell v. Hall*, 13 How. 212, 215, 14 L. Ed. 117.

36. **Stay of proceedings.**—*Carrew v. Willing*, 1 Dall. 130, 1 L. Ed. 68.

37. **Judgments.**—*Morsell v. Hall*, 13 How. 212, 14 L. Ed. 117.

Where a scire facias was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second; and the cause went to the trial upon that state of the pleadings without a joinder in demurrer, and the court gave a general judgment for the plaintiff, this was not error. *Morsell v. Hall*, 13 How. 212, 14 L. Ed. 117.

38. *Bartle v. Coleman*, 6 Wheat. 475, 5 L. Ed. 309.

39. **Consent judgment.**—*Bartle v. Coleman*, 6 Wheat. 475, 5 L. Ed. 309.

The defendant cannot appear, and consent to a reference, the report and judgment on which is to bind the appearance bail, as well as himself. Such a joint judgment is erroneous, and will be reversed as to both. *Bartle v. Coleman*, 6 Wheat. 475, 5 L. Ed. 309.

40. *Campbell v. Richardson*, 1 Dall. 131, 1 L. Ed. 68.

Lien of judgment.—The court in *Campbell v. Richardson*, 1 Dall. 131, 1 L. Ed. 68, said: "Here, as I have already observed, lands are chattels for the payment of debts; they are chattels, too, in the hands of executors; and all writs of *fi. fa.* direct the levy accordingly to be made, of the goods and chattels, lands and tenements of the deceased, in the hands of the executor. If, then, in such a case, two writs are executed upon lands, founded, one upon a prior recognizance, and the other on a judgment subsequent to the recognizance, but prior to the judgment upon it, the court must clearly

IV. In Criminal Prosecutions.

A. Admission to Bail—1. **RIGHT TO BAIL IN GENERAL.**—A person who is arrested, charged with a criminal offense against the United States which is not punishable by death, has a right by statute to be admitted to bail.⁴¹

2. **BEFORE CONVICTION**—a. *Authority to Admit to Bail*—(1) *United States Commissioners.*—Commissioners of the circuit courts of the United States have authority to take bail of any person charged with an offense against the laws of the United States, which is not punishable with death.⁴²

(2) *Clerk of United States Courts.*—Whether a clerk of a United States court has authority to take bail of a person accused of a crime is a question which does not seem to have been decided by the United States supreme court.⁴³

(3) *Justice or Judge of United States Courts.*—A justice of the United States supreme court or circuit judge or a judge of a district court is empowered to admit a person charged with criminal offenses to bail, both where the offense is punishable with death and where not so punished.⁴⁴

3. **AFTER CONVICTION**—a. *Where Conviction Is Set Aside.*—A defendant may be admitted to bail after conviction on confession where the conviction is set aside for any cause.⁴⁵

decree a preference to the judgment creditor. This seems indeed to be a legislative direction as to recognizances in similar cases; for, what confusion would arise, from supposing the lands of deceased persons to be bound from one time, and the lands of living persons from another? Upon the whole, we think that great mischiefs and dangers would be imposed upon honest purchasers, if, at this time of day, we should unsettle what has been so long the general opinion and practice on this subject. Therefore, let the plaintiffs take preference only from the date of the judgment on the scire facias."

41. **Statutory right.**—Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554; Clawson v. United States, 113 U. S. 143, 147, 28 L. Ed. 957; United States v. Barber, 140 U. S. 164, 166, 35 L. Ed. 396.

Statutory provision.—The statute provides that bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death. Fed. Anno. Stat., vol. 1, § 1015.

42. **Authority of United States commissioners.**—United States v. Jones, 134 U. S. 483, 33 L. Ed. 1007; Hunt v. United States, 166 U. S. 424, 41 L. Ed. 1063; United States v. Barber, 140 U. S. 164, 35 L. Ed. 396. See Rev. Stat., § 1014; 4 Fed. St. Anno., p. 164, § 945.

Action a judicial determination.—The decision by a United States commissioner, upon a motion for bail and the sufficiency thereof, is a judicial determination of the very matter which the statutes authorize and require him "to hear and decide," to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged, or committed on bail for trial, and in default thereof imprisoned. United States v. Jones, 134 U. S. 483, 487, 33 L. Ed. 1007.

43. **Clerk's authority.**—In Hunt v.

United States, 166 U. S. 424, 41 L. Ed. 1063, it was contended that a recognizance was void because taken before the clerk and not before the judge of a United States court. The court, however, did not pass upon the question but dismissed the case for want of jurisdiction, thereby allowing the decision of the circuit court of appeals, which held the recognizance valid, to stand unreversed.

44. **Judge of United States court.**—Hunt v. United States, 166 U. S. 424, 41 L. Ed. 1063; United States v. Barber, 140 U. S. 164, 166, 35 L. Ed. 396; Hudson v. Parker, 156 U. S. 277, 285, 39 L. Ed. 424; Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554; United States v. Hamilton, 3 Dall. 17, 1 L. Ed. 490.

Statutory provision.—"The statutes as to bail upon arrest and before trial provide that 'bail may be admitted' upon all arrests in capital cases, and 'shall be admitted' upon all arrests in other criminal cases; and may be taken in capital cases by this court, or by a justice thereof, or by a circuit court, a circuit judge or a district judge, and in other criminal cases by any justice or judge of the United States or other magistrate named. Rev. Stat., §§ 1014-1016." Hudson v. Parker, 156 U. S. 277, 285, 39 L. Ed. 424. See Fed. Stat. Anno., vol. 1, p. 522, § 1016.

Supreme court in cases of treason.—As to the authority of the United States supreme court to admit to bail persons charged with treason, see the title TREASON.

45. **Where conviction is set aside.**—Basset v. United States, 9 Wall. 38, 19 L. Ed. 548.

It is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence. In such

b. *Upon Appeal or Writ of Error from a Circuit or District Court of the United States.*—As to the admission to bail of a defendant, who has been convicted of a criminal offense in a district or circuit court of the United States, upon the prosecution of a writ of error to the supreme court of the United States, see the title **APPEAL AND ERROR**, ante, p. 280.

c. *Persons Convicted in a State or Territorial Court*—(1) *Upon Appeal from Inferior to Superior State Court.*—**Must Comply with State Law.**—Where a defendant is convicted of a criminal offense in a state or territorial court and takes an appeal to a higher court of such state or territory, his admission to bail is governed by the laws of the state or territory, and he cannot claim admission to bail as a right, where all the conditions required by the laws of such state or territory have not been fulfilled.⁴⁶

Discretion of State Court.—And where the conditions have been fulfilled and the matter is made discretionary with the state court by the state laws, the decision of the state court will not be reversed where no charge is made that the state or territorial court has abused its discretion.⁴⁷

Confinement Pending Appeal.—And the fact that the defendant is confined in a state penitentiary, pending his appeal from the lower to the higher state court, does not make a case for federal interference, where it is not claimed that he is treated as a convict in the penitentiary, undergoing the sentence pronounced in pursuance of the judgment appealed from, but only that the officer having him in charge uses that institution as a place for the confinement of the accused while the latter is in his custody.⁴⁸

(2) *Upon Writ of Error to the United States Supreme Court.*—As to the ad-

case the original indictment is still pending, and a bail bond given after this, for the prisoner's appearance from day to day, is valid. *Basset v. United States*, 9 Wall. 38, 19 L. Ed. 548.

46. **Compliance with state laws.**—*McKane v. Durston*, 153 U. S. 684, 38 L. Ed. 867; *Clawson v. United States*, 113 U. S. 143, 28 L. Ed. 957.

The defendant was convicted of a criminal offense against the laws of the state of New York and sentenced to a term of imprisonment in a state penitentiary. The order was complied with and he was delivered by the sheriff to the agent and warden of the prison, to be therein confined in conformity with the sentence against him. The defendant prosecuted an appeal to a higher court of the state and soon after his appeal was allowed, he brought an action in the circuit court of the United States for a writ of habeas corpus, claiming that he was deprived of his liberty in violation of the constitution of the United States. By the laws of the state of New York, where an appeal was allowed, in order that there be a stay of execution, it was necessary that there be filed with the notice of appeal a certificate of the judge who presided at the trial, or a justice of the supreme court, that in his opinion there was reasonable doubt whether the judgment should stand. The prisoner did not file the certificate. It was held, that he was not unlawfully restrained of his liberty. *McKane v. Durston*, 153 U. S. 684, 38 L. Ed. 867.

47. **Discretion of state court.**—*McKane v. Durston*, 153 U. S. 684, 38 L. Ed. 867;

Clawson v. United States, 113 U. S. 143, 28 L. Ed. 957.

The defendant was convicted of a violation of the laws of the territory of Utah, and an appeal was taken to the supreme court of the territory. By the laws of the territory, it was provided that an appeal to the supreme court from a judgment of conviction stays the execution of the judgment upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of the state court or of a justice of the supreme court, that in his opinion there was probable cause for appeal, but not otherwise. This certificate was filed. The statute also provided that a defendant who appealed could be admitted to bail after the conviction of an offense not punishable with death, first, as a matter of right when the appeal is from a judgment imposing a fine only; second, as a matter of discretion in all other cases. The defendant applied to the court, in which he was convicted, to be admitted bail pending his appeal; this was refused and he prosecuted an appeal to the supreme court of the United States. It was held, that since the defendant was convicted of offense not punishable by fine only, that his admission to bail was a matter within the discretion of the state court, and where no abuse of discretion was claimed, the judgment of the state court would not be reversed. *Clawson v. United States*, 113 U. S. 143, 28 L. Ed. 957.

48. **Confinement in state penitentiary.**—*Clawson v. United States*, 113 U. S. 143, 28 L. Ed. 957.

mission of a defendant to bail who had been convicted of a criminal offense in the highest court of a state, and who prosecuted a writ of error to the supreme court of the United States, see the title **APPEAL AND ERROR**, ante, p. 281.

d. *Mandamus to Compel Admission to Bail*.—Mandamus will issue to compel a circuit or district judge of the United States to obey an order of a justice of the United States supreme court ordering him to exercise his discretion as to the taking or refusing of bail of a person who had been convicted of a criminal offense and who had been allowed a writ of error and a supersedeas by such justice, where the circuit or district judge refused because he deemed the order made without authority and that the bond if taken would be invalid.⁴⁹

B. Recognizance or Bail Bond—Condition for Appearance.—It has been held, that the term of court at which the bail must produce their principal is that named in the bond and those immediately succeeding, and they are not bound to produce him at an indefinite term in the distant future.⁵⁰

C. Effect of Admission to Bail—1. **CONTROL OF SURETIES OVER PRINCIPAL.—Power and Control of Sureties.**—When a person is admitted to bail, he is in legal effect delivered into the custody of his sureties who may exercise control over him until the conditions of the bond are fulfilled or they are otherwise released from liability.⁵¹

49. *Mandamus to compel admission to bail*.—Hudson v. Parker, 156 U. S. 277, 39 L. Ed. 424.

The defendant was convicted of a criminal offense, against the laws of the United States, committed in Indian Territory, in a district court of the United States, and sentenced to a term of imprisonment. He presented to a justice of the United States supreme court a petition for a writ of error upon the judgment and for a supersedeas and bail pending the writ of error. The writ of error was allowed by such justice and an order made that the defendant should be admitted to bail subject to the approval of the district judge in whose court the defendant was originally convicted. The district judge refused to exercise his discretion upon the ground that the justice issuing the order was not the justice assigned to the circuit in which the district court was located and in his opinion the order was void and the bond, if given, would be invalid. It was held, that the district judge would be compelled by writ of mandamus from the supreme court of the United States, to exercise his discretion. Hudson v. Parker, 156 U. S. 277, 39 L. Ed. 424. See, also, the titles **APPEAL AND ERROR**, ante, p. 282; **MANDAMUS**.

50. Reese v. United States, 9 Wall. 13, 19 L. Ed. 541.

Terms at which defendant must appear.—Where the condition of a recognizance of bail in a criminal action pending in a circuit court of the United States, provided that the party held to bail should appear for trial at the next regular term of the court and at any subsequent term thereafter, the latter clause is construed to mean that the party shall appear at any subsequent term which may follow in regular succession in the course of business of the court, and not at any distant

future term to which either party might be disposed to postpone the trial, without reference to any intervening term. Reese v. United States, 9 Wall. 13, 19 L. Ed. 541.

51. Taylor v. Taintor, 16 Wall. 366, 371, 21 L. Ed. 287; Reese v. United States, 9 Wall. 13, 19 L. Ed. 541; Cosgrove v. Winney, 174 U. S. 64, 68, 43 L. Ed. 897.

Power and control.—"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.'" Taylor v. Taintor, 16 Wall. 366, 371, 21 L. Ed. 287, quoted in Cosgrove v. Winney, 174 U. S. 64, 68, 43 L. Ed. 897.

By a recognizance of bail in a criminal action the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is subjected or can be subjected by them to constant imprisonment, but that he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty. Reese v. United States, 9 Wall. 13, 19 L. Ed. 541.

2. **RIGHT OF PRINCIPAL TO LEAVE COURT'S JURISDICTION**—a. *General Rule*.—It has been held, that where a person is admitted to bail there is an implied covenant on the part of the principal with his surety, that he will not depart out of the jurisdiction of the court in which bail was given without their assent.⁵²

b. *Sureties Permitting Bail to Depart from Jurisdiction*.—And that while they may doubtless permit him to go outside of the jurisdiction of the court, they are responsible if he fails to return in time to enable him to comply with the conditions of the bond.⁵³

c. *Control Reattaches on Returning to Jurisdiction*.—Where a principal on a bail bond is suffered by his sureties to depart from the court's jurisdiction, such departure does not put an end to their custody but it immediately reattaches upon his return to the jurisdiction of the court.⁵⁴

D. Discharge of Bail—1. **ACT OF GOD**.—The sureties upon a bail bond are discharged from their obligation, where performance is rendered impossible by the act of God.⁵⁵

2. **ACT OF LAW**.—And it seems to have been held as a general rule, that any act or operation of law which places it beyond the power of the sureties to comply with their obligation, will relieve them from it.⁵⁶

Law Operative in State Where Obligation Taken.—But the law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the bond is given, the principal is allowed

52. *Reese v. United States*, 9 Wall. 13, 18, 19 L. Ed. 541.

Rule as to remaining in court's jurisdiction.—As the power of sureties on the bail bond to arrest their principal can only be exercised within the territory of the United States, there is an implied covenant on the part of the principal with his sureties that he will not depart out of this territory without their assent. *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

53. **Sureties permitting bail to depart from jurisdiction**.—*Taylor v. Taintor*, 16 Wall. 366, 372, 21 L. Ed. 287; *Cosgrove v. Winney*, 174 U. S. 64, 68, 43 L. Ed. 897.

Departing with sureties' permission.—The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the state within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee. *Taylor v. Taintor*, 16 Wall. 366, 372, 21 L. Ed. 287.

In the case of *Devine v. State*, the court, speaking of the principal, say: "The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. * * * In the case before us, the failure of the sureties to surrender their principal, was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control." The other authorities cited are to the same effect. *Taylor v. Taintor*, 16 Wall. 366, 372, 21 L. Ed. 287.

54. **Control reattaches on returning to jurisdiction**.—*Cosgrove v. Winney*, 174 U. S. 64, 68, 43 L. Ed. 897.

55. **Act of God**.—*Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287; *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. Ed. 950.

It is the settled law that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, for example, where the principal dies before the day of performance. *Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287; *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. Ed. 950.

56. **Act of the law**.—*Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287; *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. Ed. 950; *Clark v. Barnard*, 108 U. S. 436, 454, 27 L. Ed. 180.

The court in *Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287, said: "If the principal is arrested in the state where the obligation is given and sent out of the state by the governor, upon the requisition of the governor of another state, it is within the third (act of the law). In such cases the governor acts in his official character and represents the sovereignty of the state in giving efficacy to the constitution of the United States and the law of congress. If he refuse, there is no means of compulsion, but if he act, and the fugitive is surrendered, the state whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result, thereupon at once, ipso facto, lose their binding effect." Quoted in *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. Ed. 950.

by his sureties to depart into another state, and, while there, is imprisoned for a violation of the criminal laws of the latter state, the sureties will not be released.⁵⁷

3. **ACT OF OBLIGEE**—a. *General Rule*.—Any act of the obligee which renders impossible the performance of the conditions of a bail bond, will operate as a discharge of the sureties.⁵⁸

b. *Change of Terms of Bail Bond*—(1) *In General*.—Any agreement between the principal and the obligee of a bail bond to which the sureties are not parties, which materially varies the terms or conditions of the bond, will operate as a release of the sureties.⁵⁹

57. Law operative in state.—*Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287; *Clark v. Barnard*, 108 U. S. 436, 454, 27 L. Ed. 780.

The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another state for the violation of a criminal law of that state, it will not avail to protect him or his sureties. Such is now the settled rule. *Taylor v. Taintor*, 16 Wall. 366, 371, 21 L. Ed. 287; *Clark v. Barnard*, 108 U. S. 436, 454, 27 L. Ed. 780.

When the bail of a party arrested by order of a state court of one state on information for a crime, and released from custody under his own and his bail's recognizance that he will appear at a day fixed and abide the order and judgment of the court on process from which he has been arrested, have suffered him to go into another state, and while there he is, after the forfeiture of the recognizance, delivered up (under the second section of the fourth article of the constitution and the act of February 12th, 1793, passed to give effect to it) on the requisition of the governor of a third state for a crime committed (without the knowledge of the bail) in it, and is tried, convicted, and imprisoned in such third state, the bail are not discharged from liability on their recognizance on suit by the state where the person was first arrested. There has been no such "act of the law" in the case as will discharge bail. The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities. *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287; *Clark v. Barnard*, 108 U. S. 436, 454, 27 L. Ed. 780.

58. Rule as to act of obligee.—*Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287.

Where the principal was arrested and brought before a court charged with a criminal offense, and was then admitted to bail to appear before a particular court at a stated term, and before the time for his appearance that court was abolished without qualification, the sureties would be discharged from their obligation. *Taylor v. Taintor*, 16 Wall. 366, 369, 21 L. Ed. 287.

59. Change of terms.—*Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

There is an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with the covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him. *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

Although the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts, yet their positions are similar in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent. *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

In *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541, Mr. Justice Field, delivering the opinion of the court, said (p. 21): "It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking." Quoted in *Prairie State Bank v. United States*, 164 U. S. 227, 228, 41 L. Ed. 412.

Where a stipulation was made between the parties to a criminal action (the government and the prisoner), and entered

(2) *Allowing Principal to Depart from Country.*—Where a person is admitted to bail, the government has no right to do any act which will make it more difficult for the sureties to fulfill the obligation of the bail bond. Therefore, where after a person had been admitted to bail, an agreement was made between him and the officials of the government, that he would be allowed to go to a foreign country and remain there until certain civil cases were disposed of, the court held that this operated to release sureties.⁶⁰

4. **ACT OF OBLIGOR OR STRANGER.**—If any act is committed either by the obligor of a bail bond or a stranger thereto, which renders it impossible for the sureties to comply with the conditions of the bond, the sureties cannot claim to be exonerated by such action.⁶¹

5. **BY PAYMENT.**—Payment by the bail of their recognizances in a criminal case discharges their liability.⁶²

6. **ABANDONMENT OF PROSECUTION.**—It has been held, under a statute applying only to the District of Columbia, that the failure of the grand jury to take action in the case of a person charged with a criminal offense who had been admitted to bail, within the time specified in the statute, worked an abandonment of the prosecution and operated to release the bail.⁶³

7. **REMOVAL FROM STATE TO FEDERAL COURT.**—Where a criminal prosecution is removed from a state to a federal court, the sureties upon the bail bond of the defendant are thereby released from their obligation to produce defendant in the state court.⁶⁴

in the minutes of the court, to postpone the trial of the action until the determination of cases pending in another court; held, that the stipulation was inconsistent with the condition of a recognizance of bail, that the principal should appear for trial at any subsequent term following the then next term in regular succession; and that it released the principal from the obligation to appear at any such subsequent term. *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

60. **Allowing principal to depart from country.**—*Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

When in a criminal action a stipulation was made and entered in the minutes of the court, between the government and the defendant, who had given bail for his appearance for trial, that he might depart without the territory of the United States to a foreign country, and remain there until certain civil cases pending in another court were finally disposed of, and such stipulation was made without the knowledge or assent of the sureties on the recognizance of bail, held that the sureties were released. *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541.

61. **Not released by obligor's act.**—*Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287.

It is equally well settled that if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in nowise affected. And there is "a distinction between the act of the law proper and the act of the obligor, which exposes him to the control and action of the law." While the former exonerates, the latter, gives no immunity. It is the willing act of the obligor which creates

the obstacle, and the legal effect is the same as of any other act of his, which puts performance out of his power. This applies only where the accused has been convicted and sentenced. Before judgment—non constat—but that he may be innocent. *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287.

62. **Released by payment.**—*United States v. Ryder*, 110 U. S. 729, 736, 28 L. Ed. 308.

63. **Failure to indict.**—*United States v. Cadarr*, 197 U. S. 475, 49 L. Ed. 842.

"The section directly involved in number 939 of the District of Columbia Code, and is as follows: 'Section 939. Abandonment of prosecution.—If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be: Provided, however, that the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury.' 31 Stat. 1189, 1342." *United States v. Cadarr*, 197 U. S. 475, 477, 49 L. Ed. 842.

64. **Removal to federal court.**—*Davis v. South Carolina*, 107 U. S. 597, 27 L. Ed. 571.

Where a criminal prosecution was com-

E. Forfeiture of Bail Bond—1. NATURE OF ACTION—*a. In General.*—It was held in a very early case that an action to recover the penalty of a recognizance conditioned for the good behavior of defendant was an action of a criminal nature.⁶⁵

b. Civil Action.—While, under former statutes a proceeding by scire facias upon a recognizance to answer a criminal charge might have been deemed a civil action, yet the supreme court does not seem to have decided whether or not that would be the case under the present statute.⁶⁶

menced against a person in a state court and such person gave bail to answer for his appearance, and the case was subsequently removed to the circuit court of the United States, because of the fact that the offense alleged to have been committed was committed while the defendant was engaged in the discharge of his duty in assisting an officer of the United States in enforcement of the revenue laws, it was held, that the sureties upon the bail bond were released from their obligation to produce the defendant in the state court. *Davis v. South Carolina*, 107 U. S. 597, 27 L. Ed. 574.

The defendant was a United States soldier and was detailed by his commanding officer to assist a deputy United States marshal in making an arrest of a person charged with a violation of the United States revenue laws. While making the arrest, the person sought to be arrested was killed, and the defendant was arrested by the state authorities charged with murder but was released from custody upon giving bail. He then made application to have his case transferred to the United States circuit court which was duly allowed. Upon his failure to appear to answer the charge in the state court, his bail was declared forfeited, and an action was begun against his sureties to recover the amount thereof. It was held, that the action of the state court in forfeiting the bail was void, as the removal of the case from the state to the federal court discharged the liability of the sureties to produce the defendant in the state court. *Davis v. South Carolina*, 107 U. S. 597, 27 L. Ed. 574.

In *Davis v. South Carolina*, 107 U. S. 597, 601, 27 L. Ed. 574, the court used the following language: "When, by virtue of the writ of habeas corpus, the prisoner was taken into the custody of the marshal, the jurisdiction of the circuit court of the United States of his person and of the indictment against him was completely vested, and that of the state courts ceased altogether. The recognizance was an incident, and followed the principal case. The obligation to appear was transferred with the cause, and he was no longer bound to answer in the court of original jurisdiction. It would have been unlawful for his bail to have surrendered him to that tribunal. They were consequently discharged from the obligation of the recognizance, so far as it required them to do so, or to answer for the default.

There was, consequently, no breach of the bail bond in not appearing in the state court, and all proceedings to forfeit it and render judgment upon it against the sureties were coram non iudice and void. The right to proceed upon it at all against him or them passes from the state court with the transfer of its jurisdiction over the person of the prisoner and the indictment against him."

65. Action of criminal nature.—*Respublica v. Cobbet*, 3 Dall. 467, 475, 1 L. Ed. 683.

Let us now consider, whether this suit against William Cobbet is of a civil or criminal nature. It is grounded on a recognizance for the good behavior, entered into before the chief justice of this state. This recognizance, it must be conceded, was taken to prevent criminal actions by the defendant, in violation of the peace, order and tranquillity of the society; it was to prevent crimes, or public wrongs and misdemeanors, and for no other purpose. It is evidently of a criminal nature, and cannot be supported, unless he shall be convicted of having committed some crime, which would incur its breach, since its date, and before the day on which the process issued against him. Besides, a recognizance is a matter of record, it is in the nature of a judgment, and the process upon it, whether a scire facias or summons, is for the purpose of carrying it into execution, and is rather judicial than original; it is no further to be reckoned an original suit, than that the defendant has a right to plead to it; it is founded upon the recognizance, and must be considered as flowing from it, and partaking of its nature; and when final judgment shall be given, the whole is to be taken as one record. *Respublica v. Cobbet*, 3 Dall. 467, 475, 1 L. Ed. 683.

66. Civil action.—*Hunt v. United States*, 166 U. S. 421, 41 L. Ed. 1063.

How far a writ of scire facias upon a recognizance to answer for an offense should be considered a civil action is a question upon which there has been some diversity of judicial opinion, depending in some degree upon the manner in which the question has arisen, and upon the comparative regard to be paid to the form of the proceedings, and to the purpose for which and the circumstances under which such a recognizance is taken. *Hunt v. United States*, 166 U. S. 421, 425, 41 L. Ed. 1063.

"In the earlier judiciary acts of the

c. *Arising Out of the Criminal Laws of the United States.*—A proceeding by scire facias to recover the penalty of a bail bond, "is a case arising out of the criminal laws of the United States," within the meaning of the act providing that all decisions of the circuit court of appeals in such cases shall be final.⁶⁷

d. *Not an Action for the Enforcement of Revenue Laws.*—An action against sureties to recover the penalty on a bail bond is not an action for the enforcement of a revenue law within the statutory meaning.⁶⁸

2. JURISDICTION.—By statute district courts of the United States are given jurisdiction of all suits for penalties and forfeitures and this statute has been construed to include actions for the recovery of penalties on bail bonds.⁶⁹

Removal from State to Federal Court.—It has been held, that where a defendant had given a recognizance for good behavior in a state court, that court had jurisdiction in an action to recover the penalty of the recognizance, and the fact that the defendant was an alien would not justify the removal of the case into the United States circuit court.⁷⁰

3. NECESSITY OF FOLLOWING STATE PROCEDURE.—While the United States statute provides that bail shall be taken in accordance with the mode of procedure in the state in which the accused is found, yet it does not seem to have been decided by the United States supreme court, that proceedings for the enforcement of bail bonds must conform to the practice in the state where the bond is sued.⁷¹

United States, the general jurisdiction of the courts of the United States, as depending upon the suit being of a criminal or of a civil nature, was usually defined by the words 'any cause, civil or criminal' (U. R. Rev. Stat., § 637); or 'any civil suit or criminal prosecution' (U. S. Rev. Stat., §§ 641, 643); or, on the one hand, by the words, 'crimes and offenses;' and, on the other hand, by the words 'suits of a civil nature, at common law or in equity,' or 'suits at common law' or 'civil actions.' Act of September 24, 1789 (1 Stat. at L. 76-79, 84, chap. 20, §§ 9, 11, 22); act of March 3, 1875 (18 Stat. at L. 470, chap. 137, §§ 1, 2); U. S. Rev. Stat., § 563, cl. 1, 4; U. S. Rev. Stat., § 629, cl. 1, 3, 20; U. S. Rev. Stat., § 633. Under those acts a writ of scire facias upon a recognizance to answer a criminal charge might have been deemed a civil action. *Stearns v. Parrett*, 1 Mason 153; *United States v. Payne*, 147 U. S. 687, 690 (37 L. Ed. 332, 333); *Com. v. McNeill*, 103 Tenn. 127; *Com. v. Stebbins*, 4 Gray, 25; *State v. Kinne*, 41 N. H. 238. Yet see *Respublica v. Cobbet*, 3 U. S. 3 Dall. 467 (1 L. Ed. 683); 2 *Yates*, 352; *Com. v. Philadelphia County Comm'rs*, 8 Serg. & R. 151; *State v. Cornig*, 42 L. Ann. 416; *State v. Murmann*, 124 Mo. 502, 507. But the philosophy of the act of March 3, 1891, chap. 517, is quite different in this respect." *Hunt v. United States*, 166 U. S. 424, 41 L. Ed. 1063, 1064.

67. *Arising from criminal laws.*—*Hunt v. United States*, 166 U. S. 424, 41 L. Ed. 1063.

A writ of scire facias upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws; for it is a suit to enforce the penalty of a

recognizance taken to secure the appearance of the principal to answer the charge and to abide any sentence against him; the provision of § 1014 of the Revised Statutes, under which the recognizance in suit was taken, is contained in chapter 18 of title 13 of the Revised Statutes, under the head of "Criminal Procedure," and in the first of the sections regulating arrest, bail, indictments, pleadings, commitments, challenges, witnesses, trial, verdict, sentence and execution, in criminal cases; and this recognizance is, as it is described in § 1020, a "recognizance in a criminal cause." *Hunt v. United States*, 166 U. S. 424, 426, 41 L. Ed. 1063.

68. *Not to enforce revenue laws.*—*United States v. Broadhead*, 127 U. S. 212, 32 L. Ed. 147.

69. *Jurisdiction.*—*Fed. Stat.*, vol. 4, p. 218, § 563. *Insley v. United States*, 150 U. S. 512, 37 L. Ed. 1163.

70. *Removal to federal court.*—*Respublica v. Cobbet*, 3 Dall. 467, 1 L. Ed. 683.

The defendant was charged with being a common libeller before the chief justice of the state of Pennsylvania, and a recognizance was taken for his good behavior, an action of debt was instituted to recover the penalty of the recognizance on the ground that he had broken its conditions, by continuing to publish libels similar to those with which he was first charged, he filed a petition setting forth that he was an alien and praying that the suit might be removed for trial into the circuit court of the United States, the petition was refused, the court holding that the state court had jurisdiction of actions of this character. *Respublica v. Cobbet*, 3 Dall. 467, 1 L. Ed. 683.

71. *State procedure.*—*Insley v. United States*, 150 U. S. 512, 37 L. Ed. 1163.

Where the state law provided that all

4. **AMOUNT OF RECOVERY**—*a. In General.*—The amount of recovery upon a bail bond is confined to the penalty prescribed in the instrument.⁷²

b. Interest.—And in accordance with well-settled principles, no interest can be recovered in addition to the penalty on such bonds.⁷³

5. **EFFECT OF FORFEITURE ON OBLIGATION OF DEFENDANT TO APPEAR.**—The forfeiture of a bail bond, and its payment by the surety does not discharge the obligation of the principal to appear in court, or act as a bar to his subsequent arrest for the same offense.⁷⁴

F. Indemnification of Sureties.—An express contract to indemnify the bail in a criminal case may be sustained, but no such contract is implied by law.⁷⁵

Indemnification by Other than Principal.—The fact that there has been placed in the hands of the bail, by some one, not the person arrested nor any one in his behalf, nor so far as the bail knew, with his knowledge, a sum of money

actions against bail should be by a "civil action," and the judgment was recovered upon a bond sued upon by proceedings in scire facias in a United States court sitting in that state, the supreme court refused to decide the question as to whether or not scire facias was the proper remedy or not, but held that the defendant had waived his right to raise the question by failure to prosecute a writ of error from the district to the circuit court. *Insley v. United States*, 150 U. S. 512, 37 L. Ed. 1163.

The court in *Insley v. United States*, 150 U. S. 512, 514, 37 L. Ed. 1163, said: "The argument of the appellants in this connection is that, under Rev. Stat., § 1014, authorizing commissioners 'to take bail in any state where he' (the accused) 'may be found, and agreeably to the usual mode of process against offenders in such state,' proceedings for the enforcement of bail bonds should conform to the practice in the state where the bond is sued; and that, as the statutes of Kansas do not authorize proceedings by scire facias in such cases, but require a formal action, termed in the Code of Kansas a 'civil action' against the bail, this practice should also be pursued in the Federal courts; and hence that the judgment of the district court of Kansas in this case rendered upon a writ of scire facias was illegal and void. But we do not find it necessary to determine whether a scire facias was a proper remedy or not. It is a sufficient answer to the appellants' contention that the court has jurisdiction of the subject matter under Rev. Stat., § 563, which confers upon district courts jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States; and § 716, conferring upon district courts power to issue writs of scire facias; and also that the court had jurisdiction of the person of the defendant, who was not only served with the writ, but appeared and moved to quash the same, apparently for the same reasons which are now urged for holding the proceedings to be a nullity."

72. **Confined to prescribed penalty.**—*United States v. Broadhead*, 127 U. S. 212.

32 L. Ed. 147.

73. **Interest.**—*United States v. Broadhead*, 127 U. S. 212, 32 L. Ed. 147.

74. **Does not release defendant from appearing.**—*United States v. Ryder*, 110 U. S. 729, 28 L. Ed. 308; *Ex parte Milburn*, 9 Pet. 704, 9 L. Ed. 280.

Whilst payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal may at any time be retaken and brought into court. *United States v. Ryder*, 110 U. S. 729, 736, 28 L. Ed. 308.

"The points principally relied on at the argument are, in the first place, that the party is not liable to be arrested to answer the indictment, after having given a recognizance of bail; although the recognizance has been forfeited, and the party has not appeared and answered, and been tried on the indictment; in the next place, that the discharge upon the habeas corpus before Mr. Chief Justice Cranch, is a bar to any subsequent arrest. We are of opinion, that neither of these grounds can, in point of law, be maintained. A recognizance of bail in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense. And a fortiori, it cannot be deemed to apply to a case like the present, of a penitentiary offense; for that would be to suppose, that the law allowed the party to purge away the offense, and the corporal punishment, by a pecuniary compensation. There is nothing, in our opinion, in the Maryland statute of 1780, ch. 10, to change this construction of the law." *Ex parte Milburn*, 9 Pet. 704, 9 L. Ed. 280.

75. **Indemnification of sureties.**—*United States v. Ryder*, 110 U. S. 729, 28 L. Ed. 308.

equivalent to that for which the bail and himself were bound, has no effect, in a suit against the bail, on the rights of the parties.⁷⁶

G. Subrogation of Sureties to Rights of Obligee.—As to the right of the sureties on a bail bond to be subrogated, to the right of the obligee, see the title SUBROGATION.

BAILMENTS.

BY R. C. WALKER.

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⁷⁶ Other than principal.—Taylor v. Taintor, 16 Wall. 266, 267, 21 L. Ed. 287.

I. Definitions, Nature and Distinctions.

A. Definitions and Nature.—A bailment is a delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished.¹ A redelivery of the thing bailed is not contemplated in the definitions laid down by some writers.² For instances of bailments, see note.³

B. Distinctions.—When the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.⁴

1. Bouvier's Law Dict. See *The Idaho* 93 U. S. 575, 23 L. Ed. 978.

2. See Story on Bailments (9th Ed.), § 2; Jones on Bailments 1. See, also, *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165. See post, "Distinctions," I. B; "Redelivery or Delivery Over by Bailee," IV. A. 5.

3. **Instances of bailments.**—Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize master may be considered as a bailee, to the use of the whole squadron, who are to share in the prize money. *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

Where the importer has the general right and property in the goods, that right draws after it a constructive possession, and the master of the ship is but a bailee, maintaining the possession for his benefit. *Conrad v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392. See, also, *Newell v. Norton*, 3 Wall. 257, 18 L. Ed. 271. See the titles CARRIERS; SHIPS AND SHIPPING.

A public officer having property in his custody in his official capacity is a bailee. *United States v. Thomas*, 15 Wall. 337, 21 L. Ed. 89; *Bevans v. United States*, 13 Wall. 56, 62, 20 L. Ed. 531. See the title PUBLIC OFFICERS.

A receiver of public money receives it not as bailee, but as a collecting officer. If money so held is in any sense a bailment, it is that of a carrier to transmit to the treasury. *United States v. Morgan*, 11 How. 154, 162, 13 L. Ed. 643; *United States v. Prescott*, 3 How. 578, 11 L. Ed. 734. See the title PUBLIC OFFICERS.

Bailment distinguished from sale.—See post, "Distinctions," I. B.

4. **Distinguished from sale.**—*Sturm v. Boker*, 150 U. S. 312, 329, 37 L. Ed. 1093; *Lafin, etc., Powder Co. v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973. See, also, post, "Compensation Necessary Element in Bailment for Hire," III. D. And see *Union Trust Co. v. Wilson*, 198 U. S. 530, 537, 49 L. Ed. 1154; *Dows v. National Exchange Bank*, 91 U. S. 618, 633, 23 L. Ed. 214; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392; *Hauselt v. Harrison*, 105 U. S. 404, 26 L. Ed. 1075; *The Barnstable*, 181 U. S. 464, 468, 45 L. Ed. 954. See the

titles CHATTEL MORTGAGES AND CONDITIONAL SALES; SALES.

An agency to sell and return the proceeds, or the specific goods if not sold, does not involve a change of title. *Sturm v. Boker*, 150 U. S. 312, 330, 37 L. Ed. 1093.

Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. *Lafin, etc., Powder Co. v. Burkhardt*, 97 U. S. 110, 116, 24 L. Ed. 973.

An incorporated company entered into a contract with A, the owner of letters patent for an explosive compound called "dualin," whereby he undertook to manufacture it, as required by the company from time to time, in quantities sufficient to supply the demand for the same, and all sales produced or effected by the company. The contract provided that all goods he manufactured should be consigned to the company for sale, and all orders he received should be transferred to it to be filled; that the parties should equally share the net profits arising from such sales, and equally bear all losses by explosion, or otherwise, so far as the loss of the dualin was concerned, but the company assumed no risk on A's building or machinery; that the company should, semimonthly, advance to him, on his requisition, a stipulated sum, for paying salaries, for labor, and for his personal account, and such further reasonable sums as might be required for incidental expenses of manufacture; and should furnish him all the raw materials needed in manufacture said explosive in quantities sufficient to supply the demand created by the company, or should advance the money necessary to purchase them—the said advances and the cost of such ma-

II. Classification.

For practical purposes bailments are more properly divided in three classes. First, those bailments which are for the benefit of the bailor, or some person whom he represents.⁵ Second, those for the benefit of the bailee, or some person represented by him.⁶ Third, those which are for the benefit of both parties.⁷

III. Requisites and Validity.

A. Who May Be Bailee.—A man cannot hold as bailee for himself. The capacity of bailee is inconsistent with ownership.⁸ A common carrier may become an ordinary bailee for hire.⁹

B. Subject Matter of Bailment.—Choses in action, as well as other personal property, may be the subject of bailment.¹⁰

C. Return of Article Bailed.—See ante, "Distinctions," I, B.

D. Compensation Necessary Element in Bailment for Hire.—Every bailment or letting for hire must contemplate payment for the use of the thing let or bailed.¹¹ The amount need not be stipulated, it may be a reasonable com-

materials to be charged to him against the manufactured goods to be by him consigned to the company. Certain of the materials which had been furnished him under the contract, and others which he had purchased with money advanced by the company, were seized upon an execution sued out on a judgment against him in favor of a third party. The company then brought this action, to recover for the wrong conversion of the materials so seized. Held, that the delivery of them by the company to A did not create a bailment, but that, upon such delivery, they, as well as those purchased by him with the money so advanced, became his sole property, and, as such, were subject to the execution. *Laflin, etc., Powder Co. v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973.

"An invoice," as said by this court in *Dows v. National Exchange Bank*, 91 U. S. 618, 630, 23 L. Ed. 214, "is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. *** Hence, standing alone, it is never regarded as evidence of title." *Sturm v. Boker*, 150 U. S. 312, 328, 37 L. Ed. 1093.

5. Classification.—*Bouvier's Law Dict.*, vol. 1, p. 212; *Preston v. Prather*, 137 U. S. 604, 34 L. Ed. 788.

6. *Bouvier's Law Dict.*, vol. 1, p. 212.

7. *Preston v. Prather*, 137 U. S. 604, 612, 34 L. Ed. 788.

A deposit being changed from a gratuitous bailment to a security for a loan, becomes a bailment for the mutual benefit of both parties. For the bailor it obtains the loan and to that extent is to his advantage; and to the bailee it secures the payment of the loans and that is to his advantage. *Preston v. Prather*, 137 U. S. 604, 612, 34 L. Ed. 788.

8. Who may be bailee.—*Dows v. National Exchange Bank*, 91 U. S. 618, 633, 23 L. Ed. 214. See *Union Trust Co. v.*

Wilson, 198 U. S. 530, 537, 49 L. Ed. 1174.

9. Common carrier.—When as a matter of accommodation or special engagement, a common carrier undertakes to carry something which it is not his business to carry, he becomes a bailee for hire. "For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 377, 21 L. Ed. 627. See the title CARRIERS.

10. Subject matter.—*Biebinger v. Continental Bank*, 99 U. S. 143, 25 L. Ed. 271; *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. Ed. 923.

11. Compensation.—*Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160.

Though the contract indubiously and repeatedly spoke of loaning the cars to the railroad company for hire, for four months, and delivering them for use for hire, it is manifest that no mere bailment for hire was intended, no price for the hire being mentioned or alluded to. *Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160.

A manufacturing company exacted and took promissory notes for the entire selling price of the property, \$6,138.40, and, in addition thereto, collaterals to a large amount to secure payment of the notes; the aggregate of the notes was equal to the price, two of them for \$1,919.20 each, one payable at sixty days and the other at four months, bearing interest from their date at the rate of ten per cent., and the third note, at four months, being for \$2,583, interest at that rate having been added to the principal sum; one of these notes fell due only nine days after the cars were de-

pensation or a quantum valebat.¹²

IV. Rights, Duties and Liabilities.

A. As between Bailor and Bailee—1. TITLE AND RIGHT OF PROPERTY.—By the act of accepting goods in bailment, the bailee acknowledges a right or title in the bailor.¹³

2. LIABILITY OF BAILLEE FOR DAMAGES AND LOSS—*a. Degrees of Negligence and Diligence Considered.*—There is much conflict among authorities as to the propriety of establishing degrees of negligence, on the ground that gross negligence and negligence are the same.¹⁴

b. Different Classes of Bailees.—**Where the bailment is for the sole benefit of the bailor**, the bailee is liable only for losses attributable to his gross neglect. The bailee being without reward, he is only required by law to exercise a slight degree of diligence.¹⁵ But gross negligence in such cases is nothing more than

livered to the railroad company, and both the others before the expiration of four months from the date of the agreement; the notes were to be collected at maturity, and thus it was contemplated that before the end of four months the manufacturing company should have in hand in cash the full value or price of the cars. It was held that all this is totally inconsistent with the idea that the parties intended a mere letting or bailment for hire. *Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160.

12. Amount of compensation.—*Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160.

13. Title and right of property.—*Dows v. National Exchange Bank*, 91 U. S. 618, 633, 23 L. Ed. 214; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978. See post, "Redelivery or Delivery Over by Bailee," IV, A, 5.

"An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit. Nor can it be subjected by his creditors to the payment of his debts." *Sturm v. Boker*, 150 U. S. 312, 330, 37 L. Ed. 1093.

Presumption of bailor's right.—While a contract of bailment undoubtedly raises a strong presumption that the bailor is entitled to the thing bailed, it is not true that the bailee thereby conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed—to restore it, or to account for it. He does so account for it when he has yielded it to the claim of one who has a right paramount to that of his bailor. *The "Idaho,"* 93 U. S. 575, 23 L. Ed. 978.

14. Degrees of negligence.—See the title NEGLIGENCE.

15. Bailment for sole benefit of bailor.—*Preston v. Prather*, 137 U. S. 604, 34 L. Ed. 788, citing *Steamboat New World v. King*, 16 How. 139, 475, 14 L. Ed. 1019; *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 383, 21 L. Ed. 627; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374.

In the absence of bad faith, a gratuitous bailee is not liable for failure to refund money in his hands. *Eldridge v. Hill*, 97 U. S. 92, 24 L. Ed. 970.

Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

An action by the United States, to recover the proceeds arising from sales of tobacco, which, found in the hands of the defendant, a bailee, was seized as forfeited for the nonpayment of the tax due thereon, and then left with him, under an agreement with the collector of internal revenue that he, the bailee, should sell it and hold the proceeds, subject to the decision of the proper court, is, within the meaning of § 699 of the Revised Statutes, an action to enforce a revenue law, and this court has jurisdiction to re-examine the judgment, without regard to the amount involved. The defendant having set up in his plea that, while he held such proceeds, pursuant to the agreement, a suit to recover them, defended by A, the owner of the tobacco, was dismissed by the United States after plea filed, and that the defendant, after retaining them for nearly four years, and no other suit having been brought, paid them to A, the court, although testimony was offered sustaining his plea, instructed the jury that he was liable. Held, that the instruction was erroneous. *Pettigrew v. United States*, 97 U. S. 385, 24 L. Ed. 1029.

If bonds were received by a bailee for safe-keeping, without compensation in any form, but exclusively for the benefit of the bailor, the only obligation resting upon the bailee was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of this character would do generally for himself under like conditions. The exercise of

a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability.¹⁶

Where the bailment is for mutual benefit of both parties, the bailee is required to give such care as a prudent owner would extend to his own property of a similar kind and is liable for the loss of the property if caused by his neglect, though not amounting to gross negligence.¹⁷

A bailee for hire is only responsible for ordinary diligence and liable for

reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. *Preston v. Prather*, 137 U. S. 604, 608, 34 L. Ed. 788.

A gratuitous bailee of money to whom it is given for the purpose of lending it on good and sufficient security, and who, lending it to a person on property worth much more than the sum, and taking a properly executed mortgage, delivers the papers to his principal without having placed them on record, is not responsible for a loss occurring after the efflux of the term for which the money was lent, by nonrecording of the papers; the owner of the security having had abundant opportunity to have them recorded himself. *Turton v. Duffie*, 6 Wall. 420, 18 L. Ed. 868.

Forty-four record books, some deeds, mortgages, and other papers of a county having been stolen, the county officers deposited \$3,500 in the hands of A, upon condition that it should, upon the return of the stolen property, be paid to the person causing the return. It was also stipulated that the failure to "deliver some small paper or papers" should not invalidate the agreement. Within the time limited, A received a paper, signed by the deputy sheriff of the county, acknowledging the receipt of the record books, "also papers and small index books." He thereupon paid the money to the person presenting the receipt. The county then brought suit against A to recover the money, alleging that some of the books were, upon their return, in such a damaged condition as to be rendered comparatively worthless, and that he had, therefore, not performed his contract. Held, that A, being a simple bailee of the money deposited in his hands, without compensation, was not, in the absence of bad faith on his part, responsible for the condition of the property at the time of its return. *Eldridge v. Hill*, 97 U. S. 92, 24 L. Ed. 970.

As to liability of depositary for loss and damage to property, see the title DEPOSIT.

16. Gross negligence.—*Preston v. Prather*, 137 U. S. 604, 610, 34 L. Ed. 788. And see cases cited in preceding note.

The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect prop-

erty in their custody. *Preston v. Prather*, 137 U. S. 604, 610, 34 L. Ed. 788.

What will constitute reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. *Preston v. Prather*, 137 U. S. 604, 608, 34 L. Ed. 788.

If a bank be accustomed to take deposits of a nature not authorized by its charter, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *First Nat. Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750.

A person depositing valuable articles with a bailee, expects that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises, an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. *Preston v. Prather*, 137 U. S. 604, 610, 34 L. Ed. 788.

17. Bailment for mutual benefit.—*Preston v. Prather*, 137 U. S. 604, 34 L. Ed. 788; *McLemore v. Louisiana State Bank*, 91 U. S. 27, 23 L. Ed. 196.

A bailee for the benefit of both parties is required, for the protection of the property, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence. *Preston v. Prather*, 137 U. S. 604, 612, 34 L. Ed. 788.

ordinary negligence in the care of the property bailed. This is not only the common law, but the general law, on the subject.¹⁸

c. *Losses Arising without Fault or Negligence*—(1) *In General*.—The destruction of the goods bailed, without fault or negligence on the part of the bailee, terminates his obligation to make either a return thereof or pay for their loss.¹⁹ A bailee in the absence of a special contract is not an insurer of the thing bailed,²⁰ and is not responsible for damages or losses arising from inevitable accident, irresistible force or danger incident to its use.²¹ At common law a bailee is exempt from liability for loss of the consigned goods arising from inevitable accident.²² Inevitable accident occurs only when disaster happens from natural causes, without negligence or fault on either side.²³ Any casualty produced by physical causes which, from their nature, are irresistible, such as a storm at sea, is considered as inevitable accident.²⁴ By irresistible force is meant an interposition of human agency as is, from its nature and power, absolutely uncontrollable;²⁵ as the inroads of a hostile army.²⁶

(2) *Under Special Contract*.—A bailee may enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking.²⁷

18. Bailee for hire.—Clark v. United States, 95 U. S. 539, 24 L. Ed. 518; Boyden v. United States, 13 Wall. 17, 22, 20 L. Ed. 527; Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 654, 46 L. Ed. 366.

The contract for the use of the claimant's vessel, and for the payment of her value if she should be lost in the service of the government, was not reduced to writing; when in that service she was manned by a captain and crew furnished by the quartermaster's department and lost, but no negligence was attributed to them. Held, that the implied contract being such as arises upon a simple bailment for hire, the claimant cannot recover for her loss. Clark v. United States, 95 U. S. 539, 24 L. Ed. 518.

Where the owner of certain slaves, and also part owner of a vessel, hired the slaves to the master of the vessel, to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring; held, that the master, having acted with good faith, was not responsible for the escape of the slaves, in a foreign port, which was one of the contingent termini of the voyage, and, consequently, within the hazards to which the owner knew his property might be exposed; although it was doubtful whether the master had strictly pursued his orders, in going to such port. Beverly v. Brooke, 2 Wheat. 100, 4 L. Ed. 194. See, also, the title SLAVES.

19. Loss without negligence.—Sturm v. Boker, 150 U. S. 312, 330, 37 L. Ed. 1093; United States v. Thomas, 15 Wall. 337, 342, 21 L. Ed. 89.

It seems that a mere ordinary bailee would be relieved from liability by proof that the thing bailed had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. Boy-

den v. United States, 13 Wall. 17, 21, 20 L. Ed. 527.

20. Absence of special contract.—Boyden v. United States, 13 Wall. 17, 22, 20 L. Ed. 527.

21. Story on Bailments, §§ 25-32; United States v. Thomas, 15 Wall. 337, 21 L. Ed. 89.

Proof that property was taken from the bailee by superior force is a good reason for not returning it. McLemore v. Louisiana State Bank, 91 U. S. 27, 23 L. Ed. 196.

22. Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093.

23. Inevitable accident.—Bouvier's Law Dict., vol. 1, p. 1025. See Union Steamship Co. v. New York, etc., Steamship Co., 24 How. 307, 313, 16 L. Ed. 699; The Brig Morning Light, 2 Wall. 550, 560, 17 L. Ed. 862.

24. Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093.

25. Irresistible force.—Bouvier's Law Dict., vol. 1, p. 1121.

26. Hostile army.—United States v. Thomas, 15 Wall. 337, 21 L. Ed. 89. See Bevens v. United States, 13 Wall. 56, 20 L. Ed. 531.

27. Special contract.—Sturm v. Boker, 150 U. S. 312, 330, 37 L. Ed. 1093; Boyden v. United States, 13 Wall. 17, 22, 20 L. Ed. 527.

Where, by the terms and conditions of a contract consigning goods, the consignee assumed the expenses of transporting the goods to Mexico, the duty of selling them to the best advantage after they reached there, the obligation to account to the defendants for the price at which they might be sold, less one half of the profits in excess of the invoice price, and if not sold, to return the specific articles to the defendants free of expense, it was held that the agreement to return the goods, in the event they should not be sold, did not im-

d. *Presumption as to Occasion of Loss.*—Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants.²⁸

e. *Recognition of Liability for Loss.*—The taking, by a bailee, of insurance "for himself, on account of whom it might concern," is not a recognition of his liability for loss.²⁹

f. *Limiting Liability for Losses.*—See the titles CARRIERS; SHIPS AND SHIPPING.

3. SALE, TRANSFER, MORTGAGE OR PLEDGE OF PROPERTY—*a. By Bailor.*—If the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the owner has sold, mortgaged or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge.³⁰

b. *By Bailee.*—The unauthorized sale of the thing bailed will confer no title on the vendee.³¹ A bailee for custody has not the indicia of an agent to sell.^{31a}

pose upon him the risk of their destruction before he had an opportunity to sell or dispose of them under or in accordance with the terms of the consignment. The destruction of the goods, without fault or negligence on his part, terminated his obligation to make either a return thereof, or pay for their loss. Such a liability could only be imposed upon him by a contract clearly expressing his assumption of the risk of destruction, or his liability for the loss. *Sturm v. Boker*, 150 U. S. 312, 331, 37 L. Ed. 1093, 1100.

The duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. *Boyden v. United States*, 13 Wall. 17, 22, 20 L. Ed. 527. See the title PUBLIC OFFICERS.

There is a difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. *Boyden v. United States*, 13 Wall. 17, 22, 20 L. Ed. 527.

Property bailed destroyed by fire.—Where sleeping cars were furnished to a railroad company by a sleeping car com-

pany under a contract by which the railroad company assumed responsibility for damages to the cars, occasioned by casualty or accident, the railroad company was held to be liable for the loss of such cars, while in its possession, by fire originating from cause unknown. *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 35 L. Ed. 97.

28. **Presumption as to occasion of loss.**—*Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641, 650, 19 L. Ed. 422.

"This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted." *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641, 650, 19 L. Ed. 442. See the titles CARRIERS; INNS AND INNKEEPERS.

29. **Recognition of liability.**—*Sturm v. Boker*, 150 U. S. 312, 333, 37 L. Ed. 1093.

30. **Sale, mortgage, etc.**—*Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 49 L. Ed. 1154. See, generally, the title WAREHOUSES AND WAREHOUSEMEN.

Certain classes of bailees give receipts to the order of the bailor, because by a receipt in that form the bailee assents in advance to becoming bailee for any one who is brought within the terms of the receipt by an endorsement of the same. *Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 49 L. Ed. 1154.

31. **Sale by bailee.**—Where a party having possession of the wheat as a mere warehouseman, and not as a vendee, a subsequent sale and delivery thereof by him conferred no title thereto on the purchaser. *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214. See the title WAREHOUSES AND WAREHOUSEMEN.

31a. **Bailee for custody.**—*Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511.

Small sales by a bailee for custody while he has the property in charge and

A bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.³² A creditor who has possession of the property of his debtor as bailee cannot, without reducing his debt to judgment, and without the process or order of any court, and without the consent and against the will of the debtor, sell or otherwise dispose of the property and apply its proceeds to the payment of his debt.³³

4. **COMPENSATION OF BAILEE.—Liens.**—A bailee of goods asserting a lien for charges has the technical possession of the goods.³⁴

5. **REDELIVERY OR DELIVERY OVER BY BAILEE.**—A bailee's contract is to do with the property committed to him what his principal has directed;³⁵ to restore it, or account for it.³⁶ Where the bailee delivers over the property to one who has a right paramount to that of his bailor, he sufficiently complies with his contract to restore it or account for it.³⁷ Where goods in the possession of a bailee have been seized by an officer, under an attachment, they are in the custody of the law, and the bailee is not permitted to surrender them to the owner, although they may remain in his possession.³⁸

B. As between Bailor or Bailee and Third Parties.—As the bailee cannot

during the absence of the owner, are not any evidence of his right to sell, the sales being made without the knowledge or consent of the owner. An agent's authority cannot be proved by his own acts alone. *Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511. See the title **PRINCIPAL AND AGENT**.

A limited license, given to a bailee for custody, to dispose of a certain quantity and for a certain purpose is a different thing from a power to dispose of the whole property entrusted to his care. *Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511.

32. *Hardkess v. Russell & Co.*, 118 U. S. 663, 682, 30 L. Ed. 285.

33. *Xenia Bank v. Stewart*, 114 U. S. 224, 233, 29 L. Ed. 101.

34. **Lien of bailee.**—*Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154. See the title **LIENS**.

35. **Disposition according to contract.**—"The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. *Taylor v. Benham*, 5 How. 233, 274, 12 L. Ed. 130; *Kane v. Bloodgood*, 7 Johns. ch. 90, 110; *Basing v. Dabney*, 19 Wall. 1, 22 L. Ed. 90; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. Ed. 118; *Ryan v. Dox*, 34 N. Y. 307; *Story's Equity Jurisprudence*, §§ 1041, 1255; *Mechem on Agency*, § 568. And in enforcing such trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the fund." *McKee v. Lammon*, 159 U. S. 317, 322, 40 L. Ed. 165.

Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not

by action at law. *McKee v. Lammon*, 159 U. S. 317, 322, 40 L. Ed. 165. See the title **TRUSTS AND TRUSTEES**.

36. **Contract is to account for goods.**—*The Idaho*, 93 U. S. 575, 23 L. Ed. 978. See ante, "Definitions and Nature," I. A.

37. **Delivery to true owner.**—*The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

Actual delivery by the bailee on the demand of the true owner, who has the right to the immediate possession of the goods bailed, is a sufficient defense of the bailee against the claim of the bailor, and there is no difference in this regard between a common carrier and other bailees. *The "Idaho"*, 93 U. S. 575, 23 L. Ed. 978. See the titles **CARRIERS; SHIPS AND SHIPPING**.

Nor can it be maintained that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

While a bailee cannot avail himself of the title of a third person (though that person be the true owner), for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title, he is not answerable if he has delivered the property to its true owner at his demand. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

If there be any estoppel on the part of the bailee, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978. See ante, "Title and Right of Property," IV, A, 1.

38. **Goods in custody of law.**—*Stiles v. Davis*, 1 Black. 101, 17 L. Ed. 33.

If the owner has a remedy, it is against the officer who seized the goods or

confer rights which he does not possess and cannot withhold the possession from the true owner, one claiming under him cannot.³⁹

V. Procedure.

A. Right of Action.—A bailee of goods may maintain an action for the destruction thereof.⁴⁰ The owner of goods may maintain an action directly upon a subcontract made by the first bailee with a second bailee for the conveyance of the goods, the goods having been lost by the latter.⁴¹

B. Parties.—A bill by one of several joint bailors against the bailee, who holds subject to the joint order and direction of their respective attorneys, should make the other bailors and their attorneys parties, as no decree can be rendered in their absence.⁴² A bailee who has possession of certain bonds which are sued for, is a necessary party.⁴³

C. Evidence—1. **PRESUMPTION.**—See ante, "Presumption as to Occasion of Loss," IV, A, 2, d.

2. **ADMISSIBILITY.**—When a bailee for hire of certain property is sued on the contract of hiring, parol evidence is admissible to explain the meaning of terms used in the contract and of other matters conducing to show the meaning of the contract,⁴⁴ or to give effect to the contract by applying it to its proper subject matter.⁴⁵

D. Question of Law or Fact.—The question as to whether or not a bailee is guilty of gross negligence is for the jury to determine, or by the court where a jury is waived.⁴⁶

against the plaintiff in the attachment suit. *Stiles v. Davis*, 1 Black. 101, 17 L. Ed. 33. See the title **ATTACHMENT AND GARNISHMENT**, ante, p. 660.

39. Between bailor or bailee and third parties.—*Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214. See ante, "By Bailee," IV, A, 3, b.

Whether the shipper has obtained, by fraud practiced upon the true owner, the possession he gives to the carrier, or whether he mistakenly supposes he has rights to the property, his relation to his bailee remains the same. He cannot confer rights which he does not possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

40. Right of action.—*Newell v. Norton*, 3 Wall. 257, 18 L. Ed. 271. As to who is a bailee, see ante, "Definitions and Nature," I, A.

41. Action on subcontracts.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

42. Parties—Bill by one of several joint bailees.—*Gregory v. Stetson*, 133 U. S. 579, 33 L. Ed. 792. See, generally, the title **PARTIES**.

43. Bailee having possession.—*Wilson v. Oswego Township*, 151 U. S. 56, 65, 38 L. Ed. 70.

44. Parol evidence.—The bailee, by an arrangement in writing, hired a steamboat, to be put "on the route" from Washington, in the District of Columbia, to Potomac creek, until another steamboat, then building, should be prepared, and be put "on the route." The bailee was the contractor for carrying the mail of the United

States, which was carried in a steamboat to Potomac creek; except in winter, when the navigation of the river Potomac was interrupted by ice, when the mail was carried by land; the steamboat so hired was employed in carrying the mail; the ice prevented the use of the steamboat; and the owners claimed, under the contract, the hire of the boat during the time her employment was thus interrupted. Parol evidence to show the purpose for which the steamboat was employed, and to explain the meaning of the terms used in the contract, and of other matters conducing to show the meaning of the contract was held to be admissible. *Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89, 10 L. Ed. 72.

Extrinsic evidence is not admissible to explain a patent ambiguity, that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but arising from extrinsic evidence; that is but to remove the ambiguity by the same kind of evidence as that by which it is created. *Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89, 10 L. Ed. 72. See the title **PAROL EVIDENCE**.

45. Extrinsic parol evidence is admissible to give effect to a written instrument; by applying it to its proper subject matter, by proving the circumstances under which it was made; whenever, without the aid of such evidence, the application could not be made in the particular case. *Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89, 10 L. Ed. 72. See the title **PAROL EVIDENCE**.

46. Question of law or fact.—*Preston v. Prather*, 137 U. S. 604, 609, 34 L. Ed. 788.

BALANCE.—See note 1.

BALLAST.—See note 2.

BALLOTS.—See the title ELECTIONS.

BAND.—"A band means a company of persons, perhaps a company of armed persons, as may well assume to have been the case in this instance."³

BANISHMENT.—In Black's Law Dictionary banishment is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals."⁴

BANJO.—See note 5.

BANKABLE CURRENCY.—See note 6.

BANK BILL OR BANK NOTE.—See the title BANKS AND BANKING.

BANK OF RIVER.—The banks of a river are those elevations of land which confine the waters when they rise out of the bed.⁷

1. **Balance.**—In *Parsons v. Armor*, 3 Pet. 413, 430, 7 L. Ed. 724, it is said: "The balance due on general account by a correspondent is, in mercantile language, a fund in his hands; and so the correspondence shows that it was understood to be in this instance."

2. **Ballast.**—In *Insurance Co. v. Thwing*, 13 Wall. 672, 674, 20 L. Ed. 607, it is said: "There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other." And in that case, it was held where the assured warranted not to load more than her registered tonnage, ballast and dunnage were not included. See, generally, the title MARINE INSURANCE.

3. **Band.**—*Stuart v. United States*, 18 Wall. 84, 87, 21 L. Ed. 816.

In *Montoya v. United States*, 180 U. S. 266, 45 L. Ed. 521, it is said: "We are more concerned in this case with the meaning of the words 'tribe' and band. By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a band, a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a band does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a band within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action." See, also, the title

COURTS; INDIANS; UNITED STATES.

4. *United States v. Ju Toy*, 198 U. S. 253, 269, 49 L. Ed. 1040. Brewer, J., dissenting. See, also, *Fong Yue Ting v. United States*, 149 U. S. 698, 709, 740, 37 L. Ed. 905.

5. **Banjo.**—See *Dobson v. Cubley*, 149 U. S. 117, 118, 37 L. Ed. 671.

6. **Bankable currency.**—See *Rives v. Duke*, 105 U. S. 132, 140, 26 L. Ed. 1031.

7. **Bank of river.**—*Howard v. Ingersoll*, 13 How. 381, 423, 14 L. Ed. 189. In that case it was held where the state of Georgia ceded to the United States all the land situated on the west of the line running along the western bank of the Chattahoochee river that "the true boundary line intended by Georgia and the United States and the one fairly deducible from the language of the cession, is the line marked by the permanent bed of the river by the flow of the water at its usual and accustomed stage, and where the water will be found at all times in the season except when diminished by drought or swollen by freshets. This line will be found marked along its borders by the almost constant presence and abrasion of the waters against the bank. It is always manifest to the eye of any observer upon a river, and is marked in a way not to be mistaken. The junction of bank and water at this stage of the river satisfies the words of the cession, and furnishes a line as fixed and certain as is practicable; and is just and reasonable to all the parties concerned."

In *Alabama v. Georgia*, 23 How. 505, 513, 16 L. Ed. 556, it is said: "Mr Justice Story, in *Thomas and Hatch*, 3 Sumner, 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow."

In *Alabama v. Georgia*, 23 How. 505, 513, 16 L. Ed. 556, it is said: "Bouvier says banks of rivers contain the river in its natural channel, where there is the greatest flow of water."

BANKRUPTCY.

BY S. BLAIR FISHER.

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JOINT-STOCK COMPANIES; JUDGES; JUDGMENTS AND DECREES; JUDICIAL NOTICE; JUDICIAL SALES; JURISDICTION; JURY; LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MARSHALING ASSETS AND SECURITIES; MORTGAGES AND DEEDS OF TRUST; ORDERS OF COURT; PARTIES; PARTNERSHIP; PENALTIES AND FORFEITURES; PLEDGE AND COLLATERAL SECURITY; POWERS; QUESTIONS OF LAW AND FACT; RECEIVERS; REMOVAL OF CAUSES; RULES OF COURT; SEQUESTRATION; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHERIFFS', CONSTABLES' AND MARSHALS' SALES; SUMMARY PROCEEDINGS; SUMMONS AND PROCESS; SUNDAYS AND HOLIDAYS; TAXATION; UNITED STATES.

I. Definitions and Distinctions.

A bankrupt is a person who has committed an act of bankruptcy; one who has done some act or suffered some act to be done in consequence of which, under the laws of this country, he is liable to be proceeded against by his creditors for the seizure and distribution among them of his entire property.¹ A bankrupt was, originally and strictly, a trader who secreted himself or did certain other acts tending to defraud his creditors.² The term "bankrupt," includes, under the present bankrupt act, "a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."³

Bankruptcy is the state or condition of one who is a bankrupt; amenability to the bankrupt laws; the condition of one who has committed an act of bankruptcy, and is liable to be proceeded against by his creditors therefor, or of one whose circumstances are such that he is entitled, on his voluntary application, to take the benefit of the bankrupt laws.⁴

Insolvency, in the sense of the bankrupt act of 1867, means that the party whose business affairs are in question is unable to pay his debts as they become due, in the ordinary course of his daily transactions.⁵ Under the present bankrupt

1. **Bankrupt defined.**—Black's Law Dict., tit. Bankrupt.

"If a partnership engaged in any mercantile or manufacturing business fails to meet, and pay when demanded, its current business paper as it falls due, that firm is said, in popular language, to have failed. And unless it compromises with its creditors or makes arrangement for extension of time, it has failed in all senses of the word. If it continues to dishonor its paper, it has failed. If any business man or business firm does the same thing, they are, by the express terms of every bankrupt law, bankrupts." Godfrey v. Terry, 97 U. S. 171, 24 L. Ed. 944.

2. 1 Bouv. Law Dict., tit. Bankrupt, citing 2 Bla. Com. 471.

3. Bankruptcy Act, 1898, ch. 1, § 1.

4. **Bankruptcy defined.**—Black's Law Dict., tit. Bankruptcy, citing 2 Story 351.

As to meaning of "bankruptcy" as used in the constitutional provision giving congress jurisdiction, see post, "Power of Congress to Enact," II, C, 1.

5. **Insolvency defined.**—Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; Buchanan v. Smith, 16 Wall. 277, 308, 21 L. Ed. 280.

"By the bankrupt law of England and of the United States, and by the insolvency laws of Massachusetts and many other states, the person or the partnership in business which is no longer able

to pay its current debts as they fall due is insolvent." Godfrey v. Terry, 97 U. S. 171, 24 L. Ed. 944.

Refers to present inability to pay.—In Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504, the court, in referring to the bankrupt act of 1867, held that insolvency, as used in such bankrupt act, does not mean an absolute inability of the debtor to pay his debts at some future time, upon the settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business, or, in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of business as men in trade usually do, and such must be the conclusion, even though his inability be not so great as to compel him to stop business.

"The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and asserts of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of congress. It was of the bankrupts as traders that the district judge was speak-

act it is expressly provided that "a person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."⁶

Distinction between Voluntary and Involuntary Bankruptcy.—While in both voluntary and involuntary bankruptcy the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors, yet in case of voluntary bankruptcy the aid of the law is invoked by the bankrupt himself with the purpose of being discharged from his debts as his principal motive and in the other the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight and often contested. There is a corresponding difference in the facts on which the action of the court can be invoked in these different classes of bankruptcy.⁷

Distinction between Bankrupt and Insolvent Laws.—While it has been attempted to distinguish bankrupt laws and insolvent laws, as for example, by holding that laws which merely liberate a person are insolvent laws, and those which discharge the contract, are bankrupt laws, and that insolvent laws operate at the instance of an imprisoned debtor, and bankrupt laws at the instance of the creditor, yet the line of partition between them is not so distinctly marked as to enable any person to say, with positive decision what belongs exclusively to the one, and not to the other class of laws.⁸ For the purposes of this article, the term "bankrupt

ing" when he used the language which is the subject of criticism by counsel. With reference to other persons not engaged in trade or commerce the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case." *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481.

"It is pointed out that insolvency has a different meaning under the act of 1898 than it had under the act of 1867. Under the latter, the debtor was insolvent when he was unable to pay his debts in the ordinary course of business. Under the former, when the aggregate of the property at a fair valuation is insufficient to pay his debts." *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 450, 45 L. Ed. 1171.

6. Definition of insolvency in bankrupt act, 1898, ch. 1, § 1.—*Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

7. Voluntary and involuntary bankruptcy distinguished.—*Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723. And see *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654. As to application to the court in cases of voluntary and involuntary bankruptcy, who may make, form and requisites of the application, etc., see post, "Procedure to Obtain Adjudication of Bankruptcy," VII.

8. Bankrupt and insolvent laws distinguished.—*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

"Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on

the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying, that this was an insolvent, not a bankrupt act; and therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying, that the act was unconstitutional, and the commission a nullity. When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the Union possesses the power of enacting bankrupt laws; and those of the states, the power of enacting insolvent laws. If it be de-

law" or "bankrupt act" will be confined to cases arising under the bankruptcy laws enacted by congress in April 4, 1800, Aug. 19, 1841, March 2, 1867, and the present bankrupt law of July 1, 1881, with the amendments thereto, and the general orders and forms in bankruptcy adopted and established by the supreme court of the United States, Nov. 28, 1878. The term "insolvent laws" will be applied to those laws enacted by state legislatures, a full treatment of which will be found under the title *INSOLVENCY*.

II. Bankrupt Laws.

A. Origin and History.—Bankrupt laws have been enforced in England for more than three centuries, and they had their origin in the Roman law.⁹ The first bankrupt law of the United States, enacted in 1800 and repealed in 1803,¹⁰ was in great part copied from the earlier bankrupt act of England.¹¹ The second bankrupt law was enacted in 1841 and repealed in 1843.¹² The power of congress, granted by the constitution, to establish bankruptcy laws was again exercised in

termined, that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the course of descents, a distinct line of separation must be drawn, and the power of each government marked with precision. But all perceive that this line must be, in a great degree, arbitrary. Although the two systems have existed apart from each other, there is such a connection between them, as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say, who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion." *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

"It is true that from the first bankrupt act passed in England, 34 and 35 Hen. VIII. ch. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders, but as Mr. Justice Story, in his commentaries on the constitution, pointed out, 'this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors.' Section 1113. The whole subject is reviewed by that learned commentator in ch. XVI, §§ 1102 to 1115, of his works, and he says (§ 1111) in respect of 'what laws are to be deemed bankrupt laws within the meaning of the constitution,' 'Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said, that laws, which merely liberate the person of the debtor, are insolvent laws, and those, which discharge the contract, are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. * * * Again, it has been said, that insolvent laws act on imprisoned debtors only at their own in-

stance; and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was unconstitutional, and the commission a nullity. It is believed, that no laws ever were passed in America by the colonies or states, which had the technical denomination of "bankrupt laws." But insolvent laws, quite co-extensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and state legislation. No distinction was ever practically, or even theoretically, attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and state legislation will abundantly show, that a bankrupt law may contain those regulations, which are generally found in insolvent laws; and that an insolvent law may contain those, which are common to bankrupt laws.'" *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 184, 185, 46 L. Ed. 1113.

9. Origin and history.—Canada, etc., *R. Co. v. Gebhardt*, 109 U. S. 527, 37 L. Ed. 1020.

10. Act 1800.—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Wood v. Owings*, 1 Cranch 239, 2 L. Ed. 94.

11. See dissenting opinion of Gray, J., in *Merrill v. National Bank*, 173 U. S. 131, 171, 43 L. Ed. 640.

12. Act 1841.—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

This act, as is well known, was drafted by Mr. Justice Story. See dissenting opinion of Gray, J., in *Merrill v. National Bank*, 173 U. S. 131, 171, 43 L. Ed. 640.

1867, by an act which, after being several times amended, was finally repealed in 1878.¹³ On July 1, 1898, the present national bankrupt act was approved,¹⁴ and this act, as amended by the act of February 5, 1903 embodies the bankruptcy laws of the United States as now in force.

B. Purpose.—The policy and purpose of all national bankrupt acts is to secure the equal and speedy distribution of the property of the bankrupt among his creditors,¹⁵ and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property,¹⁶ and to enable him to have a fresh start in business or commercial life, freed from the obligations and responsibilities which may have resulted from business misfortunes.¹⁷ The distribution of the property is the principal object to be attained.¹⁸ The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or disposition of his property.¹⁹

C. Enactment—1. POWER OF CONGRESS TO ENACT—*a. Constitutional Provisions Authorizing.*—By the fourth clause of § 8, art. 1, of the constitution of

13. **Act 1867.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

14. **Act 1898.**—30 Stat. at L. 564, 595. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

15. **Equal and speedy distribution of bankrupt's property.**—*Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Avery v. Hackley*, 20 Wall. 407, 22 L. Ed. 385; *Bailey v. Glover*, 21 Wall. 342, 346, 22 L. Ed. 636; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235; *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538; *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967.

The design of the bankrupt act of 1841 was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of state tribunals. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

"It is obviously one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution." *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304, quoting *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

"The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days; and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt

and the speedy settlement of his estate." *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

"A note given by a bankrupt, upon a secret compromise with a creditor, is declared void; as it produces inequality in the distribution of the bankrupt's effects, and evades the provisions and policy of the law, which proposes to put all the creditors upon an equal footing. *Wells v. Girling*, 1 Brod. & Bind. 447." *United States Bank v. Owens*, 2 Pet. 527, 540, 7 L. Ed. 568.

16. **Discharge of debtor.**—*Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467; *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538; *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *Wills v. Claflin*, 92 U. S. 135, 23 L. Ed. 490; *Allen v. Ferguson*, 18 Wall. 1, 21 L. Ed. 854.

17. *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

The policy of the bankrupt act is, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start. His subsequent earnings are his own. *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

18. *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Avery v. Hackley*, 20 Wall. 407, 22 L. Ed. 385.

"The great object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt." *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377.

"The bankrupt act was not intended to prevent false credits. Its purpose is ratable distribution." *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

19. *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538. See post, "Discharge of Bankrupt," XII.

the United States, power is vested in congress, among other things, "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."²⁰

b. *Provision Construed.—In General.*—By the above provision of the Constitution, congress is authorized not merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States.²¹

Scope of Legislation.—Congress, under such provision, may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system.²² Under such provision congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law.²³ This grant of power to congress involves the power to impair the obligation of contract, and this the states were forbidden to do.²⁴

Necessity for Uniformity.—While the laws passed by congress on the subject of bankruptcy, under the constitutional authorization, must be uniform throughout the United States,²⁵ yet it has been held that the uniformity required is geographical and not personal.²⁶

2. POWER OF STATE LEGISLATURES TO ENACT.—See post, "In General," II, E, 1.

D. When Operative.—It is expressly provided by the bankrupt act of 1898 that "this act shall go into full force and effect upon its passage; provided, however, that no petition for voluntary bankruptcy shall be filed within one month

20. **Constitutional provision conferring power on congress.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Hepburn v. Griswold*, 8 Wall. 603, 623, 19 L. Ed. 513; *Houston v. City Bank*, 6 How. 486, 12 L. Ed. 526; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 696; *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538; *Canada, etc., R. Co. v. Gebhardt*, 109 U. S. 527, 27 L. Ed. 1020. And see *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491; *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Nelson v. Carland*, 1 How. 265, 10 L. Ed. 126. See the title CONSTITUTIONAL LAW.

21. **Provision construed.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

22. **Scope of legislation under constitutional provision.**—*United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538.

Meaning of "bankruptcy" as used in the constitutional provision giving congress jurisdiction.—In the case of *In re Klein* decided in the circuit court for the district of Missouri, and reported in a note to *Nelson v. Carland*, 1 How. 265, 277, 10 L. Ed. 126, Mr. Justice Catron, in holding the bankrupt act of 1841 to be constitutional, said: "In considering the question before me I have not pretended to give a definition; but purposely avoided any attempt to define the mere word 'bankruptcy.' It is employed in the constitution in the plural, and as part of an expression; 'the subject of bankruptcies.' The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, congress has general ju-

risdiction; and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of congress." Quoted in *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. See, also, *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491.

23. **May prescribe any reasonable regulations.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

24. **Involves power to impair obligation of contracts.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. See the title CONSTITUTIONAL LAW.

25. **Necessity for uniformity.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"Even a bankrupt law cannot be enacted applicable only to single corporations or single debtors. To be constitutional it must be uniform throughout the United States." Dissenting opinion of Strong, J., in *Sinking Fund Cases*, 99 U. S. 700, 727, 25 L. Ed. 496. See the title CONSTITUTIONAL LAW.

26. **Geographical and not personal uniformity required.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

The fact that the act of 1898 recognizes exemptions by the local law, does not render such act unconstitutional for want of uniformity. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof."²⁷

E. Effect of National Bankrupt Acts upon Insolvency Laws of States
—1. IN GENERAL.—It has been held that the power granted to congress by the constitution to establish uniform laws on the subject of bankruptcy throughout the United States, does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress, and the state laws conflict with those of congress.²⁸ So long as there is no national bankrupt act, each state, it would seem, has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts;²⁹ but a state cannot, by such a law, discharge one of its own citizens from his contract with a citizen of other states, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency.³⁰ The federal bankruptcy law, when once enacted is, however, para-

27. When act of 1898 operative.—30 Stat. at L. 566.

28. Effect upon state legislation.—Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579; Brown v. Smart, 145 U. S. 454, 36 L. Ed. 773; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. Ed. 1113; Tua v. Carriere, 117 U. S. 201, 29 L. Ed. 855; Bank v. Horn, 17 How. 157, 161, 15 L. Ed. 70; Baldwin v. Hale, 1 Wall. 223, 225, 17 L. Ed. 531. See, also, Boyle v. Zacharie, 6 Pet. 348, 635, 8 L. Ed. 423.

"The grant of power to congress to establish 'uniform laws on the subject of bankruptcies throughout the United States,' does not of itself carry with it an implied prohibition to the states to exercise the same powers." Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579.

29. Validity of state insolvency laws.—Brown v. Smart, 145 U. S. 454, 36 L. Ed. 773; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. Ed. 1113. And see Denny v. Bennett, 128 U. S. 489, 498, 32 L. Ed. 491.

"The constitution does not grant to the states the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as natural policy may require. It has so far restrained it, as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the states may, until that power shall be exercised by congress, pass laws concerning bankrupts; yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted, that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions." Sturges v. Crowninshield, 4 Wheat. 122, 198, 4 L. Ed. 529.

"If in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It

is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states." Sturges v. Crowninshield, 4 Wheat. 122, 196, 4 L. Ed. 529.

"No argument can be fairly drawn from the 61st section of the act for establishing a uniform system of bankruptcy, which militates against this reasoning. That section declares, that the act shall not be construed to repeal or annul the laws of any state, then in force, for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases, it affords its sanction to the relief given by the insolvent laws of the state, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt. The insertion of this section indicates an opinion in congress, that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview. It was for that reason only, that a provision against this construction could be necessary. The last member of the section adopts the provisions of the state laws so far as they apply to cases within the purview of the act. This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws, impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, unaffected by the act of congress, except where that act may apply to individual cases." Sturges v. Crowninshield, 4 Wheat. 122, 200, 4 L. Ed. 529.

As to the constitutional prohibition of impairment of contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

For a full treatment of state insolvent laws, their nature, validity and operation, see the title INSOLVENCY.

30. Brown v. Smart, 145 U. S. 454, 36 L.

mount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons or corporations, is essentially exclusive.³¹ When the power to establish bankrupt laws is actually exercised by congress, the effect of such bankrupt law is to suspend all state insolvent laws, in so far as they conflict with the act of congress, while such act remains in force,³² and on the repeal of such act of congress, the state insolvent laws will revive.³³

2. EFFECT OF LAWS REGULATING ASSIGNMENTS FOR BENEFIT OF CREDITORS.—It would seem that the enactment of a federal bankrupt law will not affect the validity of ordinary assignments for the benefit of creditors under the regulations prescribed by state statutes, so long as such statutes do not partake of the nature of insolvent laws by reason of provisions for the discharge of the debtor,³⁴ and except as against proceedings instituted under the bankrupt act for the purpose of securing the administration of the property in the bankruptcy court, a general assignment, made without intent to hinder, delay or defraud creditors, is valid at least for the purpose of securing an equal distribution of the assignor's estate among the creditors in proportion to their several demands.³⁵

Ed. 773; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"The objection to the extraterritorial operation of a state insolvent law is that it cannot, like the bankruptcy law passed by congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligation of contracts, is conceded." *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491, quoted in *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

31. National bankruptcy law paramount when enacted.—*In re Watts*, 190 U. S. 1, 47 L. Ed. 933. See post, "Jurisdiction and Powers," V, A, 2.

32. Operation as suspending state law.—*Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855. See, also, *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

33. Revival of state law on repeal of bankrupt act.—*Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855. And see cases cited in preceding note.

"The plaintiff in error concedes, as well he may, that, if the insolvent law of Louisiana had been enacted before the passage of the bankrupt act, it would have been valid, and that the effect of the bankrupt act would have been to suspend it only while the bankrupt act remained in force, and on its repeal the insolvent law would have revived." *Tua v. Carriere*, 117 U. S. 201, 209, 29 L. Ed. 855.

34. Effect on state statutes regulating assignments for the benefit of creditors.—See, generally, the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, ante, p. 599.

35. Validity of general assignment.—*Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

"In the view which we take of the case it is unnecessary to consider all of the

questions covered by the opinion of the state court and discussed here by counsel. Especially it is not necessary to determine whether the bankrupt act of 1867 suspended or superseded all of the provisions of the New Jersey statute. Undoubtedly the local statute was, from the date of the passage of the bankrupt act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and therefore independently of the bankruptcy court, constituted, itself, an act of bankruptcy, for which, upon the petition of a creditor filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. *In re Burt*, 1 Dillon 439, 440; *In re Goldschmidt*, 3 Bank. Reg. 164; *In matter of Seymour T. Smith*, 4 Bank. Reg. 377." *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

"If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the bankrupt act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke, in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or cancelled upon the ground of a mutual mistake in supposing that the local statute of 1846 was operative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and

3. **EFFECT UPON PROCEEDINGS ALREADY COMMENCED UNDER STATE LAWS.**—It is expressly provided by the bankrupt act of 1898 that "proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it."³⁶

III. Who May Become Bankrupts.

A. In General.—While it is true that from the first bankrupt act passed in England, 34 and 35 Hen. VIII, ch. 4, to the days of Queen Victoria the English bankrupt acts applied only to traders, yet, as pointed out by Mr. Justice Story,³⁷ "this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors."³⁸ According to some of the earlier decisions in this country, it was doubted whether an act of congress subjecting to a bankrupt law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject. This doubt was, however, soon resolved otherwise, and it was held that such acts might properly extend to persons other than merchants or traders.³⁹

B. Under Former Bankrupt Acts.—The bankrupt act of 1800 applied to "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer."⁴⁰

The bankrupt acts of 1841 and 1867 extended to persons other than merchants or traders,⁴¹ and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.⁴²

C. Under the Present Bankrupt Act—1. **VOLUNTARY BANKRUPT.**—By the first clause of § 4, of the bankrupt act of July 1, 1898, it is provided that, "any

distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute." *Boese v. King*, 108 U. S. 379, 27 L. Ed. 766.

As to assignment as act of bankruptcy, effect of assignment within certain time before bankruptcy, etc., see post, "General Assignment for Benefit of Creditors," IV, A, 4; "Provisions of Bankrupt Act as to Liens, Transfers and Preferences," XIX.

36. **Effect upon proceedings already commenced under state insolvency laws.**—30 Stat. at L. 766.

37. *Commentaries on the Constitution*, § 1113.

38. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

39. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"The conclusion that an act of congress establishing a uniform system of bankruptcy throughout the United States, is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

40. *Act of 1800*—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

41. *Acts of 1841 and 1867.*—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"Debtors, owing debts to the amount of \$300, who have committed any one of the acts of bankruptcy enumerated in the thirty-ninth section of the original bankrupt act, may be adjudged bankrupts on the petition of one or more of their creditors, the aggregate of whose debts provable under the act amounts to \$250, provided such petition is filed within the period therein prescribed." *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

Corporations, whether moneyed, business, or commercial, and joint-stock companies are subject to the provisions of the bankrupt act. *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493. And see *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437.

Partnerships.—The bankrupt act of 1867, enacted in its thirty-sixth section, that persons trading as partners may be decreed bankrupt, as well as persons trading as individuals. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83. See, also, *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207.

42. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. And see post, "Procedure to Obtain Adjudication of Bankruptcy," VII.

person who owes debts, except a corporation shall be entitled to the benefits of this act as a voluntary bankrupt."⁴³

2. **INVOLUNTARY BANKRUPT.**—By the second clause of § 4, of the bankrupt act of July 1, 1898, it is provided that "any natural person, except a wage earner or a person, engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."⁴⁴

IV. Acts of Bankruptcy.

A. Enumeration of Such Acts under Former and Present Bankrupt Law.—1. **CONVEYANCE, TRANSFER, CONCEALMENT OR REMOVAL OF PROPERTY TO HINDER OR FRAUD CREDITORS.**—The conveyance, transfer, concealment or removal by a person or the permitting to be concealed or removed any part of his property with intent to hinder, delay, or defraud his creditors, or any of them will constitute an act of bankruptcy.⁴⁵

43. **Who may become voluntary bankrupt.**—*Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165.

Meaning of term "persons."—By the act of 1898, § 1 (19), it is provided that "'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors, or trustees, or other similar controlling bodies of corporations."

An officer in the army falls within this description; and it may be that he is not bound to include his pay in his schedule. *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009.

Meaning of "corporations."—By the act of 1898, § 1 (6), it is provided that "'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association."

44. **Who may be adjudged involuntary bankrupt.**—*Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127.

Section as amended by Act, Feb. 1903.—By the act of February, 1903, subdivision b of § 4 was amended so as to read as follows: "b. Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining,

or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States." (32 Stat. L. 797.) Act of Feb. 9, 1903, ch 487 (amending Bankruptcy Act of July 1, 1898), 38.

Meaning of "wage earner."—Under the act of 1898, ch. 1 (27), it is provided that "'wage earner' shall mean an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year."

"Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Act 1898, § 4, cl. 2. See the title BANKS AND BANKING.

Partnerships.—By the first clause of § 5 of the act of 1898, "a partnership during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." See *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654; *Wight v. Condict*, 154 U. S. 666, 26 L. Ed. 562; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248. See post, "Application of Bankrupt Act to Partners and Partnership Estates," XX. And see, generally, the title PARTNERSHIP.

45. **Conveyance, transfer, concealment or removal of property.**—Act, 1867, § 39; Act, 1898, § 3, n. (1). *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Vesterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400; *West*

2. **TRANSFER TO CREDITORS WITH INTENT TO PREFER.**—The transfer by a person while insolvent of any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors, is an act of bankruptcy.⁴⁶

3. **PERMISSION OF PREFERENCES THROUGH LEGAL PROCEEDINGS.**—If a person shall suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposi-

Co. v. Lea Bros., 174 U. S. 590, 43 L. Ed. 1098; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

By the bankrupt act of the United States, of 1800, § 1, it is enacted, that "from and after the 1st day of June next (June 1st, 1800), if any merchant, etc., with intent unlawfully to delay or defraud his creditors, shall make or cause to be made any fraudulent conveyance of his lands or chattels, he shall be deemed and adjudged a bankrupt." *Wood v. Owings*, 1 Cranch 239, 2 L. Ed. 94.

A deed of lands in Maryland, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment on the 14th of June will not cause it to be such a deed as is contemplated in the bankrupt act which came into operation on the 2d of June. *Wood v. Owings*, 1 Cranch 239, 2 L. Ed. 94.

"On the 30th of May 1800, William Robb, who was then a merchant, carrying on trade and merchandise, in the state of Maryland, signed, sealed and delivered to Gabriel Wood, an instrument of writing, purporting to convey to the said Gabriel, his real and personal estate, in trust, to secure him from certain notes and acceptances made by him, on account of the said Robb, and afterwards, in trust for other creditors in the deed mentioned. This deed was acknowledged on the 14th of June; and was then enrolled, according to the laws of Maryland. On the 12th of July, 1800, a commission of bankruptcy was sued out, founded on the execution of the deed above mentioned, and the said William Robb being declared a bankrupt, his effects were assigned to William Owings and Job Smith, who brought this suit against Gabriel Wood, to recover the money received by him under the deed aforementioned. Judgment was confessed by the defendant below, subject to the opinion of the court on a case stated, of which the foregoing were the material facts. The court gave judgment in favor of the assignees, to which judgment a writ of error was sued out by the present plaintiff. The only question made by the counsel was, whether the deed stated in the case was an act of bankruptcy? On the 4th of April 1800, congress passed an act to establish a uniform system of bankruptcy throughout the United States, which declares, among other things, that any merchant who shall, after the first day

of June next succeeding the passage of the act, with intent unlawfully to delay or defraud his creditors, make, or cause to be made, any fraudulent conveyance of his lands or chattels, shall be deemed and adjudged a bankrupt. It was admitted, in the argument, that this deed, if executed after the 1st day of June, would have been an act of bankruptcy, but that being sealed and delivered on the 30th of May, it was not within the act, which only comprehends conveyances made after the 1st of June." *Wood v. Owings*, 1 Cranch 239, 2 L. Ed. 94.

The first section of the bankrupt act of 1841 declares that the making of any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods, or chattels, is the commission of an act of bankruptcy. *Shawhan v. Wherrett*, 7 How. 627, 12 L. Ed. 847.

Meaning of term "creditor."—Under the act of 1898, § 1, (9), it is provided that the term "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.

Meaning of "conceal."—By the act of 1898, § 1, (22), it is provided that "conceal" shall include secrete, falsify and mutilate.

Meaning of "transfer."—By the act of 1898, § 1, (25), the term "transfer" includes the sale and every other and different mode of disposing of or parting with property, or possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380. See, also, dissenting opinion in *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 375, 49 L. Ed. 790.

As to what conveyances, preferences, etc., are void as against the assignee in bankruptcy, see post, "Provisions of Bankrupt Act as to Liens, Transfers, and Preferences," XIX. And see, generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

46. **Transfer to creditors with intent to prefer.**—Act, 1867, § 39; Act, 1898, § 3, a, (2). *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Randolph v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200; *West Co. v. Lea Bros.* 174 U. S. 590, 43

tion of any property affected by such preference vacated or discharged such preference, this will constitute an act of bankruptcy.⁴⁷

4. **GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.—In General.**—Under the English bankruptcy statutes and those of the United States down to and including the act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of the bankrupt laws, and, as a necessary consequence, constituted an act of bankruptcy per se.⁴⁸

Under Present Bankrupt Act.—The present bankrupt act expressly declares that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed.⁴⁹

L. Ed. 1098; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. Ed. 596. See, also, *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136.

47. **Permission of preferences through legal proceedings.**—Act 1867, § 39; act 1898, § 3, a, (3). *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200; *Thompson v. Fairbanks*, 195 U. S. 516, 49 L. Ed. 577.

Under the act of 1841 it was an act of bankruptcy for the debtor willingly to procure his goods or lands to be attached, distrained, sequestered, or taken on execution. *Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91.

In *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, a judgment against an insolvent debtor was confessed by virtue of an irrevocable power of attorney attached to a note authorizing confession of judgment thereon at maturity. Upon this judgment execution was issued and levied and the goods sold and the proceeds applied in payment of the judgment. This proceeding left the debtor without means to meet any of his other obligations. Although the judgment and levy were without the procurement knowledge or consent of the debtor, and were unassailable in law, and could not have been vacated or discharged by any legal proceedings except by a voluntary petition in bankruptcy yet it was held that the judgment and levy were a preference "suffered or permitted" and the failure of the debtor to vacate and discharge at least five days before the sale on execution was an act of bankruptcy. See, also, *Thompson v. Fairbanks*, 195 U. S. 516, 49 L. Ed. 577.

48. **General assignment repugnant to policy of earlier bankrupt laws.**—*West Co. v. Lea Bros.* 174 U. S. 590, 43 L. Ed. 1098. See, also, *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

"This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co. v. Cleveland Insurance Co.*, 14 N. B. R. 311, 10 Fed. Cas. 488, the subject was ably reviewed and the authorities

are there copiously collected. The decision in that case was expressly relied upon in *In re Beisenthal*, 14 Blatchford 146, where it was held, that a voluntary assignment, without preferences, valid under the laws of the State of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed v. McIntyre*, 98 U. S. 507, 513, 25 L. Ed. 171. So, also, in *Boese v. King*, 108 U. S. 379, 385, 27 L. Ed. 760, it was held, citing (p. 387) *Reed v. McIntyre*, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867, March 2, 1867, c. 176, 14 Stat. 536, or the amendments thereto of June 22, 1874, c. 390, and July 26, 1876, c. 234, 18 Stat. 180; 19 Stat. 102. Neither, however, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result, of the clause, in the act of 1867, forbidding assignments with "intent to delay, defraud or hinder" creditors and from the provision avoiding certain acts done to delay, defeat or hinder the execution of the act. (Rev. Stat. 5021, par. 4, 7.) Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubts as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement, in the present statute have been lucidly expounded by Addison Brown, J. In *re Gutwillig*, 90 Fed. Rep. 475, 478. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

49. **Provision of bankrupt act.**—Bankrupt act, 1898, § 3, a, (4). *West Co. v.*

Insolvency of Debtor Immaterial.—It would seem that the making of a general assignment for the benefit of creditors authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency.⁵⁰

5. **WRITTEN ADMISSION OF INABILITY TO PAY DEBTS, etc.**—The written admission by a person of his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, will constitute an act of bankruptcy.⁵¹

6. **APPLICATION FOR OR APPOINTMENT OF RECEIVER OR TRUSTEE FOR INSOLVENT.**—By the amendatory bankruptcy act of February 1903, it was provided that acts of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has

Lea Bros., 174 U. S. 590, 43 L. Ed. 1098; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *Randolph v. Scruggs*, 190 U. S. 533, 543, 47 L. Ed. 1165; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

50. **Insolvency not an essential element.**—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

"But it is argued that whatever may have been the rule in previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition reliance is placed upon paragraph c of section 3, which reads as follows: 'c. It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and, under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.' The argument is that the words 'under the first subdivision of this section' refer to all the provisions of paragraph a, because that paragraph, as a whole, is the first part of the section, separately divided, and although designated by the letter a, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words 'first subdivision of this section,' if considered intrinsically and apart from the context of the act, would be held to refer to paragraph a as an entirety or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph a. Thus, in the last sentence of paragraph c the matter intended to be referred to by the words 'first subdivision of this section,' used in the prior sentences, is additionally designated as follows: 'and under said subdivi-

vision one,' etc., language which cannot possibly be in reason construed as referring to the whole of paragraph a, but only to subdivision 1 thereof." *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

"It is urged that the following provision contained in paragraph b of § 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proven that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: 'A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act.' Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph c, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph a, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph d, conforming in this respect to the requirement of paragraph a, contemplates an issue as to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor at the time of the commission of the act of bankruptcy." *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

"Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment, is not warranted by the bankruptcy law; and therefore, that the question certified must be answered in the negative; and it is so ordered." *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

51. **Written admission of inability to pay debts, etc.**—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

been put in charge of his property under the laws of a state, of a territory, or of the United States."⁵²

7. OTHER ACTS FORMERLY HELD TO AUTHORIZE INVOLUNTARY BANKRUPTCY.—While the five classes of acts above mentioned embrace all of those which, under the present bankrupt act, are held to constitute acts of bankruptcy, yet under the earlier bankrupt laws there were still other acts which were held to authorize involuntary bankruptcy; as, for instance, the departure of the debtor or concealment of himself to avoid service of process;⁵³ the arrest, custody, or imprisonment of debtor;⁵⁴ or the fraudulent nonpayment by a banker, merchant or debtor, of his commercial paper within a specified time.⁵⁵

B. Effect as Dependent on Insolvency of Debtor.—With regard to the transfer of property with the intent to prefer certain creditors, or the suffering or permitting a creditor to obtain preference through legal proceedings, the present bankrupt act in § 3a, would seem to clearly contemplate not only the commission of the acts provided against, but also to make the insolvency of the debtor at the time of its commission an essential concomitant.⁵⁶ On the contrary, as to the other acts enumerated in such section, there is no express requirement that the acts should have been committed while insolvent.⁵⁷ It is expressly provided by the act of 1898 that it shall be a complete defense to any proceedings in bankruptcy instituted on the ground of conveyance, transfer or concealment or removal, or the

52. Under amendatory act of Feb., 1903.—In *re Watts*, 190 U. S. 1, 27, 47 L. Ed. 933.

53. Departure or concealment of debtor.—By the act of 1867, § 39, it was held that it should be deemed an act of bankruptcy if the debtor should depart from the state, district, or territory of which he was an inhabitant, with intent to defraud his creditors, or being absent, with such intent, remain absent; or should conceal himself to avoid the service of legal process, in an action for the recovery of a debt or demand provable under the act. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

Declarations of bankrupt as evidence of intent.—"The rule applicable to this case has been thus stated by this court: 'Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.' *Insurance Co. v. Mosley*, 8 Wall. 397, 404, 405, 19 L. Ed. 437. In accordance with this rule, a bankrupt's declarations, oral or by letter, at or before the time of leaving or staying away from home, as to his reason for going abroad, have always been held by the English courts to be competent, in an action by his assignees against a creditor, as evi-

dence that his departure was with intent to defraud his creditors, and therefore an act of bankruptcy. *Bateman v. Bailey*, 5 T. R. 512; *Rawson v. Haigh*, 9 J. B. Moore, 217; S. C., 2 Bing. 99; *Smith v. Cramer*, 1 Scott, 541; S. C., 1 Bing. N. C. 535." *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 296, 36 L. Ed. 766.

54. Arrest or imprisonment of debtor.—Under the act of 1867, § 39, it was also held to constitute an act of bankruptcy, where the debtor had been "arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any state, district or territory, within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding \$100, and such process is remaining in force and not discharged by payment or in any other manner provided by the law of such state, district or territory applicable thereto, for a period of seven days, or has been actually imprisoned for more than seven days in a civil action founded on contract for the sum of \$100, or upwards." *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

55. Failure to pay commercial paper.—Under the act of 1867, § 39, a person was held to have committed an act of bankruptcy who being a banker, merchant or trader, had fraudulently stopped or suspended and not resumed the payment of his commercial paper within a period of 14 days. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171.

56. Insolvency of debtor as essential.—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

57. West Co. v. Lea Bros., 174 U. S. 590, 43 L. Ed. 1098.

permitting to be concealed or removed any part of the debtor's property, to allege and prove that the party proceeded against was not insolvent at the time of filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed.⁵⁸

C. Effect as Dependent on Intent of Debtor.—In the case of a conveyance, transfer, concealment, etc., of property by the debtor, an intent on the part of the debtor to hinder, delay or defraud his creditor is necessary to constitute the act one of bankruptcy.⁵⁹ So, also, in the case of a transfer by the debtor while insolvent, of a portion of his property for the purpose of preferring certain creditors, an intent to prefer such creditors over his other creditors is necessary.⁶⁰ In the cases of permitting creditors to obtain preferences through legal proceedings, general assignments for the benefit of creditors, or the written admission of the debtor's inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, no such intent is required.⁶¹ The effect of the knowledge and intent of the creditor to whom the conveyance or transfer is made, or the preference given, as determining the right of the trustee or assignee in bankruptcy to recover back the property transferred, or to set aside the preference given, will be treated elsewhere in this title.⁶²

D. Effect as Dependent on Time of Commission.—In order that any of the acts above mentioned may authorize involuntary bankruptcy, proceedings to that end must be instituted within a specified time after the commission of such act.⁶³

V. Jurisdiction.

A. Creation and Original Jurisdiction of Courts of Bankruptcy—1. CREATION.—Under the present bankrupt act the district courts of the United States in the several states; the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska are made courts of bankruptcy.⁶⁴

2. JURISDICTION AND POWERS—a. In General.—Provision of Bankrupt Act.—The above-mentioned courts of bankruptcy are, by the provision of the bankrupt act creating them, invested, within their respective territorial limits as established, or as they may be subsequently changed,⁶⁵ with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy

58. Act, 1898, § 3c. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

59. *Necessity for intent to hinder, delay or defraud.*—*Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

60. *Intent to prefer creditors.*—*Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

61. *Intent not a prerequisite.*—*Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

Intent necessary under act of 1867.—Under the act of 1867 the procuring or suffering his property to be taken on legal proceedings, must have been with intent on the part of the debtor to give a preference to one or more of his creditors. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568.

62. *Effect on trustee's right to recover property.*—See post, "Provisions of Bankrupt Act as to Liens, Transfers, and Preferences." XIX.

63. *Necessity for institution of proceedings within specified time after commission of act.*—See post, "When to Be Instituted," VII, B, 4.

64. *Enumeration of bankruptcy courts under act of 1898, §§ 1 and 2.*—*Bardes v.*

First Nat. Bank, 178 U. S. 524, 44 L. Ed. 1175; *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

The forty-ninth section of the act of 1867 enacted "That all the jurisdiction, power, and authority conferred upon and vested in the district courts of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the supreme court of the District of Columbia * * * when the bankrupt resides in the District of Columbia." *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748.

65. *Territorial extent of jurisdiction.*—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

The language of the act of 1867 was that district courts should have "original jurisdiction in their respective districts" in all matters and proceedings in bankruptcy, meaning by this that the jurisdiction was to be exercised in their respective districts. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414.

proceedings, in vacation in chambers,⁶⁶ and during their respective terms, as they are now or may be hereafter held.⁶⁷

Waiver of Objection to Jurisdiction of State Court.—Notwithstanding the rule as to the exclusive jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, it has been held that when an assignee or trustee in bankruptcy voluntarily submits himself to the jurisdiction of the state court, in a suit affecting the estate, and that court renders judgment against him,

66. In chambers in vacation.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57. See, generally, the title CHAMBERS AND VACATION.

67. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

Under the act of 1841, § 6, it is provided that "the district court, in every district, shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily in the nature of summary proceedings or equity, and for this purpose the said district court shall be deemed always open." *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

By the act of 1867, power and jurisdiction in all matters and proceedings in bankruptcy were conferred upon the district courts. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Colby v. Ledden*, 7 How. 626, 12 L. Ed. 847; *Hall v. Allen*, 12 Wall. 452, 20 L. Ed. 458; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43.

"Exclusive original jurisdiction, in all matters and proceedings in bankruptcy, is conferred by the acts of congress upon the district courts, but in case of a vacancy in the office of a district judge, or in case the district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge may make all necessary rules and orders preparatory to the final hearing, and cause the same to be entered or issued, as the case may require, by the clerk of the district court." *Morgan v. Thornhill*, 11 Wall. 65, 72, 20 L. Ed. 60.

"In the act of 1867, the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows: 'Sec. 1. That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear

and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.' 14 Stat. 517; Rev. Stat., §§ 563, 711, 4972, 4973. 'Sec. 2. That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.' 14 Stat. 518; Rev. Stat., §§ 4979, 4986." *Bardes v. First Nat. Bank*, 178 U. S. 524, 530, 44 L. Ed. 1175.

In *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, the court, in speaking

it is too late for him to allege that the federal courts alone have jurisdiction in bankruptcy.⁶⁸

of the provisions of the act of 1898 conferring jurisdiction of bankruptcy proceedings as distinguished from similar provisions in the act of 1867, said: "Section 2 of this act is entitled 'Creation of Courts of Bankruptcy and their Jurisdiction,' takes the place of § 1 of the act of 1867, and hardly differs from that section, except in the following particulars: First. It begins by describing the jurisdiction conferred on 'the courts of bankruptcy' as 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;' and it ends by declaring that 'nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.' Second. It specifies in greater detail, matters which are, in the strictest sense, proceedings in bankruptcy. Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to '(4) arraign, try and punish bankrupts, officers and other persons, and the agent, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of law of the United States;' '(6) bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;' and '(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act.' The general provisions at the beginning and end of this section mention 'courts of bankruptcy' and 'bankruptcy proceedings.'" *Bardes v. First Nat. Bank*, 178 U. S. 524, 534, 44 L. Ed. 1175.

Jurisdiction exclusive.—The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, is exclusive. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Winchester v. Heiskell*, 119 U. S. 450, 30 L. Ed. 462; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *In re Watts*, 190 U. S. 1, 27, 47 L. Ed. 933; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833.

"The intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts." *In re Watts*, 190 U. S. 1, 47 L. Ed. 933.

"In cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrongdoer in an action at law for its recovery." *Barton v. Barbour*, 104 U. S. 126, 134, 26 L. Ed. 672.

68. Effect of voluntary submission to state court.—*Scott v. Kelly*, 22 Wall. 57, 22 L. Ed. 729; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. Ed. 313; *Winchester v. Heiskell*, 119 U. S. 450, 30 L. Ed. 462; *Adams v. Crittenden*, 133 U. S. 296, 33 L. Ed. 623.

Where the consideration of a question is *prima facie* within the jurisdiction and control of a state court—such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs—if the person who gave the mortgage becomes bankrupt and his assignee goes into the state court, submits to its jurisdiction, and nowhere asserts, in any way, the rights of the federal courts in the matter—he cannot, after taking his chance for a decision in his favor, and getting one against him, raise in this court the point of want of jurisdiction in the state court. *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389.

"Objection was not made in the pleadings to the jurisdiction of the court over the subject matter of the action on account of the exclusive jurisdiction of the courts of the United States, under § 711 of the Revised Statutes, 'of all matters and proceedings in bankruptcy,' but it clearly was at the trial before the referees, and it was directly presented to and decided by the supreme court. An immunity was claimed by the appellants under his statute from the operation of the decree of the state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases. We thus have jurisdiction.

b. *Enumeration of Specific Powers*.—(1) *Adjudication of Bankruptcy*.—Courts of bankruptcy under the act creating them have the power to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof,⁶⁹ or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions.⁷⁰

(2) *Allowance or Disallowance of Claims*.—Courts of bankruptcy may allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.⁷¹

(3) *Appointment of Receivers or Marshals*.—Courts of bankruptcy are authorized to appoint receivers or marshals upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.⁷²

(4) *Punishment of Offenses against Bankrupt Act*.—Courts of bankruptcy

but as the decision of the state court upon this question was clearly right, we do not care to hear further argument. The assignee in bankruptcy appeared in the state court and litigated his rights there. This he had authority to do, and the judgment in such an action is binding on him. This we have many times decided. *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Doe v. Childress*, 21 Wall. 642, 647, 22 L. Ed. 540; *Scott v. Kelly*, 22 Wall. 57, 22 L. Ed. 729; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Burbank v. Bigelow*, 92 U. S. 179, 182, 23 L. Ed. 542; *Jerome v. McCarter*, 94 U. S. 734, 737, 24 L. Ed. 136; *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; *Davis v. Friedlander*, 104 U. S. 570, 26 L. Ed. 818. The question here is not whether that decree thus rendered binds these appellants, but whether the state court had jurisdiction so as to bind those who were parties to the suit, and those whom the parties in law represented." *Winchester v. Heiskell*, 119 U. S. 450, 453, 30 L. Ed. 462.

Generally, as to waiver of objections to jurisdiction, see the title JURISDICTION, and cross references there found.

As to effect of failure to raise objections in court below, see the title APPEAL AND ERROR, vol. 1, p. 333.

As to the intervention of the assignee or trustee in pending proceedings, see post, "By Trustee or Assignee," XXI, B. 3, b, (1).

69. As to residents, etc.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

As to what constitutes domicile or residence within the meaning of the bankrupt act, see, generally, the titles CONFLICT OF LAWS; DOMICILE.

By § 11 of the act of 1867 the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided or carried

on business for the six months next preceding. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 114.

Jurisdiction to adjudicate railroad company bankrupt.—"The jurisdiction of the bankruptcy court to adjudicate a railroad company bankrupt and to administer its property, under the bankrupt act, has been sustained by several circuit courts of the United States. *Adams v. Boston, Hartford & Erie Railroad Co.*, 1 Holmes 30; *Sweatt v. Boston, Hartford & Erie Railroad Co.*, 3 Cliff. 339; S. C., 5 Nat. Bank Reg. 234; *Alabama & Chattanooga Railroad Co. v. Jones*, 5 Nat. Bank Reg. 97; *Winter v. Iowa, Minnesota & Northern Pacific Railroad Co.*, 2 Dill. 487. No circuit court before which the question has been brought has denied the jurisdiction. As they were the courts of last resort upon this question, and valuable rights may depend upon their judgments upon this point, we think the question should be considered as settled by the authorities cited, and are unwilling at this late day to re-examine it, especially as we have no jurisdiction to do so, except in a collateral proceeding like the present." *New Orleans, etc., R. Co. v. Delamare*, 114 U. S. 501, 29 L. Ed. 244.

70. Nonresidents having property within jurisdiction.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

The enumeration of the specific powers of courts of bankruptcy will be found in § 2 of the bankrupt act of 1893, under the same subdivisions as are used in setting them out in this title.

71. Allowance or disallowance of claims.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116. See post, "Proof and Allowance of Claims," XV.

72. Appointment of receivers or marshals.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Whitney v. Wrenman*, 198 U. S. 539, 49 L. Ed. 1157; *Bryan*

have jurisdiction to arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees or other similar controlling bodies, of corporations for violations of the bankrupt act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States.⁷³

(5) *Authorizing Continuance of Business of Bankrupt.*—Courts of bankruptcy may authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates.⁷⁴

(6) *Bringing in and Substituting Additional Parties.*—Courts of bankruptcy may bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy.⁷⁵

(7) *Collection and Distribution of Bankrupt Estates, and Determination of Controversies Relating Thereto.*—**In General.**—Courts of bankruptcy have jurisdiction to cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto,⁷⁶ except as in the bank-

v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814; *In re Watts*, 190 U. S. 1, 47 L. Ed. 933. See post, "Seizure and Custody of Property by Court," IX, A. 1.

73. Punishment for violations of bankrupt act.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. And see *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity." *Bardes v. First Nat. Bank*, 178 U. S. 524, 535, 44 L. Ed. 1175.

74. May authorize continuance of bankrupt's business.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Allowance of extra pay for continuance of business—Amendment of February, 1893.—By the act of February 9, 1903, clause five of § 2 of the act of 1898 was amended so as to read as follows: "(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services;" (32 Stat. L. 797). Act of February 9, 1903, ch. 487 (amending Bankruptcy act of July 1, 1898), 38.

75. Bringing in or substitution of parties.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

Generally, as to the right of courts to

bring in additional parties or to substitute parties, see the title PARTIES.

76. Collection and distribution of estates, etc.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114.

As to jurisdiction of the United States and state courts in controversies between trustees and adverse claimants concerning the property, see post, "Proceedings between Trustees and Adverse Claimants of Bankrupt's Property," V, B, 1.

Under the act of 1841 it was provided that "the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt, and other remedial process, to the same extent the circuit courts may here do in a suit pending therein in equity. And it shall be the duty of the district court, in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules and regulations and forms

rupt act otherwise provided.⁷⁷ When the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same,⁷⁸ and the extent and character of liens thereon or rights therein.⁷⁹

shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms be substituted therefor." *Commercial Bank v. Buckner*, 20 How. 108, 117, 15 L. Ed. 862. And see *Ex parte Christy*, 3 How. 292, 11 L. Ed. 303.

Under the act of 1867, § 1 (Rev. Stat., § 1972), "the jurisdiction conferred upon the district courts as courts of bankruptcy extends * * * to the collection of all the assets of the bankrupt; * * * to the adjustment of the various priorities and conflicting interests of all parties; * * * to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; * * * to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy." *Merchants Bank v. Slagle*, 105 U. S. 558, 27 L. Ed. 204. See, also, *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336; *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Hall v. Allen*, 12 Wall. 452, 20 L. Ed. 458.

As to jurisdiction of bankruptcy court to compel surrender to trustee of property of the bankrupt in his possession or that of some one for him, see post, "Power of Court to Compel Surrender to Trustee," XVI. E, 1, b, (1), bb.

As to waiver of objection to jurisdiction of state court by the submission of the assignee to such jurisdiction, see ante, "In General," V, A, 2, a.

77. Exception.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814. And see cases cited in preceding note.

The exception here made refers to the provisions of § 23 of the bankrupt act, the general scope and object of which, as indicated by its title, are to define the "jurisdiction of the United States and state courts" in the premises. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mitchell v. McClure*, 178 U. S. 539, 540, 44 L. Ed. 1182; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157; *First*

Nat. Bank v. Chicago, etc., Co., 198 U. S. 280, 49 L. Ed. 1051.

"It is enacted by § 630 of the Revised Statutes 'that the circuit court shall have jurisdiction in matters in bankruptcy, to be exercised within the limits and in the manner provided by law.' This refers to the limitations in § 4979." *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000. See, also, *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003.

78. Jurisdiction over property held by or for bankrupt.—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

"It is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claim to its ultimate possession and control." *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122.

Custody of referee as that of court.—At the date of an adjudication in bankruptcy by the district court certain goods were in the store of the bankrupts, and in their actual possession, and were claimed by them as their property. On the same date, that court referred the case to a referee in bankruptcy and by his direction the entrance to the store was locked. It was held that the goods were then in the lawful possession and custody of the referee in bankruptcy, and of the bankruptcy court whose representative and substitute he was, and being thus in the custody of a United States court, they could not be taken from such custody upon any process from a state court. *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183.

79. Determination as to liens on property and rights therein.—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

"This conclusion accords with a number of well-considered cases in the federal courts. In *re Whitener*, 105 Fed. Rep. 150; In *re Antiago Screen Door Co.*, 123 Fed. Rep. 249; In *re Kellogg*, 121 Fed. Rep. 333. In the case of *First National Bank v. The Chicago Title and Trust Company*, decided May 8 of this term, p. 280, in holding that the jurisdiction of the district court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure." *Whitney v. Wenman*, 198 U. S. 539, 552, 553, 49 L. Ed. 1157.

Jurisdiction of district court over liens or mortgages.—Under the act of 1841, the

and this jurisdiction cannot be ousted by a surrender of the property by the receiver, without authority of the court.⁸⁰ The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts existed under the prior bankruptcy law, and is recognized in §§ 23, 24 and 25 of the present act,⁸¹ and it is now well settled that a bankruptcy court is without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien is asserted.⁸²

district court, when sitting in bankruptcy had jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603, followed in *Norton v. Boyd*, 3 How. 426, 11 L. Ed. 664.

In the case of a contested claim, the district court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

The control of the district court over proceedings in the state courts upon such liens, is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603. See the title INJUNCTIONS. And see post, "Injunctions to Restrain Interference," IX, B.

Control of district court over distribution by trustees.—Under § 5103 of the Revised Statutes (act of 1867), an order of the district court sitting in bankruptcy, and affirmed by the circuit court, directing the distribution by trustees in bankruptcy, of the proceeds of sale of the bankrupt's property is binding and conclusive on the bankrupt. *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

"The court by order is to direct all acts and things needful to be done to carry into effect the resolution of the creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy." *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

"Under § 4972 of the Revised Statutes, 'the jurisdiction conferred upon the district courts as courts of bankruptcy extends * * * to the collection of all the assets of the bankrupt; * * * to the adjustment of the various priorities and conflicting interests of all parties; * * * to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; * * * to all acts, matters, and things to be done under and in virtue of the bank-

ruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy.' Is there anything in § 5103 in conflict with this comprehensive declaration of the powers of the district court over a case in bankruptcy 'until the final distribution and settlement of the estate?' On the contrary, it is one of the express provisions of the latter section that 'the winding up and settlement of any estate under provisions of this section shall be deemed to be proceedings in bankruptcy,' and the section is full of directions to the court to aid in this settlement, and the trustees are twice assimilated in their functions to those of an assignee in bankruptcy." *Merchants' Bank v. Slagle*, 106 U. S. 558, 561, 27 L. Ed. 204.

"By the 11th section of the bankrupt law (act, 1841) the court had power to order the assignee to redeem and discharge 'any mortgage or other pledge, deposit, or lien upon any property,' etc. It also necessarily had the power, on the sale of mortgaged premises, to distribute the proceeds as the law required." *Fowler v. Hart*, 13 How. 373, 14 L. Ed. 186.

Jurisdiction of district court to compel return of property seized by replevin in state court.—In *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, it was held that after an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun, and that a district court of the United States sitting in bankruptcy has jurisdiction by summary proceedings to compel the return of the property seized. See post, "Seizure, Custody and Release of Bankrupt's Property," IX, A.

80. Jurisdiction not ousted by unauthorized surrender of property of receiver.—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

81. Distinction between bankruptcy proceedings and controversies in settlement of bankrupts estate.—*First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051.

82. No jurisdiction by summary proceedings where property not in possession of assignee.—*First Nat. Bank v. Chicago,*

When property upon which certain liens are claimed is not in the possession of the bankruptcy court, but only in the possession of the party purchasing from it, a state court has the right to hear and determine as to the existence of the alleged liens, and as to whether there is any valid defense to their enforcement.⁸³

(8) *Closing Estates and Discharging Trustees*.—Courts of bankruptcy may close estates, when it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and may reopen them whenever it appears that they were closed before being fully administered.⁸⁴

(9) *As to Compositions between Debtors and Creditors*.—Courts of bankruptcy may confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases.⁸⁵

(10) *As to Records and Finding of Referees*.—Courts of bankruptcy may consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees.⁸⁶

(11) *Determination of Claims to Exemptions*.—Courts of bankruptcy are empowered to determine all claims of bankrupts to their exemptions.⁸⁷

(12) *Discharge of Bankrupts*.—Courts of bankruptcy may discharge or refuse to discharge bankrupts, and may set aside discharges and reinstate the cases.⁸⁸

(13) *Enforcement of Obedience to Orders*.—Courts of bankruptcy are au-

etc., Co., 198 U. S. 280, 49 L. Ed. 1051, citing *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

As to the preservation of this distinction in the provisions as to revision in matter of law and appeals, see post, "Appellate Jurisdiction," V, C.

As to jurisdiction of proceedings between trustees and adverse claimants, see post, "Proceedings between Trustees and Adverse Claimants of Bankrupt's Property," V, B, k.

83. Adjudication as to liens upon property which has passed from the assignee.—*Adams v. Crittenden*, 133 U. S. 296, 33 L. Ed. 623.

"The regularity of the proceedings of the state court is not challenged. They were all subsequent to the proceedings in the bankrupt court, and were not commenced until after the title had passed away from the assignee in bankruptcy. The general jurisdiction of the state court is conceded. The purchaser, the plaintiff in error, was a party to that suit, and the claim of the plaintiff in error can only be sustained upon the theory that by reason of the bankrupt proceedings the state court was prevented from taking jurisdiction. But the truth is, the question is one of error and not of jurisdiction. The state court had jurisdiction of the parties, and they were served with process and appeared. It had jurisdiction of the foreclosure of liens, and it had a right to hear and determine whether the alleged liens still existed, and whether there was any valid defense to their enforcement. The property upon which the liens were claimed was not in the possession of the bankrupt court, but only in the possession of the party purchasing from it." *Adams v. Crittenden*, 133 U. S. 296, 298, 33 L. Ed. 623.

84. Closing estates and discharging trustees.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

As to accounting and discharge of trustees in bankruptcy, see post "Rights, Powers, Duties and Liabilities," XVI, E.

85. Composition between debtors and creditors.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. See post, "Compositions with Creditors," XVIII.

86. Records and findings of referees.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405. See post, "The Referee," XIII, C.

87. Claims to exemptions.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Smalley v. Laugenour*, 196 U. S. 93, 49 L. Ed. 400; *Lucius v. Cawthorn Coleman Co.*, 196 U. S. 149, 49 L. Ed. 425; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061.

As to right to exemptions, etc., see post, "Exemptions of Property," XI, B; "Vested with Title to All Unexempted Property of Bankrupt," XVI, E, 1, b, (1), (a); "Setting Apart Bankrupt's Exemptions," XVI, E, 2, k.

"The bankruptcy court is expressly vested with jurisdiction 'to determine all claims of bankrupts to their exemptions.' Section 2, cl. 11. Where there is a trustee he sets apart the exemptions, and reports thereon to the court, § 47, cl. 11; where no trustee has been appointed, under general order XV, the court acts in the first instance." *Smalley v. Laugenour*, 196 U. S. 93, 97, 49 L. Ed. 400.

88. Discharge of bankrupt.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Generally, as to discharge of bankrupt, application therefor, when proper, effect, etc., see post, "Discharge of Bankrupt," XII.

thorized to enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment.⁸⁹

(14) *Extradition of Bankrupts*.—Courts of bankruptcy may extradite bankrupts from their respective districts to other districts.⁹⁰

(15) *As to Orders, Process, and Judgments Necessary to Enforcement of Act*.—Courts of bankruptcy may make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the bankrupt act.⁹¹

(16) *Punishment for Contempts before Referees*.—Courts of bankruptcy have jurisdiction to punish persons for contempts committed before referees.⁹²

(17) *Appointment or Removal of Trustees*.—Courts of bankruptcy may, pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them.⁹³

(18) *Taxation of Costs and Rendition of Judgment Therefor*.—Courts of bankruptcy are authorized to tax costs, whenever they are allowed by law, and to render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy.⁹⁴

(19) *Transfer of Cases to Other Courts*.—Courts of bankruptcy may, under proper circumstances, transfer cases to other courts of bankruptcy.⁹⁵

c. *Effect of Enumeration upon Unspecified Powers*.—By the last clause of § 2 of the present bankrupt act it is expressly provided that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specified powers not herein enumerated."⁹⁶

d. *Nature of Jurisdiction and Manner of Exercise*.—Generally speaking, the jurisdiction of courts of bankruptcy in bankruptcy proceedings is to be exercised summarily in the nature of summary proceedings in equity.⁹⁷

89. Enforcement of obedience to orders.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *In re Watts*, 190 U. S. 1, 47 L. Ed. 933.

"Bankruptcy courts have original jurisdiction in their respective districts of all matters and proceedings in bankruptcy, and are authorized to hear and adjudicate upon the same, according to the provisions of the bankrupt act. They have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

90. Extradition of bankrupts.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. See the title EXTRADITION.

91. Orders, process and judgment necessary to enforcement of act.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *In re Watts*, 190 U. S. 1, 47 L. Ed. 933.

92. Punishment for contempts before referees.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v.*

Nugent, 184 U. S. 1, 46 L. Ed. 405. See post, "Contempts before Referees," XIII, C, 10. See, generally, the title "CONTEMPT."

93. Appointment and removal of trustees.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Generally, as to appointment, powers and duties, and removal of trustees, see post, "Trustees or Assignees," XVI.

94. Taxation of costs and rendition of judgment therefor.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. See, generally, the title COSTS. And see post, "Administration and Distribution of Estate," XVII.

95. Transfer of cases.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

96. Effect of enumeration upon unspecified powers.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

"The district courts as courts of bankruptcy are invested with 'such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings' in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration." *Elliott v. Toeppner*, 187 U. S. 327, 331, 47 L. Ed. 200.

97. Jurisdiction exercised summarily in nature of summary proceedings in equity.—*Ex parte Christy*, 3 How. 292, 11 L. Ed.

B. Jurisdiction of United States and State Courts in Controversies Other than Bankruptcy Proceedings—1. PROCEEDINGS BETWEEN TRUSTEES AND ADVERSE CLAIMANTS OF BANKRUPT'S PROPERTY—*a. Under Former Bankrupt Acts*—(1) *In General*.—The bankrupt acts of 1841, 1867, and the amendment of 1874 each contained a provision conferring on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt.⁹⁸

603; See *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

Generally, as to nature of bankruptcy proceedings, see post, "Nature, Operation and Effect of Bankruptcy Proceedings," XXI.

98. **Concurrent jurisdiction of the United States circuit and district courts under former bankrupt acts.**—*Bardes v. First Nat. Bank*, 178 U. S. 524, 41 L. Ed. 1175; *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Barton v. Geiler*, 108 U. S. 161, 27 L. Ed. 687; *Ex parte Schwab*, 98 U. S. 240, 25 L. Ed. 105; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Scott v. Kelly*, 22 Wall. 57, 22 L. Ed. 729; *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. Ed. 268; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

By the act of 1841, § 8, it is provided "that the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt transferable to or vested in such assignee." *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

Section 2 of the act of 1867 is to the same effect.—*Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

"Jurisdiction is vested in the circuit courts, under the bankrupt act, concurrent with the district court for the same district, of all suits, at law or in equity, which may or shall be brought by any person against the assignee of the bankrupt's estate, touching any property, or rights of property, of the bankrupt transferable to, or vested in, such assignee."

Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483.

"In such a case a circuit court of the United States, having otherwise jurisdiction in the case, will, as a general rule, administer the same relief in equity which the state courts can grant. *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123; *Case of Broderick's Will*, 21 Wall. 503, 519, 520, 22 L. Ed. 599; *Van Norden v. Mattson*, 99 U. S. 378, 380, 25 L. Ed. 453; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *Reynolds v. Crawfordville Bank*, 112 U. S. 405, 28 L. Ed. 733. It has general power given to it, irrespective of citizenship, to grant equitable relief, in a suit in equity by an assignee in bankruptcy against any person who claims an adverse interest touching the assigned property." *Chapman v. Brewer*, 114 U. S. 158, 170, 29 L. Ed. 83.

"In *Lathrop v. Drake* (1875), 91 U. S. 516, 23 L. Ed. 414, the jurisdiction conferred on the district courts and the circuit courts of the United States by the bankrupt act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of 'two distinct classes: First, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him.' And the jurisdiction of the district and circuit courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of § 1 of that act, giving to the district court original jurisdiction of proceedings in bankruptcy, and of § 2, giving to the circuit court supervisory jurisdiction over such proceedings, but wholly under the distinct clause of § 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such

(2) *Jurisdiction Concurrent with That of State Courts.*—It has been held that under the provisions of the bankrupt acts above set out the jurisdiction conferred upon the federal court for the benefit of an assignee in bankruptcy was concurrent with and did not divest that of the state courts in suits of which they had full cognizance.⁹⁹

assignee.' In an earlier case, it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from a decree of the circuit court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction conferred by the later clause was 'other and different from the special jurisdiction and superintendence described in the first clause of the section,' was 'of the same character as that conferred upon the circuit courts by the eleventh section of the judiciary act' of 1789, and was 'the regular jurisdiction between party and party, as described in the judiciary act and the third article of the constitution.' *Morgan v. Thornhill* (1870), 11 Wall. 65, 76, 80, 20 L. Ed. 60." *Bardes v. First Nat. Bank*, 178 U. S. 524, 531, 532, 44 L. Ed. 1175.

Revised Statutes, § 4979, is a re-enactment of § 2, of the act of 1867. *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

The act of 1874 changes the words "the same district" to "any district," and adds to "person claiming an adverse interest" the words, "or owing any debt to such bankrupt." *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414.

Jurisdiction regardless of citizenship of parties.—Under § 4979, Rev. Stat. (act of 1867, § 2), the circuit court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee. *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003, citing and approving *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, and *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

Suit in district other than where decree of bankruptcy made.—Under the bankrupt act of March 2, 1867 (14 Stat. 517), an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in a district other than that in which the decree of bankruptcy was made. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414.

"By § 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for

the six months next preceding; and the district court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act." *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414.

A proceeding to remove cloud on title brought by the assignee of the bankrupt, is within the provisions of the act of 1867, § 2. *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83.

99. Jurisdiction concurrent with state courts.—*Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114; *Bardes v. First Nat. Bank*, 178 U. S. 524, 531, 532, 44 L. Ed. 1175; *Wilson v. Goodrich*, 154 U. S. 640, 25 L. Ed. 1011; *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771; *Winchester v. Heiskell*, 119 U. S. 450, 30 L. Ed. 462; *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Scott v. Kelly*, 22 Wall. 57, 22 L. Ed. 729; *Nugent v. Boyd*, 3 How. 426, 11 L. Ed. 664; *Ex parte Christy*, 3 How. 292, 318, 11 L. Ed. 603.

"Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the state courts. *Ex parte Christy*, 3 How. 292, 318, 319, 11 L. Ed. 603; *Nugent v. Boyd*, 3 How. 426, 11 L. Ed. 664." *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833.

"It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now

b. *Under Present Bankrupt Act.*—By the first clause of § 23 of the bankrupt act of 1898 it is provided that the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between the trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.¹ By the second clause of this section, it is provided that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted,² unless by consent of the proposed defendant

claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith v. Mason* (1871), 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox* (1872), 16 Wall. 551, 557, 21 L. Ed. 481; *Eyster v. Gaff* (1875), 91 U. S. 521, 525, 23 L. Ed. 493. The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts." *Bardes v. First Nat. Bank*, 178 U. S. 524, 532, 44 L. Ed. 1175.

"Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district and circuit courts of the United States by the express provision to that effect in § 2 of that act, and was not derived from the other provisions of §§ 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases." *Bardes v. First Nat. Bank*, 178 U. S. 524, 533, 44 L. Ed. 1175.

1. *Provision of act of 1898, § 23, cl. a.*—*Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 620; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed.

1171; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

First clause relates to circuit courts only.—The first clause of § 23 of the act of 1898, relates to the circuit courts only, and not to the district courts of the United States. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Surety on bail bond of bankrupt an adverse claimant within rule.—In *Jaquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 620, the district court dismissed for want of jurisdiction a petition to compel the surety on a bankrupt's bail bond to pay to the trustee in bankruptcy money deposited with such surety to indemnify the latter for his liability. It was held by the supreme court that such dismissal was proper, the surety being an adverse claimant within the prohibition of § 23.

2. *Provision of act of 1898, § 23, cl. b.*—*Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911; *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114; *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051; *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 620; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128; *Louisville Trust Co. v. Comings*, 184 U. S. 18, 46 L. Ed. 413; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Wall v. Cox*, 181 U. S. 214, 45 L. Ed. 845; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Mitchell v. McClure*, 178 U. S. 541, 44 L. Ed. 1133; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Where by reason of the amount involved and the diverse citizenship existing, the bankrupt might have sued the defendant in the circuit court of the United States, independently of the bankruptcy proceedings, under § 23 of the act of 1898 that right is preserved to the trustee, and the citizenship of the latter is wholly immaterial to the jurisdiction of the court in such a case. *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114.

Clause applicable to district and circuit courts as well as state courts.—The second clause applies both to the district courts and to the circuit courts of the

ant.³ By the amendment of February 1903, the following words were added to

United States, as well as to the state courts. This appears, not only by the clear words of the title of this section, but also by the use, in this clause, of the general words, 'the courts,' as contrasting with the specific words, 'the United States circuit courts,' in the first and the third clauses." *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Purpose of restricted provisions of act, 1898, § 23.—In *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, the court, after referring to the provisions in the bankrupt acts of 1867 and 1841, conferring on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt, said: "We find it impossible to infer that when congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it has under the obsolete provision of the earlier acts. On the contrary, congress, by the second clause of § 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case. One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the state, to the greater economy and convenience of litigants and witnesses."

"Section 2 of the bankrupt act of 1898, among other things, confers jurisdiction upon the district courts of the United States, as courts of bankruptcy, (3) to 'appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;' (7) to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided.' This section, in connection with § 23, was before this court for construction in the case of *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, in which case it was held that § 23b of the act as it then stood prevented the

courts of the United States from entertaining jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the bankruptcy proceedings, without the consent of the defendants. In that case it was held that the power conferred in subdivision 7 of § 2, above quoted, was limited by the direct provisions of § 23 as to the jurisdiction of suits brought by trustees, the effect of which section was to compel the trustee to resort to the state courts to set aside conveyances of the character named where an alleged fraudulent transfer had been made by the bankrupt before the beginning of the proceedings, unless jurisdiction in the district court was by consent." *Whitney v. Wenman*, 198 U. S. 539, 549, 550, 49 L. Ed. 1157.

"When the purpose of a prior law is continued, usually its words are, and an omission of the words implied an omission of the purpose. This rule we lately applied in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. In that case, in determining whether the jurisdiction of the circuit and district courts of the United States was concurrent with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: 'We find it impossible to infer that when congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.'" *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 448, 45 L. Ed. 1171.

No application to proceedings for reconsideration and rejection of claims. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

Power of district court to determine nature of claim.—The district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed, and according to the conclusion reached, the court will retain jurisdiction or decline to adjudicate the merits. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. Ed. 413; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

3. No jurisdiction unless by consent.—*Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911; *Bush v. Elliott*, 202 U. S. 477, 50

the second clause of § 23: "Except suits for the recovery of property under § 60, subdiv. b, and § 67, subdiv. e."⁴ The excepted suits, for the recovery of property, covered by the amendment of 1903, pertain to actions to recover property conveyed by the bankrupt in fraud of the act.⁵ The act of 1903 also amended subdivision e of § 67 and subdivision e of § 70 of the act of 1898, (relating to recovery of property transferred by the debtor) by adding at the end of each subdivision the words: "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."⁶

L. Ed. 1114. And see cases cited to preceding text.

Participation in proceedings in bankruptcy court after objection to jurisdiction not a consent thereto.—In *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051, the claimants of certain property not in possession of the trustee asserted the express statutory limitation on jurisdiction set out in clause b, of § 23, and objected that the district court could not proceed, but their objections were overruled. It was held, that the fact that they did not then abandon their claims, did not amount to waiver of their objections or to a consent to an exercise of jurisdiction against which they protested.

Effect of participation in proceedings before referee under peremptory orders.—In *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. Ed. 413, a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying jurisdiction, which the court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon petition for review, the circuit court of appeals reversed the bankruptcy court, and the supreme court upon certiorari affirmed the circuit court of appeals.

"We are of opinion that even if Cominger could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered." *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. Ed. 413.

In *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, it was held that the main fact that the complainant proved up her judgment as a preferred debt in bankruptcy before the referee did not operate to deprive the state court of jurisdiction over a suit by such creditor to set aside as

fraudulent a certain deed nor will such fact amount to a consent to the exercise of jurisdiction by the district court.

Effect of making assignee for creditors party defendant to petition in bankruptcy.—In *Louisville, etc Co. v. Cominger*, 184 U. S. 18, 46 L. Ed. 413, the assignee for the benefit of creditors was made a party defendant in a petition for adjudication in bankruptcy. This petition set up no cause of action against the assignee and prayed no special relief against him, and he was apparently made a defendant because adjudication would put an end to further action by him as assignee. The supreme court affirmed the holding of the circuit court of appeals to the effect that he could not thus be deprived of his rights to have his claims adjudicated by the proper court and in the customary mode, nor did he continue to be subject to the orders of the court without further process.

Effect of removal to circuit court of suit by trustee in state court.—Where a suit commenced by a trustee in bankruptcy in the state court is removed on the ground of diverse citizenship, such removal places it in the circuit court as if it had been commenced there on that ground of jurisdiction and not by consent of defendant under § 23 of the bankrupt act. *Spencer v. Duplan Silk Co.*, 100 U. S. 526, 48 L. Ed. 287. See the title REMOVAL OF CAUSES.

4. Amendment of February 1903.—*Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114; *Whitney v. Wemman*, 198 U. S. 539, 49 L. Ed. 1157.

Effect of amendment.—In *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, it was held that the effect of the amendment of February 5, 1903, was to give the bankruptcy court concurrent and not exclusive jurisdiction.

When amendment operative.—It was provided in the amendment of February 5, 1903 (32 Stat. 797, c. 487, § 19), that such act should "not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July 1, 1898." *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911.

5. To what actions applicable.—*Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114. See post, "Provision of Bankrupt Act as to Liens, Transfers and Preferences," XIX.

6. Amendment of §§ 67 e, 70 e.—Act of

2. **CONCURRENT JURISDICTION OF CIRCUIT AND BANKRUPTCY COURTS OVER OFFENSES AGAINST BANKRUPT ACT.**—By § 23 c of the bankruptcy act of 1898 it is provided that “the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.”⁷

C. Appellate Jurisdiction—1. **JURISDICTION OF CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.**—Under § 24a of the present bankrupt act it is provided that the supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.⁸ By the same section it is further provided that the supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.⁹

2. **SUPERVISORY JURISDICTION IN MATTERS OF LAW OVER INFERIOR COURTS OF BANKRUPTCY**—a. *Right to Exercise.*—**Under Act of 1867.**—Supervisory jurisdiction in matters of law over the inferior courts of bankruptcy was conferred on the circuit courts by the bankrupt act of March 2, 1867, 14 Stat. 517, 518, c. 176, § 2; Rev. Stat., § 4986.¹⁰ The powers and jurisdiction granted by

February 9, 1903, ch. 487 (amending Bankruptcy Act of July 1, 1898), 38.

7. **Concurrent jurisdiction of circuit and bankruptcy courts.**—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

As to the jurisdiction of courts of bankruptcy over such offenses, see ante, “Punishment of Offenses against Bankrupt Act,” V, A, 2, b, (4).

“The provisions of the second clause of § 23 of the bankrupt act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.” *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

8. **Provisions of act of 1898, § 24a.**—*Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *Bardes v. First Nat. Bank*, 175 U. S. 524, 526, 44 L. Ed. 1175; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

Meaning of “appellate courts.”—“By subdivision 3 of § 1 of the bankrupt act of 1898, the words ‘appellate courts’ are defined to ‘include the circuit courts of appeals of the United States, the supreme courts of the territories, and the supreme court of the United States.’” *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992.

9. **Further provisions of § 24 a.**—*Denver*

First Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127.

Generally, as to jurisdiction of appellate courts, see the title APPEAL AND ERROR, vol. 1, p. 333.

10. **Jurisdiction under act of 1867.**—*Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60; *Hall v. Allen*, 12 Wall. 452, 20 L. Ed. 458; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Mead v. Thompson*, 15 Wall. 635, 21 L. Ed. 242; *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Bank v. Cooper*, 20 Wall. 171, 22 L. Ed. 273; *Sandusky v. First Nat. Bank*, 23 Wall. 289, 23 L. Ed. 155; *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

“The first question is, whether the decree dismissing the bill for want of jurisdiction was rightly made, and this is to be solved by reference to the second section of the bankrupt act. By this section it is declared that the circuit courts ‘shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other process, of any party aggrieved, hear and determine the case as in a court of equity.’ By a subsequent clause of the same section it is declared that said courts ‘shall have concurrent jurisdiction with the district courts * * * of all suits at law or in equity * * * by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any prop-

this section might be exercised by the circuit court, or any justice thereof, in term time or vacation.¹¹

Under Present Bankrupt Act.—By § 24b of the bankrupt act of 1898, it is provided that the several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.¹² The special and summary character of the revision contemplated by the present act is substantially the same as in the prior act.¹³ It is confined to questions of law, and does not contemplate a review of the facts.¹⁴

b. Manner and Time of Application.—The supervisory power conferred on circuit courts of appeal by the present bankrupt act is to be exercised on due notice and petition by any party aggrieved.¹⁵

erty, or rights of property, of said bankrupt, transferable to or vested in such assignee. The first clause confers upon the circuit courts that supervisory jurisdiction which may be exercised in a summary manner, in term or vacation, in court or at chambers, and upon the exercise of which this court had decided that it has no appellate jurisdiction. The second clause confers jurisdiction by regular suit, either at law or in equity, in the cases specified; that is, in controversies between the assignee and persons claiming an adverse interest, touching any property of the bankrupt." *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 181, citing *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60.

Extent of supervisory jurisdiction.—The supervisory jurisdiction of the circuit court extends to all cases and questions arising in the district court when sitting as a court of bankruptcy. *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193.

Retrial of question of fact twice tried and decided.—After an assignee in bankruptcy, aided by a creditor, has twice contested before the district court or its referee the claim of a person who has been allowed to prove his claim, and, after all the evidence which could then or afterwards be produced, it has been twice decided that the claim was a valid one, no bill lies in the circuit court either under the general provisions of the bankrupt act or under the second section of it, giving to the circuit court a general superintendence and jurisdiction of all cases and questions arising under the act against either the assignee or the person who has been allowed to prove his claim, to have the order allowing it reversed. Such a bill may be demurred to for want of equity. *Bank v. Cooper*, 20 Wall. 171, 22 L. Ed. 273.

Adjournment into circuit court under act, 1841.—Under the act of 1841, "the district judge may adjourn any point or question arising in any case of bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined, and for this purpose the circuit court of such district shall be deemed always open." *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862; *Norton*

v. Boyd, 3 How. 426, 11 L. Ed. 664; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Nelson v. Carland*, 1 How. 265, 10 L. Ed. 125.

11. How and when power exercised.—*Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152.

12. Under act of 1898, § 24 b.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 988; *Schweer v. Brown*, 195 U. S. 171, 49 L. Ed. 144; *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992; *Smalley v. Langenour*, 196 U. S. 93, 49 L. Ed. 400; *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Elliott v. Tappner*, 187 U. S. 237, 47 L. Ed. 200.

The United States district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed, and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. If the courts err in retaining jurisdiction on the merits the remedy is by petition to the circuit court of appeals under § 24 b of the bankrupt act. *Schweer v. Brown*, 195 U. S. 171, 49 L. Ed. 144, citing *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Louisville Trust Co. v. Commercial*, 184 U. S. 18, 46 L. Ed. 113; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

13. Character of revision same under both acts.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

14. Confined to questions of law.—*Elliott v. Tappner*, 187 U. S. 237, 47 L. Ed. 200; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *First Nat. Bank v. Chicago, etc., Co.*, 189 U. S. 280, 49 L. Ed. 1051.

15. Power exercised on notice and petition.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179; *Schweer v. Brown*, 195 U. S. 171, 49 L. Ed. 144; *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051; *Elliott v. Tappner*, 187

c. Exercise of Power Not Reviewable on Appeal to Supreme Court.—It was settled under the act of 1867 that appeals to the supreme court would not lie from the decisions of the circuit courts in the exercise of their supervisory jurisdiction,¹⁶ and this rule is held equally applicable in the case of the exercise of

U. S. 327, 47 L. Ed. 200; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

In *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152, decided under the act of 1867 it was held that "circuit courts have a general superintendence and jurisdiction of all cases and questions arising under that act, within and for the districts where the proceedings under the acts are pending; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved hear and determine the case as in a court of equity." See, also, *Hall v. Allen*, 12 Wall. 452, 20 L. Ed. 458; *Bank v. Cooper*, 20 Wall. 171, 22 L. Ed. 273; *Lathrop v. Drake*; 91 U. S. 516, 23 L. Ed. 414.

The district court sitting in bankruptcy has no jurisdiction to proceed by rule to take goods seized, before any act of bankruptcy by the lessees, for rent due by them in Louisiana, under "a writ of provisional seizure," and then in the hands of the sheriff, and held by him as pledge for the payment of rent due out of his hands, and to deliver them to the assignee in bankruptcy to be disposed of under the orders of the bankrupt court; neither the sheriff nor the lessor having been parties to the proceedings in bankruptcy nor served with process to make them such. The circuit court may, under the second section of the bankrupt act, entertain on bill as an original proceeding, a case thus involving a question of adverse interest in goods so seized. *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

If a petition to the circuit court to re-examine a decree of the district court in bankruptcy, pray the court to "review" and reverse that decree and "to grant such further order and relief as may seem just," the jurisdiction invoked must be regarded as the supervisory jurisdiction which is allowed to circuit courts acting as courts of equity by the second section of the bankrupt act. *Mead v. Thompson*, 15 Wall. 635, 21 L. Ed. 242.

Time of application.—Under the act of 1867, while the application was undoubtedly required to be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate might not be delayed, neither such act nor any rule of the supreme court determined what that time should be. *Bank v. Cooper*, 20 Wall. 171, 22 L. Ed. 273, in which case the court held that "perhaps, generally, it should be fixed in analogy to the period within which appeals must be taken."

16. Not reviewable on appeal to supreme court.—*Morgan v. Thornhill*, 11

Wall. 65, 20 L. Ed. 60; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Sandusky v. First Nat. Bank*, 23 Wall. 289, 23 L. Ed. 155; *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *Conro v. Crane*, 94 U. S. 441, 24 L. Ed. 145; *Nimick & Co. v. Coleman*, 95 U. S. 266, 24 L. Ed. 447; *Cleveland Ins. Co. v. Globe Ins. Co.*, 98 U. S. 366, 25 L. Ed. 201; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986.

This court cannot review the action of the circuit court in the exercise of its supervisory jurisdiction over an adjudication of bankruptcy rendered by the district court. It is immaterial whether such adjudication was upon a summary hearing by the district court, or after a trial by jury to ascertain the fact of the alleged bankruptcy. *Sandusky v. First Nat. Bank*, 23 Wall. 289, 23 L. Ed. 155, and *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923, cited and approved. *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193.

"The first question presented in this case is one of jurisdiction. In *Sandusky v. First Nat. Bank*, 23 Wall. 289, 23 L. Ed. 155, we decided that an adjudication of bankruptcy, without a trial by jury, could not be brought here for re-examination by appeal, as the circuit court could only review such a proceeding under its supervisory jurisdiction where its action was final. It only remains to consider, therefore, whether a different rule must be applied when the adjudication is after a trial by jury. The reason why we cannot review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law, is, as we have already said at the present term, in *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923, 'that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings.'" *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193.

"The cases are numerous in which it has been decided that we cannot review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. *Morgan v. Thornhill*, 11 Wall. 65, 74, 20 L. Ed. 60; *Hall v. Allen*, 12 Wall. 452, 454, 20 L. Ed. 458;

such jurisdiction by the circuit courts of appeals under the present act.¹⁷

3. APPEALS IN BANKRUPTCY PROCEEDINGS—*a. From Courts of Bankruptcy to Courts of Appeals*—(1) *When Proper, and to What Courts Taken*.—Under the former bankrupt acts appeals might be taken from the district to the circuit courts in certain cases.¹⁸

Mead v. Thompson, 15 Wall. 635, 638, 21 L. Ed. 242; *Marshall v. Knox*, 16 Wall. 551, 555, 21 L. Ed. 481; *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50; *Sandusky v. First Nat. Bank*, 23 Wall. 289, 293, 23 L. Ed. 155. The principle upon which these decisions rests is, that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decree in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings." *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

An appeal does not lie to this court from the decree of a circuit court dismissing in the exercise of its supervisory jurisdiction under the bankrupt law, an appeal from a district court, and affirming the order appealed from. *Nimick & Co. v. Coleman*, 95 U. S. 266, 24 L. Ed. 447.

The supreme court has no jurisdiction to review a judgment of the circuit court rendered in a proceeding upon an appeal from an order of the district court rejecting the claim of a supposed creditor against the estate of the bankrupt, for the reason that a proceeding to prove a debt is part of the suit in bankruptcy and not an independent suit in law or in equity. "Such being the nature of the proceeding it is a matter of no consequence whether the appeal from the district court to the circuit court was taken by the creditor or the assignee, for it has always been held that this court has no control over judgments or orders made by the circuit court in mere bankruptcy proceedings." *Leggett v. Allen*, 110 U. S. 741, 28 L. Ed. 313, affirming *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

A question relating to the adjustment of priorities and conflicting interests in a bankrupt's estate in his assignee's hands, arising on motion before the register, was taken, by means of a case and question agreed on, into the district court. The decision of that court was in turn taken by appeal to the circuit court, which reversed the decision. The action of the circuit court herein, held to have been under the 2d section of the bankrupt act and only in the exercise of its superintending and revisory jurisdiction, and hence, on

the authority of *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60, not capable of being brought by further appeal here. *Hall v. Allen*, 12 Wall. 452, 20 L. Ed. 458.

If a petition to the circuit court to re-examine a decree of the district court in bankruptcy, pray the court to "review" and reverse that decree and "to grant such further order and relief as may seem just," the jurisdiction invoked must be regarded as the supervisory jurisdiction which is allowed to circuit courts acting as courts of equity by the second section of the bankrupt act. From the action of the circuit court in the exercise of such jurisdiction no appeal lies to this court. *Mead v. Thompson*, 15 Wall. 635, 21 L. Ed. 242.

When, after opposition by a creditor to the discharge of a petitioner in bankruptcy, the district court discharges him, and the opposing creditor files in the circuit court a "petition of appeal,"—a petition setting forth the application for the benefit of the bankrupt act, the opposition, and the discharge, and praying the circuit court for a reversal of the orders of discharge of the district court—such "petition of appeal" must be regarded as being a petition for review under the first clause of the second section of the bankrupt act, which gives the circuit courts a general superintendence and jurisdiction of all cases and questions arising under the act; and on an affirmance by the circuit court of the decree of discharge by the district court, no appeal lies to this court, though the debt of the opposing creditor discharged be more than \$2,000. *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152.

17. Application to circuit courts of appeal under present act.—*Holden v. Stratton*, 191 U. S. 115, 18 L. Ed. 116; *Ingersoll v. Bourne*, 151 U. S. 645, 38 L. Ed. 1091. See, also, *Hewitt v. Berlin Machine Works*, 191 U. S. 296, 18 L. Ed. 986.

"In *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923, we decided that an appeal to this court would not lie from the judgment of a circuit court in a proceeding by a creditor to prove his demand against the estate of a bankrupt. This is clearly such a case. Although on account of the peculiar character of the demand, the proceeding assumed to some extent the form of a suit in equity, it was instituted and carried on solely for the purpose of obtaining the allowance of the demand against the estate of the bankrupt." *Ingersoll v. Bourne*, 151 U. S. 645, 38 L. Ed. 1091.

18. Under the act of 1867, § 8 (Rev. Stat., § 4980, etc.), appeals might be taken from the district to the circuit courts in all cases in equity, and writs of error

Under § 25a of the bankrupt act of 1898, appeals, as in equity cases, may be taken in bankruptcy proceedings¹⁹ from the courts of bankruptcy to the

might be allowed to said circuit courts from the said district courts in cases at law under the jurisdiction created by the act when the debt or damages claimed amounted to more than \$500; and any supposed creditor whose claim was wholly or in part rejected, or an assignee who was dissatisfied with the allowance of the claim might appeal from the decision of the district court to the circuit court from the same district. *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *Ex parte Mead*, 109 U. S. 230, 27 L. Ed. 914; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 257, 21 L. Ed. 493. See, also, *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57.

"Appellate jurisdiction, in its strictest sense, as exercised under the judiciary act, is certainly conferred upon the circuit courts in four classes of cases by the express words of the bankrupt act, without any resort to construction: (1) By appeal from the final decree of the district courts in suits in equity commenced and prosecuted in the district courts by virtue of the jurisdiction created by the third clause of the second section of the act. (2) By writs of error sued out to the district court in civil actions finally decided by the district courts, in the exercise of jurisdiction created by the same clause of that section. (3) By appeal from the decisions of the district courts rejecting wholly or in part of the claim of a creditor, as provided in the eighth section of the act. (4) By appeal from the decisions of the district courts allowing such a claim when the same is opposed by the assignee." *Morgan v. Thornhill*, 11 Wall. 65, 78, 20 L. Ed. 60.

A proceeding under the bankrupt act in which by petition in form, the assignee sets forth articulately that A., B., C., etc., claim liens against the bankrupt's estate, the validity of each of which liens he, the assignee, denies, and in which he prays that the parties setting up the liens may be made parties, and be required to answer, each of them, all his charges and allegations as made, and be compelled, each of them, to set forth and state in their respective answers the particulars and facts upon which their respective claims are based, and that on final hearing all questions and rights of each and all the parties may be ascertained and determined by the court, and that the petitioner be directed to sell the estate and distribute the proceeds; and in which the assignee prays that he "may have such other and further relief in the premises, and may be further directed in his duties as the nature of the case requires;" in which proceeding, the parties asserting the liens, answer in form, and the assignee replies in form, is a "case in equity" within the eighth section of the bankrupt act, which gives an ap-

peal to the circuit court in all cases in equity; and is not a case for the general superintendence and jurisdiction by that court given in the second section of the act, in cases where no provision for the supervision of the circuit court is otherwise made. The fact that a subpoena is not prayed for does not change this view, the defendants voluntarily appearing. If such a case be taken into the circuit court under this general superintending jurisdiction given by the said second section, it is wrongly taken. No jurisdiction exists there so as to review the case. And no appeal lies to this court from the action of the circuit court made under such circumstances, to hear and determine the merits. Where a case has been so taken, and the decision reversing the decree of the district court is in favor of the party taking it, this court will reverse the judgment or decree of the court below, and remand the suit with direction to dismiss it. *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50.

No appeal to supreme court from decision of district court.—There is no act of congress authorizing an appeal to the United States supreme court from the decision of a district court in a case of bankruptcy. *Crawford v. Points*, 13 How. 11, 14 L. Ed. 29, citing *Nelson v. Carland*, 1 How. 265, 10 L. Ed. 126; *Ex parte Christy*, 3 How. 292, 314, 11 L. Ed. 603. See the title **APPEAL AND ERROR**, vol. 1, p. 333.

Effect of judgment of circuit court on appeal.—The final judgment of the circuit court rendered upon an appeal was, by Rev. Stat., § 4985, made conclusive, and the list of debts must, if necessary, be altered to conform thereto. *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

19. The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24 and 25 of the bankrupt act of 1898, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *First Nat. Bank v. Chicago, etc., Co.*, 198 U. S. 280, 49 L. Ed. 1051.

The words "bankruptcy proceedings" are used in § 25, in contradistinction to controversies arising out of the settlement of the estates of bankrupts, as they are also so used in §§ 23 and 24. *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127.

"Apart from § 25, the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other

circuit court of appeals of the United States, and to the supreme court of the territories, from a judgment adjudging or refusing to adjudge the defendant a bankrupt;²⁰ from a judgment granting or denying a discharge;²¹ and from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.²²

cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Huntington v. Saunders*, 163 U. S. 319, 41 L. Ed. 174; *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 81, 38 L. Ed. 80." *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 205, 46 L. Ed. 1127.

"Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, * * * while § 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by § 2, to settle the estates of bankrupts and to determine controversies in relation thereto. *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179; *Burleigh v. Foreman*, 125 Fed. Rep. 217." *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 936.

"By § 25a appeals 'as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories' from judgment adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; and allowing or rejecting a claim of five hundred dollars or over. The act clearly distinguishes between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings' proper, and between supervisory jurisdiction in a summary way in matter of law, and jurisdiction by appeal or writ of error. Appellate jurisdiction over controversies, as in other cases, is vested by § 24a, and over certain designated bankruptcy proceedings by § 25a, by appeal, as in equity cases, bringing up both law and fact." *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992.

20. Adjudication as to bankruptcy of defendant.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *First Nat. Bank v. Chicago, etc., Co.*, 193 U. S. 280, 49 L. Ed. 1051; *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. Ed. 992; *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 51 L. Ed. 292.

Congress did not attempt by § 25a of the bankrupt act, which provides for appeals as in equity cases from the district court to the circuit court of appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, to em-

power the appellate court to re-examine the facts determined by a jury under § 19, otherwise than according to the rules of the common law. The provision applies to judgments where trial by jury has not been demanded and the court proceeds on its own findings of fact. In such case the facts and the law are re-examinable on appeal; but in case of a jury trial the judgment is reviewable only by writ of error for error in law, and alleged errors in instructions, the giving or refusal of instructions or in the admission or rejection of evidence which must appear by exceptions duly taken and preserved by bill of exceptions in the absence of which such alleged errors cannot be considered, although the transcript of the record contains what purports to be the evidence heard by the jury, exceptions reserved to evidence, admitted or excluded, the charge and exceptions, instructions asked and refused and exceptions. *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200. See, also, *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 51 L. Ed. 292.

21. Grant or denial of discharge.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127. See post, "Discharge of Bankrupt," XII.

22. Allowance or rejection of debt or claim exceeding \$500.—*Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116. See, also, *Randolph v. Scruggs*, 100 U. S. 533, 47 L. Ed. 1165.

In *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179, it was held that "the petition was incident to the claim, * * * and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25 regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars (\$500), or over,' within § 253a, and was not an independent ground of appeal."

"While the word 'claim' is used in its signification of the demand or assertion of a right in subd. 11 of § 2, in respect of 'all claims of bankrupts to their exemptions,' it is also used in many parts of the act, and, as we think, in § 25, as referring to debts (which by subsec. 11 of § 1 include 'any debt, demand or claim provable in bankruptcy'), presented for proof against estates in bankruptcy. *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. Ed. 1179; *In re Whitener*, 105 Fed. Rep. 189; *In re Columbia Real Estate Co.*, 112 Fed. Rep. 643, 645." *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

"The allowance or rejection of a

The usual rules as to the finality of judgments or decrees as determining their appealability apply to decisions of the bankruptcy court.²³

(2) *When to Be Taken.*—The appeal is to be taken within ten days after the judgment appealed from has been rendered.²⁴

debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the act of 1867 it was held that this court had no jurisdiction to review judgments of the circuit courts dealing with the action of the district courts in such allowance or rejection because they were not final. *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *Leggett v. Allen*, 110 U. S. 741, 28 L. Ed. 313. The jurisdiction now given is carefully restricted and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. *McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893." *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

Under act of 1867.—In *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60, the court, after setting out the provisions of the first and second clauses of the second section of the act of 1867, said: "Apart from those two provisions the third clause of the section provides that circuit courts shall also have concurrent jurisdiction with the district courts of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt transferable to or vested in such assignee. Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur, the party suing may, at his election, commence his suit either in the circuit or district court, and if in the latter, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the circuit court for re-examination, by writ of error, if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damage claimed amounts to more than five hundred dollars, and a writ of error is seasonably sued out and the plaintiff in error complies 'with the statutes regulating the granting of such suits,' or the appeal is claimed and the required notices are given within ten days from the judgment or decree." See, also, *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748.

Where, under the 41st section of the bankrupt act of 1867, a trial by jury is had in the district court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the circuit court when the debt or damages claimed amount to more than \$500; and if the court dismiss or declines to hear the matter, a mandamus will lie to compel it to proceed to final judgment. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

23. As to when judgments or decrees are final for the purpose of appeal, see the titles **APPEAL AND ERROR**, vol. 1, p. 333; **JUDGMENTS AND DECREES**.

A decree of the circuit court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree, is not such a final decree as can be appealed from to this court. *Pulliam v. Christian*, 6 How. 209, 12 L. Ed. 408.

24. Time of taking appeal under act of 1893, § 25a.—*Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127.

Claim of appeal, notice and entry under act of 1867 (Rev. Stat., § 4980-82).—By § 8 of the act of 1867, it was provided that "no appeal shall be allowed in any case from the district court to the circuit court unless it is claimed and notice given thereof to the clerk of the district court to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same." *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Bank v. Cooper*, 20 Wall. 171, 22 L. Ed. 273; *Morgan v. Thornhill*, 11 Wall. 65, 75, 20 L. Ed. 60; *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923; *Ex parte Wollen*, 104 U. S. 300, 26 L. Ed. 768; *Ex parte Mead*, 109 U. S. 230, 27 L. Ed. 914; *Bryar v. Campbell*, 177 U. S. 649, 44 L. Ed. 926.

"Proceedings under § 5081 for the re-examination of a claim filed against a

(3) *Hearing and Determination.*—Such appeal may be heard and determined by the appellate court in term or vacation as the case may be.²⁵

b. *From Final Decisions of Court of Appeals to United States Supreme Court*—(1) *When Proper.*—By § 25b of the bankrupt act of 1898, it is provided that from any final decision of a court of appeals, allowing or rejecting a claim under the bankrupt act an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States,²⁶ in the follow-

bankrupt's estate are in the nature of a suit against the assignee for the establishment of the claim. A creditor may move for the re-examination, and, under general order in bankruptcy No. 34, may be required to form the issue which is to be certified to the district court for determination, but the assignee alone can appeal from an order of allowance, and if the supposed creditor appeals the assignee must defend in the circuit court, where the proceedings are against him. Hence the necessity for notice to him in such cases; and, in our opinion, the words 'to the assignee or creditor, as the case may be,' in § 4981, mean to the assignee if the appeal is by the supposed creditor, and to the supposed creditor if it is by the assignee." *Ex parte Mead*, 109 U. S. 230, 27 L. Ed. 914.

The ten days' limitation for giving notice after the entry of the decree or decision from which the appeal from the district to the circuit court is taken, taken literally does not extend to writs of error, "but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word appeal at the commencement of the second clause means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that prescribed in the judiciary act or the act to amend the judiciary system." *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 267, 21 L. Ed. 493.

"The language of the statute is very strong and admits of no other interpretation. No appeal shall be allowed in any case from the district to the circuit court, unless it is claimed and notice given to the clerk, and also to the other party, within ten days after the entry of the decree or decision appealed from. The failure to give notice to the other party within the ten days, whether claimant or assignee, is equally fatal to the appeal, as the failure to give the notice to the clerk that the appeal is claimed. This is in harmony with the policy of the bankrupt law, second only in importance, as we have recently said in the case of *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636, to the policy of equal distribution, namely, the necessity of speedy disposition of the bankrupt's assets. In that case this same

provision for limiting the time for appeals is referred to as evidence of that policy." *Wood v. Bailey*, 21 Wall. 640, 641, 22 L. Ed. 689.

Under the eighth section of the bankrupt act, which enacts that "no appeal shall be allowed in any case from the district to the circuit court unless it is claimed and notice given thereof, * * * to the assignee * * * or to the defeated [sic] party in equity, within ten days after the entry of the decree or decision appealed from," the omission to give the notice within the ten days specified is fatal to the appeal. The word "defeated," in the above quotation, which, as to that word, follows both the Statutes at Large and the Revised Statutes, should be construed as meaning the "opposite," "adverse," or "successful" party. *Wood v. Bailey*, 21 Wall. 640, 641, 22 L. Ed. 689. See the title APPEAL AND ERROR, vol. 1, p. 333.

Statement of claim under Rev. Stat., § 4984, and proceedings thereon.—If a supposed creditor took an appeal from an order rejecting his claim, he must, under the provisions of § 4984, file in the clerk's office of the circuit court "a statement in writing, of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall be thereupon had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted in the usual manner in the courts of the United States." *Ex parte Mead*, 109 U. S. 230, 27 L. Ed. 914.

25. Time of hearing and determination under § 25a.—*Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127.

26. Under such rules and in such time prescribed by supreme court.—*Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128.

For enumeration of the general orders and forms in bankruptcy, adopted and established by the supreme court of the United States, Nov. 28, 1898, see 172 U. S. 653.

The time for taking an appeal under § 25b of the bankrupt act and general order in bankruptcy XXXVI runs from the entry of the original judgment or decree. *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128.

Such time, after its expiration, cannot be revived by applying for a rehearing

ing cases and no other: Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States;²⁷ or where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the bankrupt act throughout the United States.²⁸

nor can it be arrested by the court's order. *Conboy v. First Nat. Bank*, 203 U. S. 141, 414, 51 L. Ed. 128.

"Paragraphs 2 and 3 of General Orders in Bankruptcy, XXXVI, read: '2. Appeals under the act to the supreme court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the supreme court of the United States. '3. In every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States, on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.' The law provides that appeals shall be taken 'within such time as may be prescribed by the supreme court of the United States,' and by General Order XXXVI this court prescribed the time and limited it to thirty days, in harmony with the policy of the bankruptcy act, requiring prompt action and the avoidance of delay. The limitation has the same effect as if written in the statute, and the allowance of an appeal on certificate can not operate as an adjudication that it is taken in time." *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128.

27. Where amount in controversy exceeds two thousand dollars, etc.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128; *Hatchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

Generally, as to the amount in controversy as fixing appellate jurisdiction, see the title **APPEAL AND ERROR**, vol. 1, p. 333.

By § 9 of the act of 1867 it was provided that in cases arising under such act, no appeal or writ of error should be allowed in any case from the circuit courts to the supreme court of the United States unless the matter in dispute should

exceed two thousand dollars. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60.

Where a suit by or against an assignee, or by or against any person claiming an adverse interest in the property or rights of the bankrupt proceeded in the circuit court to a final judgment or decree and the debt or damage claimed or the matter in dispute exceeded the sum of two thousand dollars, exclusive of costs, there seems to have been no doubt that the judgment or decree might have been removed into the supreme court for re-examination by writ of error if the judgment was rendered in a civil action, or by appeal if the decree was entered in a suit of equity, as in other similar cases falling within the appellate jurisdiction of the supreme court. *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60. See also, *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748.

An appeal from a proceeding in bankruptcy disposing, under the first section of the bankrupt act, of a claim by an assignee in bankruptcy to a fund as the property of his bankrupt, which some time before the bankruptcy a firm of which the bankrupt was a member transferred to a third party, lies (other requisites allowing it), from the supreme court of the District of Columbia to this court. *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748.

An appeal by an assignee in bankruptcy lies here from the final decree of the circuit court, affirming that of the district court rendered when sitting in equity, against him for the payment of money, if the amount in controversy be sufficient. *O'Reilly v. Edrington*, 96 U. S. 724, 24 L. Ed. 659.

An appeal, where the amount in controversy is sufficient, lies to this court from a decree rendered by the circuit court, in the exercise of its appellate jurisdiction, in a suit wherein a bill in equity against the creditors of a bankrupt was filed and prosecuted to a final decree in the district court by his assignees, who prayed for a sale of his land, and an adjustment of the liens thereon arising from judgment, mortgage, or otherwise. *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444.

28. Certificate of justice of supreme court, etc.—*Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128.

(2) *Record on Appeal*.—By subdivision 3 of general order in bankruptcy, XXXVI, relating to appeals, it is provided that "in every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, state separately, and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."²⁹

c. *Necessity for Bond*.—Under the act of 1867 it was provided that applicants for an appeal from the district or circuit court, under the jurisdiction created by the bankrupt act must give bond.³⁰ By § 25c of the act of 1898 it is expressly provided that trustees shall not be required to give bond when they take appeals or sue out writs of error.⁴¹

4. *CERTIFICATION OF CONTROVERSIES TO UNITED STATES SUPREME COURT*.—By § 25d of the act of 1898, it is provided that controversies may be certified to the supreme court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.³²

29. *Record on appeal*.—*Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945; *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. Ed. 128. See, generally, the titles APPEAL AND ERROR, vol. 1, p. 333; FINDINGS OF COURTS; RECORDS.

30. *Necessity for bond*.—*Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

31. *Generally, as to necessity for appeal bonds, form and sufficiency of such bonds, etc.*, see the title APPEAL AND ERROR, vol. 1, p. 333.

32. *Certification of controversies to United States supreme court*.—*Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116; *Bardes v. First Nat. Bank*, 175 U. S. 526, 44 L. Ed. 261; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200. See, generally, the titles APPEAL AND ERROR, vol. 1, p. 333; CERTIORARI.

"By the fifth section of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, it was provided that appeals or writs of error might be taken from the district courts or from the circuit courts direct to this court, among other cases, in any case in which the jurisdiction of the court was in issue, but that in such cases the question of jurisdiction alone should be certified from the court below for decision; by the sixth section, that in cases made final in the circuit courts of appeals, those courts might at any time certify to this court any questions or propositions of law concerning which they desired instruction for the proper decision of the cases, and this court might answer the questions, or might require the whole record and cause to be sent up for consideration; and also that in respect of cases so made final, it should be competent for

this court to require by certiorari or otherwise any such case to be certified to this court for review and determination with the same power and authority as if it had been brought here by appeal or writ of error. It was early held under that act, *McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893, that appeals or writs of error in cases in which the jurisdiction of the court was in issue could only be taken directly to this court after final judgment; and subsequently in *United States v. Rider*, 163 U. S. 132, 41 L. Ed. 101, that review by appeal, writ of error, or otherwise, must be as prescribed by that act, and that the use of certificate was limited by it to the certificate by the courts below, after final judgment, of questions made as to their own jurisdiction, and to the certifying by the circuit courts of appeals of questions of law in relation to which the advice of this court was sought as therein provided. We there held that the act of March 3, 1891, covered the whole subject matter, and furnished the exclusive rule in respect of appellate jurisdiction, on appeal, writ of error or certificate. The bankruptcy act has made no change in this remark, and as this case has not gone to judgment, the certificate must be dismissed." *Bardes v. First Nat. Bank*, 175 U. S. 526, 44 L. Ed. 261.

"Section 6 of the act of March 3, 1891, has no application, as that refers to cases carried to the circuit court of appeals by appeal or writ of error. But in view of the terms of that act and of the nature of the writ, we have held that under a reasonable construction of subdivision d of § 25, certiorari lies to decrees in revision. *Bryan v. Bernheimer*, 175 U. S. 724, 44 L. Ed. 338; *S. C.*, 181 U. S. 188, 45 L. Ed. 814; *Moeller v. Nugent*, 180 U. S. 640, 45 L. Ed. 711; *S. C.*, 184 U. S. 1, 46 L. Ed. 403;

5. REVIEW OF DECISIONS OF STATE COURTS RELATING TO BANKRUPTCY.—For a full treatment of the jurisdiction of the supreme court of the United States to review decisions of state courts, see the title *APPEAL AND ERROR*, vol. 1, p. 333.

VI. General Provisions of Bankrupt Act Governing Procedure Thereunder.

A. Rules, Forms and Orders—By Whom Prescribed.—Under the act of 1841 it was made the duty of the district court in each district to prescribe rules and regulations and forms of proceedings in all matters of bankruptcy.³³ Under the present act it is provided that "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed and may be amended from time to time by the supreme court of the United States."³⁴

B. Computation of Time in Bankruptcy Proceedings.—Under the present bankrupt act it is provided that "whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday."³⁵

C. Notices to Creditors.—Necessity.—The bankrupt act expressly provides that creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of all examinations of the bankrupt; all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; all meetings of creditors; all proposed sales of property; the declaration and time of payment of dividends; the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; the proposed compromise of any controversy, and the proposed dismissal of the proceedings.³⁶

Louisville Trust Co. v. Cominger, 181 U. S. 620, 45 L. Ed. 1031; *S. C.*, 184 U. S. 13, 46 L. Ed. 413. In the case first cited it is pointed out that the circuit court of appeals treated the case as if before it on a petition for revision though it had been carried there by appeal, and we considered the decree as rendered in the exercise of the supervisory power. *Bryan v. Bernheimer*, 181 U. S. 188, 192, 193, 45 L. Ed. 814." *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

33. By the act of 1841, § 6, "it shall be the duty of the district court, in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules and regulations and forms shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms be substituted therefor." *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

34. To be prescribed and amended by supreme court.—Bankrupt act of 1898, § 30. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

For a full enumeration of the general orders and forms in bankruptcy, adopted and established by the supreme court of the United States, Nov. 28, 1898, see 172 U. S. 653. And see, also, the various sec-

tions in this title to which such orders and forms are applicable.

35. Computation of time.—Bankrupt act of 1898, § 31. See generally, the title *SUNDAYS AND HOLIDAYS*.

Under Revised Statutes, § 5013.—"Congress has also defined the meaning of certain terms employed in the bankrupt act, and has regulated the mode of computing time 'in all cases in which any particular number of days prescribed by the act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under the same for the doing of any act or for any other purpose,' the rule enacted being that the computation 'shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall be dies non within the judicial sense. Rev. Stat., § 5013, p. 974." *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130.

36. Notices to creditors.—Bankrupt act, 1898, § 58a. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. See, also, *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57. See post "Discharge of Bankrupt," XII; "Meetings of Creditors," XIV; "Final Reports and Accounts," XVI, E. 2, h; "Power to Arbitrate or Compromise Controversies," XVI, E, 1, c; "Sale of Prop-

Publication of Notices.—Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.³⁷

D. Oaths and Affirmations.—Oaths required by the bankrupt act, except upon hearings in court, may be administered by referees; officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; and diplomatic or consular officers of the United States in any foreign country. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.³⁸

E. Evidence in Proceedings under Bankrupt Act—1. **POWER OF COURT TO COMPEL ATTENDANCE OF WITNESSES.**—The court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration under the act.³⁹

2. **DEPOSITIONS.**—The right to take depositions in proceedings under the bankrupt act are to be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions except as otherwise provided in the act.⁴⁰

3. **EFFECT OF CERTIFIED COPIES OF PROCEEDINGS, ORDERS, ETC.**—**Admissibility of Certified Copies as Evidence.**—It is expressly provided by the bank-

erty," XVII, C; "Declaration and Payment of Dividends," XVII, F.

Under the act of 1867 it was provided that "Where the debts exceed three hundred dollars it is the duty of the judge to issue a warrant, directed to the marshal, authorizing him to publish notices in such newspapers as the warrant specifies, and to serve written or printed notices on all creditors whose names are included in the schedule or whose names may be given to him in addition by the debtor, and to give such personal or other notice as the directions of the warrant require. (1) That a warrant in bankruptcy has been issued against the estate of the debtor. (2) That the payment of any debts or the delivery of any property belonging to such debtor to him or the transfer of any property by him are forbidden by law. (3) That a meeting of the creditors of the debtor will be held at a court of bankruptcy to be holden at the time designated in the warrant. Due notice to the creditors in that regard is indispensable, as the provision is that if it be not given the meeting shall be adjourned and a new notice given as required." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

37. Publication of notice.—Bankrupt act of 1898, § 58b. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

38. Oaths and affirmations.—Bankrupt act, 1898, § 20. See, generally, the titles **OATH; PERJURY.**

In *United States v. Passmore*, 4 Dall.

372, 1 L. Ed. 871, decided under the bankrupt law of 1800, it was held that perjury under such law was not indictable under the act of April 30, 1790, § 18, as that section applied only to perjuries in course of judicial proceedings.

39. Compulsory attendance of witnesses.—Bankrupt act 1898, § 21a. See the titles **EVIDENCE; WITNESSES.**

As to examination of bankrupt, see post, "Examination of the Debtor upon Issue of Solvency," VII, B, 9, c; "Duties of Bankrupt," XI, A.

Amendment of 1903.—By the act of 1903 subdivision a of § 21 was amended so as to read as follows: "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt." (32 Stat. L. 798.) Act of February 9, 1903, ch. 487 (Amending Bankruptcy Act of July 1, 1898), 38.

40. Laws governing depositions.—Bankrupt act of 1898, § 21b. See, generally, the title **DEPOSITIONS AND INTERROGATORIES.**

rupt act that certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.⁴¹

F. Effect upon Proceedings of Death or Insanity of Bankrupt.—The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane. In case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence.⁴²

VII. Procedure to Obtain Adjudication of Bankruptcy.

A. Voluntary Proceedings—1. **BY WHOM INSTITUTED.**—By § 59 of the bankrupt act of 1898 it is provided that "any qualified person may file a petition to be adjudged a voluntary bankrupt."⁴³

2. **WHERE INSTITUTED.**—Generally, as to the jurisdiction of courts of bankruptcy as dependent upon the residence or place of business of the debtor, see ante, "Adjudication of Bankruptcy," V, A, 2, b, (1).

3. **PETITION**—a. *In General.*—The adjudication of voluntary bankruptcy is to be made upon the filing of a voluntary petition by the debtor.⁴⁴

b. *Form and Requisites*—(1) *Form.*—The form of the voluntary petition is prescribed by the general orders and forms in bankruptcy established by the United States supreme court.⁴⁵

(2) *Essential Allegations.*—A voluntary petition in bankruptcy should make the proper averments as to the place of business, residence or domicile, of the applicant within the judicial district for the prescribed time prior to the filing of the petition.⁴⁶ It should also allege that the petitioner owes debts which he

41. Admissibility in evidence of certified copies of proceedings, papers, etc.—Bankrupt act, 1898, § 21d. See, generally, the titles DOCUMENTARY EVIDENCE; EVIDENCE; RECORDS.

"Proceedings in bankruptcy are deemed to be matters of record, but they are not required to be recorded at large. Instead of that, the requirement is that they shall be filed, kept, and numbered in the office of the clerk of the court, a short memorandum thereof being kept in books provided for the purpose; and the express provision of the act of congress is that 'copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated.' 14 Stat. 535; Rev. Stat., § 4992." *Turnbull v. Payson*, 95 U. S. 418, 422, 24 L. Ed. 437.

Effect of certified copy of order approving trustee's bond.—See post, "Rule Stated," XVI, E, 1, b, (1), (a), aa.

Effect of certified copies of order relating to composition or discharge.—See post, "Discharge of Bankrupt," XII; "Compositions with Creditors," XVIII.

42. Proceedings not abated by death or insanity of bankrupt.—Bankrupt act of 1898, § 8.

43. As to who may become a voluntary bankrupt, see ante, "Who May Become Bankrupts," III.

Petition by officer of corporation.—Un-

der the act of 1867, corporations, whether moneyed, business, or commercial, and joint-stock companies, were subject to the provisions of the bankrupt act; and the 37th section of such act provided to the effect, that upon the petition of any officer of such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, the like proceedings should be had and taken as were required in other cases of voluntary bankruptcy. *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

As to voluntary petition by one partner constituting involuntary bankruptcy as to copartners, see post, "By Whom Instituted," VII, A, 1.

44. Upon petition.—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Proceedings in bankruptcy are deemed to be commenced from the filing of the petition, in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor. *United States v. Heron*, 20 Wall. 251, 22 L. Ed. 275.

45. Form of petition.—See 172 U. S. 653, 667.

46. Allegations as to place of business, residence, etc.—Form Number One of the General Orders and Forms in Bankruptcy, 172 U. S. 667. And see ante, "Adjudication of Bankruptcy," V, A, 2, b, (1).

is unable to pay in full,⁴⁷ and "that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law."⁴⁸

4. **NOTICE TO CREDITORS.**—The allegations of the petition as to the petitioner's indebtedness, and his willingness to surrender his property, establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition.⁴⁹ These are not issuable facts, and notice is unnecessary, unless dismissal is sought, when notice is required.⁵⁰

5. **HEARING AND ADJUDICATION.**—Upon the filing of a petition, the judge shall hear the petition and make the adjudication or dismiss the petition.⁵¹

B. Involuntary Proceedings.—1. **JURISDICTION.**—**In General.**—Generally as to jurisdiction of involuntary proceedings in bankruptcy as dependent upon the residence or place of business of the debtor, see ante, "Adjudication of Bankruptcy," V, A, 2, b, (1).

Transfer of Cases Commenced in Different Courts.—In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction, the case shall be transferred, by order of the courts relinquishing jurisdiction, and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.⁵²

2. **AGAINST WHOM INSTITUTED.**—**In General.**—A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy.⁵³

3. **BY WHOM INSTITUTED.**—a. **In General.**—**Statutory Provisions.**—Under the present bankrupt act three or more creditors who have provable claims⁵⁴

47. **Inability to pay debts.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

48. **Willingness to surrender property.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Under the act of 1867 the debtor was required to aver that "he is unable to pay all his debts in full, and is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act." *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

49. **Conclusiveness of allegations of petition.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723. And see *Dent v. Ferguson*, 132 U. S. 50, 33 L. Ed. 242.

"As Judge Lowell said: 'He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property.' In *re Fowler*, 1 Lowell 161." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

50. **Notice unnecessary unless dismissal sought.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

51. **Hearing and adjudication or dismissal.**—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"Adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for a distribution among all his creditors. After adjudication, the creditors are given at least ten days' notice by publication and

by mail of the first meeting of creditors, and of each of the various subsequent steps in administration." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Meaning of "adjudication."—By the act of 1898, § 1, (2), it is provided that "adjudication" shall mean the date of the entry of a decree that the defendant in a bankruptcy proceedings, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed.

52. **Transfer of cases commenced in different courts.**—Bankrupt act of 1898, § 32.

53. **Against whom instituted.**—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

Provisions of act of 1867 applicable to corporations as to natural persons.—In *New Lamp Chimney Co. v. Ansonia Brass, etc. Co.*, 91 U. S. 656, 23 L. Ed. 336, it was held that the like proceedings in involuntary bankruptcy shall be had and taken in the case of corporations as provided in the case of debtors. And that all the provisions applying to the debtor, or setting forth his duties, shall apply to the officers of such corporation.

Generally, as to who may be adjudged involuntary bankrupts, see ante, "Who May Become Bankrupts," III.

54. **Who may institute.**—Bankrupt act of 1898, § 59b.

"Any creditor of another may institute proceedings in bankruptcy against his debtor, if he have probable cause to believe that his debtor has committed an act of bankruptcy; but a condition precedent to such right is, that he be, in fact, a

against any person which amount in the aggregate, in excess of the value of securities, held by them, if any, to five hundred dollars or over;⁵⁵ or if all of the

creditor." Dissenting opinion of Bradley, J., in *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116.

As to what are "provable claims" within the meaning of the act, see post, "What Debts May Be Proved," XV, A, 2.

Creditor induced by fraud to release debt.—Where one creditor has been induced by fraudulent representations of another creditor, who wishes to get into his own hands all the property of their common debtor, to release his debt, and the second creditor does so get the property, and thus obtains a preference, the creditor who has been thus, as above said, induced to release his debt, may disregard his own release, and petition that his debtor be decreed a bankrupt. *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

If on a petition and other proceedings regular in form, a decree in bankruptcy is made in such a case, and an assignee in bankruptcy is appointed in a way regular on its face, the decree in bankruptcy, though it be a decree pro confesso, cannot, in a suit by the assignee to recover from the preferred creditor the property transferred, be attacked on the ground that the party petitioning had released his debt, was no creditor, that his petition was accordingly fraudulent, and that the decree based on it was void. *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

Petition under act of 1837 against corporations without specifications as to number of creditors or amount of debts.—In *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336, it was held that under the act of 1867, the petition for involuntary bankruptcy against a corporation or joint-stock company might be made and presented by any creditor or creditors in the manner provided in respect to debtors, without any specifications as to the number of the creditors or the amount of their debts.

55. Bankrupt act of 1898, § 59b.

Under the act of 1867, § 39, it is provided that any person having committed any of the acts before specified, "shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed." *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520. See, also, *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Under the thirty-ninth section of the bankrupt act, enacting that a person may,

in certain events, be decreed a bankrupt, against his will, "on the petition of one or more of his creditors the aggregate of whose debts provable under this act amounts to at least \$250," it is not necessary that the principal of the debt should amount to \$250. If with interest plainly due on it, according to what appears on the face of the petition, it amounts to at least \$250, that authorizes the decree. *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

In a case where the decree is thus authorized, in other words, where jurisdiction exists in the district court of the United States to decree a person a bankrupt, and the person has been decreed a bankrupt accordingly, a party against whom the assignee in bankruptcy brings suit in another court, not appellate, to recover assets of the bankrupt's estate, cannot show that payments made on account had reduced the petitioning creditor's debt so low as that the bankrupt did not owe as much as the petitioning creditor in his petition alleged. The finding of the district court of the existence of a debt to the amount of \$250, due from the party proceeded against to the petitioning creditor, is conclusive, in a collateral action, of the fact that a debt of that amount was due. *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

"We are all, therefore, clearly of the opinion that accrued interest constitutes part of a debt provable against the estate of the bankrupt, and if it does it is necessarily part of a debt which may be used to uphold involuntary proceedings. It is only necessary, upon this point of jurisdiction, that the petitioning creditors should have owing to them from the debtor they wish to pursue, debts provable under the act to the required amount. The English cases referred to in the argument, in our opinion, have no application here. They are founded upon the English statutes and the established practice under them. Our statute is different in its provisions and requires, as we think, a different practice. This is conclusive of the case. The petition filed in the bankrupt proceedings distinctly averred that the debts due the petitioner exceeded the sum of \$250; and if interest is added, the particular indebtedness specified amounts to more than that sum. The court found this allegation true. That finding is conclusive in a collateral action. We have so decided in *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520, at the present term. Where the record shows jurisdiction, an adjudication of bankruptcy can only be assailed by a direct proceeding in a competent court." *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

Institution of proceedings by creditor at

creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.⁵⁶

b. *Computation of Number of Creditors.*—In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.⁵⁷

c. *Right of Other than Original Petitioners to Appear and Join in Petition, etc.*—Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petitioner.⁵⁸

4. **WHEN TO BE INSTITUTED.**—A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act.⁵⁹

5. **PETITION**—a. *Definition.*—A petition in a proceeding in involuntary bankruptcy is defined in § 1, of the act of 1898, cl. 20, to mean “a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named.”⁶⁰

debtor's instigation and with promise of payment in full.—The sale of a bankrupt's property under proceedings in involuntary bankruptcy cannot be invalidated by the fact that he, before their commencement, had promised to pay in full his debt to a creditor who, at his instance, instituted them. *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895.

56. Bankrupt act, 1898, § 59b.

Voluntary petition by one partner—Compulsory as to copartner.—A voluntary petition by one of two partners alleging the refusal of the copartner to join, making him a party and praying that he be adjudged a bankrupt, constitutes a case of involuntary or compulsory bankruptcy as to the copartner. *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654.

“We do not doubt that *Medsker's* was a case of involuntary or compulsory bankruptcy within the meaning of this amendment. The distinction intended by this language is clearly between the cases in which the bankrupt himself and of his own volition initiates proceedings in bankruptcy, and those in which they are commenced by someone else against him. In the one case it is voluntary and in the other compulsory. It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by anyone else; and it is compulsory and involuntary if he refuses to join in such case and is forced into it, as much as in any other enforced bankruptcy.” *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654.

57. **Computation of number of creditors who must join.**—Bankrupt act of 1898, § 59e.

58. **Right of other than original petitioners to appear, etc.**—Bankrupt act of 1898, § 59f.

As to allowance of time for other petitioners to join, where the answer denies that the aggregate of the claim of the original petitioner amounted to one-third of the debts provable against the debtor, see post, “Amendment of Petition,” VII. B, 5, c.

59. **Within four months after commission of act of bankruptcy.**—Bankrupt act of 1898, § 3b. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

This statement in the statute, by way of recital, that a petition may be filed “against a person who is insolvent and who has committed an act of bankruptcy,” was not designed to superadd a further requirement to those contained in paragraph a of § 3, as to what should constitute acts of bankruptcy. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098. See ante, “Effect as Dependent on Insolvency of Debtor,” IV, B.

Time of filing petition under act of 1867.—Under the act of 1867, § 39, a petition of the creditors to have one adjudged an involuntary bankrupt, on the ground that he has committed one or more of the acts of bankruptcy specified in such act, must be brought within six months after the acts of bankruptcy shall have been committed. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

60. **“Petition” as defined in act of 1898, § 1, cl. 20.**—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

Effect of filing petition as a caveat—In effect an attachment and injunction.—“It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction.” *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; and on adjudication, title to the bankrupt's property became vested

b. *Form and Requisites*—(1) *Form*.—The proper form of a creditor's petition for involuntary bankruptcy is laid down in the general orders and forms in bankruptcy established by the United States supreme court.⁶¹

(2) *Petitions to Be Filed in Duplicate*.—Under the present bankrupt act it is required that the petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.⁶²

(3) *Essential Allegations*.—**As to Commission of Act of Bankruptcy**.—The petition should allege the commission of an act of bankruptcy by the debtor therein named.⁶³

Allegations as to Insolvency.—While the rules in bankruptcy promulgated by the supreme court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer, yet these rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.⁶⁴

c. *Amendment of Petition*.—A petition for involuntary bankruptcy may be amended on leave of court.⁶⁵

6. **DEPOSITS FOR FEES AND COSTS**.—The petitioner must at the time of filing the petition make a deposit to cover the fees of the referee, clerk and trustee.⁶⁶

7. **SERVICE OF PETITION AND WRIT OF SUBPOENA**.—Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be

in the trustee, §§ 70, 21c, with actual or constructive possession, and placed in the custody of the bankruptcy court." *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405. See post, "Title and Rights as to Property of Bankrupt," XVI, E. 1, b.

61. **Form of petition**.—Form Number Three, 172 U. S. 681. And see *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

62. **Necessity for duplicate petition**.—Bankrupt act, 1898, § 59c.

As to service of petition on bankrupt, etc., see post, "Service of Petition and Writ of Subpoena," VII, B. 7.

63. **Allegation of act of bankruptcy**.—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

64. **Allegation as to insolvency**.—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

65. **Amendment of petition**.—*International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866. See, generally, the title **AMENDMENTS**, vol. 1, p. 288.

Effect of amendment upon continuity of proceedings.—On the 23d of February, 1875, certain creditors filed their petition in the district court of the United States, praying that A. should be declared a bankrupt. On the 9th of March he appeared, and leave was given them to amend their petition, by adding new causes of bankruptcy or otherwise. On the 16th of April, he filed his answer, denying that the

aggregate of the claims of the petitioners amounted to one-third of the debts provable against him. Time was thereupon allowed for other creditors to unite with the petitioners, and the previous leave to amend the petition was continued. On the 22d of that month one B. was permitted to unite with the petitioning creditors, and their petition was amended by alleging that A. within six months before the petition was filed, committed, by the nonpayment of his commercial paper, an act of bankruptcy. The amount of A's debts then represented, was sufficient, and upon the alleged act of bankruptcy set forth in the amended petition, A. was duly declared a bankrupt. On the 12th of July, 1875, an assignment was made to C. as assignee which included all the property and effects of every kind in which A. "was interested or entitled to have" on the 23d of February, 1875. C. filed, July 7, 1877, his bill to reach certain securities which had been transferred by A. on or about March 20, 1875. Held: 1. That the continuity of the proceedings in bankruptcy was unbroken and that the assignment was operative, according to its terms, although the act upon which the adjudication was had was first alleged in said amendment to the petition. 2. That C's suit was not barred by the Statute of Limitations. *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

66. **Deposit for fees of referee, clerk, and trustee**.—Bankrupt Act of 1898, § 40a, 48a, 52.

made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in courts of the United States,⁶⁷ except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.⁶⁸

8. APPEARANCE AND PLEADING BY BANKRUPT OR CREDITORS—*a. Right to Appear and Plead to Petition.*—Upon the filing and service of a petition for involuntary bankruptcy, the bankrupt, or any creditor, may appear and plead to the petition within a certain time after the return day, or within such further time as the court may allow.⁶⁹

b. Verification of Pleading.—All pleadings in involuntary proceedings in bankruptcy setting up matters of fact are to be verified under oath.⁷⁰

c. Solvency as a Defense.—Under the present bankrupt act it is provided that it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of § 3 of the act, to allege and prove that the party proceeded against was not insolvent as defined in the act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed.⁷¹ Under said first subdivision, the burden of proving solvency is upon the alleged bankrupt.⁷²

9. HEARING AND ADJUDICATION—*a. Duty of Judge to Determine Issues Where Allegations of Petition Controverted.*—If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issue presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by the act,⁷³ and shall make the adjudication or dismiss the petition.⁷⁴

67. Service of petition and writ of subpœna.—Bankrupt Act of 1898, § 18a. See, generally, the title SUMMONS AND PROCESS.

68. Bankrupt Act of 1898, § 18a.

69. Appearance and plea to petition.—Bankrupt Act of 1898, § 18b.

Appearance of debtor as waiver of notice.—By § 41 of the act of 1867, Rev. Stat., § 5026, the appearance and consent of the debtor were made a waiver of other notice. *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83.

Amendments of §§ 18a, 18b, by act, 1903.—By the act of 1903 subdivisions a and b of § 18 were amended so as to read as follows: "a. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the

return day shall be ten days after the last publication unless the judge shall for cause fix a longer time." "b. The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow." (32 Stat. L. 798.) Act of February 9, 1903, ch. 447 (amending Bankruptcy Act of July 1, 1898), 38.

70. Verification of pleadings.—Bankrupt Act of 1898, § 18c. See, generally, the title PLEADING.

71. Solvency as a defense.—Act, 1898, § 3c. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

72. Burden of proof upon bankrupt.—*West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098; *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

73. Duty of judge to determine issues.—*Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200; *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193. See post, "Jury Trial," VII, B, 9, b.

74. Where allegations of petition controverted.—Bankrupt Act of 1898, § 18d. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

"Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, but the forty-first section of the bankrupt act expressly provides that the court shall, if the debtor, on the return day, or day of hearing, 'so demand in writing,' order a

b. *Jury Trial*—(1) *Right to Jury Trial*—(a) *In General*.—Under the present bankrupt act a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as in the act otherwise provided,⁷⁵ and any act of bankruptcy alleged in such petition to have been committed,⁷⁶ upon filing a written application therefor at or before the time within which an answer may be filed.⁷⁷

(b) *Waiver of Right*.—If such application is not filed within such time, a trial by jury shall be deemed to have been waived.⁷⁸ The right to submit matters in controversy, or an alleged offense under the bankrupt act, to a jury is to be determined and enjoyed, except as provided by such act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.⁷⁹

(2) *Manner of Securing Jury*.—Where in involuntary bankruptcy proceedings the right to a jury trial exists, if a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a cir-

trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the alleged fact of such alleged bankruptcy. Regulations are also enacted as to the matters open to inquiry and the course of the trial, as follows; that if upon such hearing or trial, the debtor proves to the satisfaction of the court, 'when the hearing is summary, or of the jury, if one is demanded,' that the facts set forth in the petition are not true, or that he, the debtor, has paid and satisfied all liens upon his property, in case the existence of such liens is the sole ground of the petition, the proceedings shall be dismissed and the respondent shall recover costs." *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493. See the title APPEAL AND ERROR, vol. 1, p. 333.

75. *Right to jury trial on question of insolvency*.—Bankrupt Act 1898, § 19a. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

76. *Jury trial as to commission of act of bankruptcy*.—Bankrupt Act of 1898, § 19a. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

77. *Necessity for written application*.—Bankrupt act of 1898, § 19a. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200; *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 51 L. Ed. 292. See, also, *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

"The right to a trial by jury on written application thus given is absolute and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, or bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases." *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200. See, also, *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 51 L. Ed. 292.

"The bankruptcy courts act under specific statutory authority, and when on an

issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Parsons v. Bedford*, 3 Pet. 433, 448, 7 L. Ed. 732; *Duncan v. Landis*, 106 Fed. Rep. 839." *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

By § 41 of the bankruptcy act of 1867 it was provided that the court should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

"Going, then, to the bankrupt law, we find, Rev. Stat., § 5026, that in cases of involuntary bankruptcy 'the court shall proceed summarily to hear the allegations of the petitioner and the debtor,' or 'shall, if the debtor * * * so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy.' And, also, that 'if upon the hearing or trial, the facts set forth in the petition are found to be true, * * * the court shall adjudge the debtor to be a bankrupt.' Section 5028. From this it is clear that the trial by jury is as much before the court 'when sitting as a court of bankruptcy,' and as much a part of the suit in bankruptcy, as the summary hearing by the court is when a jury shall not be demanded." *Hill v. Thompson*, 94 U. S. 322, 24 L. Ed. 193.

78. *Waiver by failure to file application*.—Bankrupt act of 1898, § 19a. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.

79. *Application of United States laws relating to trial by jury*.—Bankrupt act of 1898, § 19c. *Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200. See, generally, the title JURY.

cuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.⁸⁰

c. *Examination of the Debtor upon Issue of Solvency.*—Under the present bankrupt act, whenever a person against whom a petition has been filed as provided under the second and third subdivisions of § 3 of the act, relating to transfers while insolvent with intent to prefer certain creditors, or the suffering or permitting while insolvent, any creditor to obtain a preference through legal proceedings, takes issue with and denies the allegations of his insolvency, it is his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.⁸¹

VIII. Schedule of Property.

A. *Necessity.*—Under the bankrupt act the bankrupt is required to prepare, make oath to, and file in court, within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property.⁸² To the neglect of this duty, the law attaches a punitive consequence.⁸³

B. *Form and Contents.*—The schedule should show the amount and kinds of property, the location thereof, its money value in detail, and a list of the bankrupt's creditors, showing their residence, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.⁸⁴

80. *How jury secured.*—Bankrupt Act of 1898, § 19b. *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

81. *Attendance of debtor and submission to examination.*—Bankrupt Act of 1898, § 3d. *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098. See *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200.

"This manifestly only refers to enumerations 2 and 3 found in paragraph a, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent." *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098.

82. *Necessity for schedule.*—Bankrupt Act of 1898, § 7, cl. 8. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Preparation by messenger and assignee in absence of bankrupt.—Under Rev. Stat., §§ 5030 and 5031, the law provided that the order of adjudication should require the bankrupt to deliver a schedule of creditors and an inventory and valuation of his estate, and if the bankrupt was absent or could not be found, such schedule and inventory should "be prepared by the messenger and the assignee from the best in-

formation they can obtain." *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791.

83. *Punishment for neglect of duty.*—*Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

84. *Form and contents of schedule.*—Bankrupt Act of 1898, § 7, cl. 8. *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Under the act of 1867, "persons applying for the benefit of the bankrupt act are required to annex a schedule to the petition, verified by oath, containing a full and true statement of all their debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact must be so stated, and the sum due to each, and the nature of each debt or demand, whether found on written security, obligation, contract, or otherwise, and also the true cause or consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Statement of nature of debt under act of 1841.—A bankrupt is bound to state, upon his schedule, the nature of a debt if

IX. Protection of Property and Rights of Creditors Pending Adjudication and Appointment of Trustees.

A. Seizure, Custody and Release of Bankrupt's Property—1. **SEIZURE AND CUSTODY OF PROPERTY BY COURT**—a. *In General*.—A court of bankruptcy has the power, both pending the adjudication in bankruptcy,⁸⁵ and after the adjudication of bankruptcy and pending the appointment of a trustee,⁸⁶ upon proper showing as to probable loss of or injury to such property,⁸⁷ and the giving of a suitable bond,⁸⁸ to issue a warrant to the marshal, commanding him to take pos-

it be a fiduciary one. Should he omit to do so, he would be guilty of fraud, and his discharge will not avail him; but if a creditor, in such case, proves his debt and receives a dividend from the estate, he is estopped from afterwards saying that his debt was not within the law. But if the fiduciary creditor does not prove his debt, he may recover it afterwards from the discharged bankrupt, by showing it was within the exceptions of the act. *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

"The bankrupt is bound to show on his schedule the nature of his debts, at least so far as to enable the court to take jurisdiction of them. If, for instance, he owe a debt as executor, and he state it on his schedule as an ordinary debt, he commits a fraud on the law and the discharge cannot avail him. If, in this respect, he suppress the truth or state falsehood, he is guilty of fraud, and this may be shown against his discharge." *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

Omissions from schedule.—Where a person took the benefit of the bankrupt law of the United States; omitted in first schedule of property, to take any notice of a claim which he had against the Mexican Republic, for the unlawful seizure of the cargo of a vessel; filed an amended schedule, in which he mentioned the claim so indistinctly as to give no information of its value, although he was then prosecuting it before the board of commissioners; concealed the evidence of the property, so that the assignee in bankruptcy reported that it was of no value, and sold the whole, for a nominal consideration, to the sister of the bankrupt, who afterwards transferred it to him; the purchase was fraudulent, under the 4th section of the bankrupt law, and also by the general principles of equity. *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77.

As to omissions from schedule as affecting discharge, see post, "Discharge of Bankrupt," XII.

As to omissions from schedules as amounting to fraudulent concealment taking an action from the operation of Rev. Stat., § 5057, see post, "Limitations," XVI, F, 2.

85. Power of court to take possession pending adjudication.—Bankrupt Act of 1898, §§ 3e, 69. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175;

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405. See, also, *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

86. After adjudication of bankruptcy and pending appointment of trustee.—Power to make such seizure after an adjudication of bankruptcy and before the appointment of a trustee rests on the authority given to the court of bankruptcy, by cl. 3 of § 2, of the act of 1898, to "appoint receivers or marshals, upon application of parties in interest, in case the courts will find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814. See ante, "Appointment of Receivers or Marshals," V, A, 2, b. (3).

The bankrupt act of 1867 contained a similar provision. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277.

87. Showing as to probable cause.—Under § 69 of the bankrupt act of 1898 the warrant of seizure is to be issued only on satisfactory proof, by affidavit, that the bankrupt against whom an involuntary petition has been filed and is pending "has committed an act of bankruptcy, or has neglected or is neglecting or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value."

Under the bankrupt act of 1867, ch. 176, § 40, it was provided that the court might issue the warrant upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal or to make any fraudulent conveyance of his property. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

88. Requirement of bond as condition of taking charge of property prior to adjudication.—By § 3e of the bankrupt act of 1898 it is provided that "whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a rehearing on the petition, the petitioner

session of all the property of the bankrupt and hold the same subject to the further orders of the court.⁸⁹

b. *What Property May Be Seized under Warrant.*—Under the warrant issued by the court, it is the duty of the marshal to take into his possession the bankrupt's property wherever he may find it.⁹⁰ It has been held, however, that the

or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment in the case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt." See *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

By § 69 of the bankrupt act of 1898 providing for the issuance of a warrant to the marshal to seize and hold, subject to further orders, the property of a bankrupt against whom an involuntary petition has been filed and is pending, it is further provided that "before such warrant is issued the petitioner applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages, as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

Sections 3e and 69 not applicable after adjudication of bankruptcy.—In *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, it was held that the provisions of §§ 3e and 69 of the bankrupt act of 1898, each relate to applications to take charge of and hold property of a bankrupt after the petition and before the adjudication in bankruptcy. The provisions of these sections, requiring the applicants to give bond for damages, have no application to a case where there has been an adjudication of bankruptcy, and the property thereby brought within the jurisdiction of the court of bankruptcy.

Duty of commissioners under act, 1800.—"The fifth section (of the act, 1800) declares that it shall be the duty of the commissioners, after the party has been declared a bankrupt, 'to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, etc.; and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed.'" *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

89. Issuance of warrant.—Bankrupt Act of 1898, § 69, bankrupt act of 1867, ch. 176,

§ 40. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984; *Leroux v. Hudson*, 109 U. S. 468, 469, 27 L. Ed. 1000. *Schoot v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003.

90. Seizure of bankrupt's property wherever found.—*Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277.

Seizure of bankrupt's property in hands of third persons.—"The bankrupt act of March 2, 1867, c. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the court might issue a warrant to the marshal commanding him 'forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.' 14 Stat. 536; Rev. Stat., § 5024. It was held by the court of appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle v. Sharpe*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion, said: 'The act of congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provi-

marshal does this on his own responsibility for not only a faithful but a correct judgment in deciding what property to seize,⁹¹ and that he is liable to suit if by mistake he takes possession of property not liable to seizure.⁹²

2. **RELEASE OF PROPERTY ON BOND BY BANKRUPT.**—Property seized under warrant from the court shall be released, if the bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property or pay the value thereof in money to the trustee in the event he is adjudged a bankrupt pursuant to such petition.⁹³

3. **ALLOWANCE OF COSTS, EXPENSES AND DAMAGES OCCASIONED BY SEIZURE.**—When a petition has been filed for the purpose of having another adjudged a bankrupt and an application has been made and granted to take charge of and hold the property of the alleged bankrupt, pending a hearing on the petition, if such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in the bond given on the application.⁹⁴

B. Injunctions to Restrain Interference—1. **JURISDICTION OF BANKRUPTCY COURT TO RESTRAIN BY INJUNCTION.**—It is expressly provided by the Revised Statutes of the United States that the writ of injunction shall not be

sional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it.' *Sharpe v. Doyle*, 102 U. S. 686, 689, 690, 26 L. Ed. 277. A like decision was made in *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984." *Bryan v. Bernheimer*, 181 U. S. 188, 195, 45 L. Ed. 814.

"In the opinion in *Bardes v. First Nat. Bank*, 178 U. S. 524, 538, 44 L. Ed. 1175, it was indeed said: 'The powers conferred on the courts of bankruptcy by clause 3 of § 2, and by § 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse

claimant, and have no bearing upon the question in what courts the trustee may sue him.' But the remark, 'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment." *Bryan v. Bernheimer*, 181 U. S. 188, 197, 45 L. Ed. 814.

91. **Responsibility of marshals for improper seizure.**—*Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277.

92. **Liability to suit.**—*Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003. See, also, *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

Bankruptcy court will not enjoin action of trespass against marshal in state court.—The fact that the provisional warrant issued from a federal court, will not protect the marshal from suit in a state court for his tort in levying it upon property not liable, and the bankruptcy court will not protect him by enjoining such action of trespass. *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003.

93. **Release of property on bond from bankrupt.**—Bankrupt Act of 1898, § 69.

94. **Allowance of costs and damages for seizure of property.**—Bankrupt Act of 1898, § 3e. See *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814.

By § 69, of the act of 1898, the bond is conditioned "to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." See ante, "In General," IX, A, 1, a.

granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.⁹⁵ A judge of a court of bankruptcy may issue an injunction to stay proceedings of a court or officer of the United States, or of a state,⁹⁶ and is authorized to compel persons who have forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody.⁹⁷ The bankruptcy court has, however, no authority to issue an injunction to restrain proceedings of a state court at the instance of a purchaser at a bankruptcy sale, or of his vendee.⁹⁸

2. HEARING AND DECISION ON APPLICATION.—By clause 3 of the twelfth general order in bankruptcy, applications to the court of bankruptcy for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge; but he may refer such an application,

95. Prohibition of injunction except where authorized by bankrupt law.—Rev. Stat. of the United States, § 720. *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Ex parte Schwab*, 98 U. S. 240, 25 L. Ed. 105; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Sargent v. Helton*, 115 U. S. 348, 29 L. Ed. 412; *Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981; *United States v. Parkhurst-Davis Mercantile Co.*, 176 U. S. 317, 44 L. Ed. 485; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122. See, generally, the title INJUNCTIONS.

"By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in § 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law." *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345. See, also, *Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981.

As to the rights of the court first obtaining rightful jurisdiction, see post, "As Divesting Jurisdiction of State Courts over Subject Matter," XXI, B, 1. And see, generally, the titles COURTS; JURISDICTION.

The court of bankruptcy was authorized, by § 40 of the act of 1867, § 5024, Rev. Stat., where a petition in involuntary bankruptcy was filed, to restrain all persons, by injunction, from interfering with the debtor's property. *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Sargent v. Helton*, 115 U. S. 348, 29 L. Ed. 412.

Power of bankruptcy court under act of 1898, § 2, cl. 15 to make orders, etc.—Among the powers specifically conferred upon the court of bankruptcy by § 2 of the bankrupt act of 1898 are to "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary

for the enforcement of the provisions of this act." *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183. See ante, "As to Orders, Process and Judgments Necessary to Enforcement of Act," V, A, 2, b, (15).

96. Injunction to stay proceedings of court or officer of the United States or state.—*White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122.

97. To compel restoration of property taken from custody of court.—*White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122.

Facts held not to authorize relief by suit in bankruptcy court.—In *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000, the marshal seized certain goods under warrant of the bankruptcy court, and was shortly thereafter made defendant in an action of trespass for such seizure. After adjudication of bankruptcy, the goods were delivered by the marshal to the assignee, and were by him sold under order of the court and the proceeds held by him to be applied as part of the estate of the bankrupts if the title should be found to be in the assignee. The assignee together with the marshal and his deputies brought a suit in equity in the United States circuit court praying an injunction to restrain the plaintiffs in the action for trespass from further prosecuting their suit, and asking that the title of the assignee to the goods or the funds arising therefrom be quieted and decreed to be perfected in him. On appeal from a decree granting this relief, it was held, that the bankruptcy court had no jurisdiction to grant such relief, there being no claim adverse to the interest of the assignee, no interference with the possession of the latter, and there being no occasion for the latter to sue to recover the property in question.

98. Bankruptcy court will not enjoin proceedings in state court at instance of purchaser from assignee.—*Sargent v. Helton*, 115 U. S. 348, 29 L. Ed. 412.

or any specified issue arising thereon, to the referee to ascertain and report the facts.⁹⁹

C. Receivers—1. **APPOINTMENT.**—As has been already seen, courts of bankruptcy are authorized to appoint receivers or marshals to take charge of the property of the bankrupt, pending the appointment and qualification of the trustee.¹

2. **POWERS AND DUTIES.**—A receiver is appointed by the court a temporary custodian and it is his duty to hold possession of the property until determination of the proceedings or until the appointment of a trustee for the bankrupt.² His possession is that of the court and the latter has jurisdiction to hear and determine the interest of those claiming a lien in the property or ownership thereof,³ which jurisdiction cannot be ousted by a surrender of the property by the receiver, without authority of the court.⁴ The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit. While this rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy, as to which the jurisdiction is not concurrent, it still remains as a rule of comity.⁵

D. Suits by Creditors to Recover Property.—Creditors may institute proceedings to recover property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, and where such property is recovered for the benefit of the bankrupt's estate by the efforts and at the expense of one or more creditors such creditors are entitled to priority of payment from the bankrupt's estate, for the reasonable expenses of such recovery.⁶

99. Hearing and decision on application.—*Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 129; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183.

1. **Power of court to appoint.**—See ante, "Appointment of Receivers or Marshals," V. A, 2, b, (3).

2. **Receiver a temporary custodian of property.**—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

3. **Possession as conferring jurisdiction on court to determine controversies relating to property.**—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

4. **Receiver may not surrender property without authority of court.**—*Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157.

5. **Right of receiver as against any receiver appointed in subsequent suit.**—*In re Watts*, 190 U. S. 1, 47 L. Ed. 933.

6. **Suits by creditors to recover property—Reimbursement of expenses.**—Bankrupt Act, § 64 (b), (2), as amended in 1903. See post, "Filing Fees in Involuntary Cases, and Expenses of Recovering Property," XVII, D, 2, b.

"The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In *Worrall v. Harford* (8 Ves. Jr. 4), Lord Eldon said: 'The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed.' This rule has been followed by the district courts of

the United States. See a forcible opinion of Judge Bryan, *In re Williams* (2 Bank. Reg. 28), in the District court of South Carolina; and *In the Matter of O'Hara* (8 Law Reg. n. s. 113), in the western district of Pennsylvania. In a case in Massachusetts before Judge Lowell the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of Judge Lowell are so opposite, and seem to us so well considered, that we quote from his opinion. 'A petition in invitum,' says he, 'to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor, nor any three of four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their

X. Arrest, Detention and Extradition of Bankrupt.

Arrest and Detention.—Under the present bankrupt act the judge may, at any time after the filing of a petition by or against a person and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If, upon hearing the evidence of the parties, it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.⁷

Extradition of Bankrupt.—Power is expressly given to courts of bankruptcy to extradite bankrupts from their respective districts to other districts.⁸ Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of the court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which the district court has jurisdiction to another.⁹

XI. Duties, Exemptions and Rights of Bankrupt.

A. Duties of Bankrupt.—The present as well as the former bankrupt law devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors.¹⁰ Among his other duties under the act, the bankrupt is required to prepare, make oath to, and file in court within the prescribed time a schedule of his property;¹¹ and when present at the first meeting of his creditors, and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate;¹² but no testi-

debts. * * * The strong equities of the petitioner's case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records." *Trustees v. Greenough*, 105 U. S. 527, 534, 26 L. Ed. 1157.

7. Arrest and detention of bankrupt.—Bankrupt Act of 1898, § 9 b.

8. Power of courts of bankruptcy to extradite.—See ante, "Extradition of Bankrupts," V, A, 2, b, (14).

9. Manner of extradition.—Bankrupt Act of 1898, § 10. See, generally, the title EXTRADITION.

10. In general.—Bankrupt Act of 1898, § 7. *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

Application to corporations.—All the provisions in the act of 1867 which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examination, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force,

effect, and penalties, apply to each and every officer of a corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

11. Preparation, verification, and filing of schedule.—Bankrupt Act of 1898, § 7. See ante, "Schedule of Property," VIII.

12. Submission to examination.—Bankrupt Act of 1898, § 7. *Burrell v. Montana*, 191 U. S. 512, 48 L. Ed. 1122.

"The 18th section of the act, 1800, contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom, and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, moneys, or other effects and estate; and of all books, papers and writings relating thereunto, of

mony given by him shall be offered in evidence against him in any criminal proceedings.¹³

B. Exemptions of Property.—It is expressly provided by the bankrupt act that such act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.¹⁴ Such exempt

which he or she was possessed; or in which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had, in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission; or whereby such bankrupt, or his or her family, then hath, or may have or expect, any profit, possibility of profit, benefit or advantage whatsoever, etc.' It then goes on further to provide, that the bankrupt shall, upon such examination, execute, in due form of law, such conveyance, assurance and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners, to vest the same in the 'assignees,' and also requires the bankrupt to deliver up 'all books, papers and writings relating thereunto,' which are in his possession, custody, or power, at the time of the examination; upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of the fifth section, we think it is cleared up and illustrated by that of the present. Here, the words 'profit, possibility of profit, benefit, or advantage whatsoever,' are used, and show that mere interests in present, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, 'whereby the bankrupt then hath, or may have or expect, any profit.' *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

"The disclosure is required of estate and effects, in which the bankrupt was interested, as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, 'whatsoever and wheresoever.' The object of the provision was to make such conveyances auxiliary to, and confirmatory of, the assignments made by the commissioners; and we believe, that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act has been supposed to demonstrate the correctness of the construction of the statute contended for by the counsel for the

original plaintiff. It declares, 'that if any estate, real or personal, shall descend, revert to, or become vested in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, etc., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, etc.' This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy." *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

13. Such testimony inadmissible against bankrupt in criminal proceedings.—Bankrupt act, 1898, § 7. *Burrell v. Montana*, 194 U. S. 572, 48 L. Ed. 1122, in which it was held that this provision does not exempt the bankrupt from prosecution, but only provides that in case of prosecution, his testimony cannot be used against him.

"In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the bankrupt act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed and now claims exemption from prosecution. For the reasons we have given the claim is untenable." *Burrell v. Montana*, 194 U. S. 572, 48 L. Ed. 1122. See the title WITNESSES.

14. Allowance of exemptions prescribed by state laws.—Bankrupt Act, 1898, § 6. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Spindle v. Shreve*, 111 U. S. 542, 28 L. Ed. 512.

"The rights of a bankrupt to property as exempt are those given him by the state statutes, and of such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the act of congress." *Smalley v. Laugenour*, 196 U. S. 93, 97, 49 L. Ed. 400.

For a full treatment of the subject of exemptions, see the titles EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTIONS.

Provision does not render act unconstitutional.—This recognition of the local law in the matter of exemption does not render the bankrupt act unconstitutional for want of uniformity. *Hanover Nat.*

property does not vest in the trustee.¹⁵ Elsewhere in this title will be found a full treatment of the duty of the bankrupt to claim exemptions,¹⁶ the jurisdiction of courts of bankruptcy to determine all claims of bankrupts to their exemptions,¹⁷ and the duty of trustees to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment.¹⁸

C. Privilege from Arrest on Civil Process.—It is expressly provided by the bankrupt law that a bankrupt shall be exempt from arrest upon civil process except when issued from a court of bankruptcy for contempt or disobedience of its lawful orders, or when issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.¹⁹

D. Suits by and against Bankrupts.—Elsewhere in this title will be treated the effect of the filing of a petition in bankruptcy upon suits pending against the bankrupt;²⁰ the power of the court to order the trustee to enter his appearance and defend pending suits against the bankrupt,²¹ and the power of a trustee, with the court's approval, to prosecute suits previously commenced by the bankrupt.²²

E. Composition with Creditors.—The right of a bankrupt to offer terms of composition to his creditors, confirmation or setting aside of such composition, etc., will be treated in a subsequent section of this title.²³

XII. Discharge of Bankrupt.

A. Definition.—Under the present bankrupt act, a discharge means "the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are exceptions to this act."²⁴

B. Power of Congress to Regulate.—The right of congress to prescribe regulations concerning discharges in bankruptcy has already been considered in this title.²⁵

C. Control of Bankruptcy Courts over Matters Relating to Discharge.—Courts of bankruptcy may discharge or refuse to discharge bankrupts and may set aside discharges and reinstate the cases.²⁶

D. Who Entitled to Discharge.—Under the present bankrupt act any per-

Bank *v.* Moyses, 186 U. S. 181, 46 L. Ed. 1113. See, generally, the title CONSTITUTIONAL LAW.

For a construction of the proviso in § 70 of the act, in connection with § 3, see post, "Enumeration of Specific Property and Rights Passing to Trustee," XVI, E, 1, b, (2).

15. Exempt property does not vest in trustee.—Lockwood *v.* Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061. See post, "Title and Rights as to Property of Bankrupt," XVI, E, 1, b.

16. Duty to claim exemption.—See ante, "Form and Contents," VIII, B.

17. Jurisdiction to determine claims.—See ante, "Determination of Claims to Exemptions," V, A, 2, b, (11).

18. Duty of trustees to set apart exemptions, etc.—Bankrupt act, 1898, § 47, cl. 11. Lockwood *v.* Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061. See post, "Setting Apart Bankrupt's Exemptions," XVI, E, 2, k.

19. Exemption from arrest—Exceptions.—Bankrupt Act, 1898, § 9. See the titles

ARREST, ante, p. 541; CONTEMPT.

20. Stay of proceedings until adjudication or dismissal of petition in bankruptcy.—See post, "Nature, Operation and Effect of Bankruptcy Proceedings," XXI.

21. Appearance and defense by trustee.—See post, "Prosecution or Defense of Pending Suits," XXI, B, 3, b.

22. Prosecution by trustee of suits commenced by bankrupt.—See post, "Prosecution or Defense of Pending Suits," XXI, B, 3, b.

23. Composition with creditors.—See post, "Compositions with creditors," XVIII.

24. Discharge defined.—Bankrupt act, 1898, § 1, (12). Audubon *v.* Shufeldt, 181 U. S. 575, 45 L. Ed. 1009.

25. Power of congress to prescribe regulations as to discharge.—See ante, "Provision Construed," II, C, 1, b.

26. Power of bankruptcy courts as to discharges.—See ante, "Discharge of Bankrupts," V, A, 2, b, (12).

son may apply for and obtain a discharge in bankruptcy upon complying with the requirements of such act.²⁷

Exceptions as to Corporations or Joint-Stock Companies under Former Bankrupt Laws.—Under the bankrupt law in force prior to the act of 1898, it was provided that no discharge should be granted to any corporation or joint-stock company, or any officer or member thereof.²⁸

E. Application and Hearing Thereon—1. **TIME AND PLACE OF APPLICATION.**—Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt,²⁹ file an application for a discharge in the court of bankruptcy in which the proceedings are pending.³⁰ If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next six months.³¹

27. Who entitled to discharge under present act.—Bankrupt Act, 1898, §§ 4 and 14. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. See post, "Application and Hearing Thereon," XII, E.

28. Discharge of corporations, joint-stock companies, etc., forbidden.—*New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

"Corporations, whether moneyed business, or commercial, and joint-stock companies, are subject to the provisions of the bankrupt act; and the thirty-seventh section of the act provides to the effect, that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of the same, made and presented in the manner provided in respect to other debtors, the like proceedings shall be had and taken as are required in other cases of voluntary or involuntary bankruptcy; but the same section provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. 14 Stat. 535." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

Reason for excepting corporation, etc.—"Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt 'to free his faculties from the clog of his indebtedness,' and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes, or with the consequences of antecedent improvidence, mismanagement, or rashness. Many corporations, it is known, are formed under laws which affix to the several stockholders' an individual liability to a greater or less extent for the debts of the corporation, which, in

case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not, in most cases, attach to the stockholder until the corporation fails to fulfill its contract, nor in some cases until judgment is recovered against the corporation, and execution issued, and return made of nulla bona. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

Receipt of dividend by creditor of corporation as waiving right of action for remainder.—The creditor of the manufacturing corporation, which was duly adjudicated a bankrupt, who proved his claim and received a dividend thereon, does not thereby waive his right of action for so much of the claim as remains unpaid. *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

29. Time of application.—Bankrupt Act, 1898, § 14a. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Cannot be made before expiration of one month.—An application for a discharge in bankruptcy cannot be made until after the expiration of one month from adjudication. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

30. Where filed.—Bankrupt Act, 1898, § 14a. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Form Number 57 of the General Orders and Forms in Bankruptcy gives the form of petition for discharge and order for hearing to be entered thereon, requiring notice to be published in a designated newspaper printed in the district, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. For the full form of this petition for discharge, see 172 U. S. 718.

31. Extension of time for filing.—Bankrupt Act, 1898, § 14a. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

2. CONDUCT OF HEARING.—It is the duty of the judge to hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest,³² at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application,³³ and upon due notice to the creditors.³⁴

32. Hearing of application, proofs and pleas.—Bankrupt Act, 1898, § 14b. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Showing cause against discharge.—The creditors of the bankrupt are entitled to appear at the time and place appointed and show cause why a discharge should not be granted. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Appeal from dismissal of objections.—The objections of a creditor to the discharge of a bankrupt being dismissed for want of prosecution, the creditor filed his petition for revision in the circuit court of the United States. Issues were made up and the case heard. The circuit court held that the petition must be dismissed and an order to that effect was entered. Thereupon the creditor appealed to the circuit court of appeals, which court dismissed the appeal for want of jurisdiction. Appeal was taken to this court. Held, that this court had jurisdiction of such an appeal, when it appeared affirmatively that the amount in controversy exceeded \$1,000, besides costs, which did not appear in this case. *Huntington v. Saunders*, 163 U. S. 319, 41 L. Ed. 174.

"It was stipulated that Huntington was a creditor of Saunders, and that the amount of his claim against the bankrupt, which will be discharged if the discharge granted to the bankrupt shall stand, amounts to over five thousand dollars (\$5,000), exclusive of any interest or costs." From the final decree of the circuit court of appeals Huntington prayed an appeal to this court, which was allowed, and having been docketed here, a motion to dismiss was made. This appeal is prosecuted under the last clause of § 6 of the judiciary act of March 3, 1891, providing: 'In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.' This is not one of the cases in which the decrees or judgments of the circuit courts of appeals are made final by that section, but in our opinion the matter in controversy does not exceed one thousand dollars besides costs. The proof of *Huntington's* claim was not in controversy nor the amount of it. Whether *Saunders* was entitled to a certificate of discharge was in controversy,

but even assuming that the value of this certificate was susceptible of an estimate in money, there was no evidence whatever in the record tending to show this value. *South Carolina v. Seymour*, 153 U. S. 353, 358, 38 L. Ed. 742. *Huntington* was entitled to share in whatever assets passed to the assignee, and whether *Saunders* had acquired new assets after he was put into bankruptcy did not appear. The matter in controversy must have actual value, and that cannot be supplied by speculation on the possibility that if a discharge were refused something might be made out of the bankrupt. *Durham v. Seymour*, 161 U. S. 235, 40 L. Ed. 682." *Huntington v. Saunders*, 163 U. S. 319, 41 L. Ed. 174.

When, after opposition by a creditor to the discharge of a petitioner in bankruptcy, the district court discharges him, and the opposing creditor files in the circuit court a "petition of appeal," a petition setting forth the application for the benefit of the bankrupt act, the opposition, and the discharge, and praying the circuit court for a reversal of the orders of discharge of the district court, such "petition of appeal" must be regarded as being a petition for review under the first clause of the second section of the bankrupt act, which gives the circuit courts a general superintendence and jurisdiction of all cases and questions arising under the act; and on an affirmance by the circuit court of the decree of discharge by the district court, no appeal lies to this court, though the debt of the opposing creditor discharged be more than \$2,000. *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152.

Generally, as to appellate jurisdiction of bankruptcy proceedings, see ante, "Appellate Jurisdiction," V, C.

33. Opportunity for hearing and investigation.—Bankrupt Act, 1898, § 14b. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

34. Notice to creditors.—See ante, "Notices to Creditors," VI, C. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Sufficiency of notice.—Personal service of notice of the application for a discharge is not required. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

"If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not es-

3. GRANTING OR REFUSAL OF DISCHARGE.—Upon such hearing and investigation, the judge shall discharge the applicant,³⁵ unless he has committed an offense punishable by imprisonment as provided in the bankrupt act;³⁶ or with

sential to the binding force of a decree." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Hearings upon the application for the discharge of the bankrupt are among the proceedings of which § 58 of the act of 1898 requires at least ten days' notice to be given to the creditors by mail, to their respective addresses, etc. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

35. Applicant to be discharged except in certain cases.—Bankrupt Act, 1898, § 14b. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Liebke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336.

"Proceedings in bankruptcy are deemed to be commenced from the filing of the petition in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor; and if it appear to the court that the bankrupt has in all things conformed to the requirements of the bankrupt act, it is made the duty of the court to grant him a certificate, under the seal of the court, that he be forever discharged from all debts and claims that by said act are provable against his estate, which existed on the day the petition for adjudication was filed, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

"It is of the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and rendered his property he should be released from all his debts, except those of a fiduciary character or founded in fraud, of which this is not one. And the case of *Wilnot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536, decides that though no written discharge be granted, a lawful composition and its performance by the party has the same effect. That case holds that § 17 of the act of 1874, which governs this case, is a part of the bankrupt law, and the proceedings under it discharge all debts which can be discharged under the law, as to creditors 'whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed.'" *Liebke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744.

"Whether the bankrupt is entitled to a discharge pursuant to the twenty-ninth section of the bankrupt act is always a question to be decided by the district court under the conditions prescribed in that section. Creditors opposing the discharge may file a specification in writ-

ing of the grounds of their opposition, but the only effect of such a specification, as declared in the thirty-first section of the act, is to authorize the court, 'in its discretion,' to postpone the question of fact to be tried at a stated session of the court, as the thirty-second section provides that if it shall appear to the court that the bankrupt has, in all things, conformed to his duty under the act, the court shall grant the prescribed discharge." *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152.

"Regulations of a different character are prescribed in a case where the question is whether the alleged insolvent shall be adjudged a bankrupt without his consent, as in that event the provision is that the court shall, if the debtor, on the return day of the notice, required to be given on the petition, so demand in writing, order a trial by jury as therein provided, but the bankrupt act contains no provision for a jury trial on the question of discharge, and in the judgment of the court the only power vested in the circuit court to review and revise the decision of the district court, made in granting or refusing such a discharge, is that conferred by the first clause of the second section of that act." *Coit v. Robinson*, 19 Wall. 274, 22 L. Ed. 152.

Section 5103 of the Revised Statutes further provides that the court may compel the production of witnesses, books, and papers before the trustees, in the same manner as in other cases of bankruptcy, and that the bankrupt shall in like manner be entitled to his discharge. *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

As to withholding discharge pending determination of creditors' rights to subject exempt property under waivers, given by the bankrupt, see post, "Setting Apart Bankrupt's Exemptions," XVI, E, 2, k.

As to the effect of refusal of discharge, or determination of proceedings without a discharge, upon the right of action of a creditor proving his debt or claim, see post, "Effect of Proving Debt upon Creditors' Right of Action," XV, A, 7.

Copy of order granting or setting aside discharge as evidence.—A certified copy of an order granting or setting aside a discharge not revoked shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. *Bankrupt Act*, 1898, § 21f, Rev. Stat., § 5119. *Palmer v. Hussey*, 119 U. S. 96, 30 L. Ed. 362.

36. Commission of offense punishable by imprisonment.—*Bankrupt Act*, 1898, § 14b, (1). *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

The offenses referred to are enumerated in § 29 of the bankrupt act of 1898, and

fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.³⁷

F. Effect of Discharge—1. UPON DEBTS OF BANKRUPT—*a. In General.*—It is provided by the present as well as former bankrupt acts that a discharge in bankruptcy shall release the bankrupt from all of his provable debts with certain specified exceptions.³⁸

embrace misappropriation of property; concealing property belonging to the estate; making false oaths or accounts; presenting false claims; receiving property from a bankrupt with intent to defeat the act; extorting money for acting or forbearing to act in bankrupt proceedings. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

Provision of act of 1841 as to effect of preferences.—In *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862, the court in referring to the act of 1841, said: "By the second section, the amount of preferences which may have been given in contemplation of bankruptcy, are declared to be a part of the bankrupt's estate. It is the duty of the assignee to sue for them, and the bankrupt who has made them, when they have been proved, cannot be allowed a discharge under the provisions of the act. And that this disability to receive a discharge was meant to apply prospectively to preferences which might be given, and retroactively to such as had been given in contemplation of bankruptcy, or to such preferences, whether given before the decree of discharge or after it, is manifest from the whole language of the fourth section, particularly that part which makes a bona fide surrender by the bankrupt of all his property and rights of property, for the benefit of his creditors, one of the prerequisites of his being discharged from all of his debts; and declares, that if the bankrupt shall be guilty of any fraud or willful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of the act; or, if he admits a false and fictitious debt against his estate, that he shall not be entitled to such discharge or certificate."

37. Destruction, concealment or failure to keep books of accounts, etc.—Bankrupt Act, 1898, § 14b, (2). *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

The fourth section of the act of 1841 declares, that no "merchant, banker, factor, underwriter, or marine insurer," shall be entitled to a discharge, "who has not kept proper books of accounts." *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

Section as amended by act, 1903.—By the act of 1903 subdivision b of § 14 was amended so as to read as follows: "b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by

parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court." (32 Stat. L. 797, 798.) Act of February 9, 1903, ch. 487 (amending Bankruptcy Act of July 1, 1898), 38.

38. General rule as to effect of discharge.—Bankrupt Act, 1898, § 17a. *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Birkett v. Columbia Bank*, 195 U. S. 315, 49 L. Ed. 231; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931; *Fleitas v. Richardson*, 147 U. S. 550, 37 L. Ed. 276; *Long v. Bullard*, 117 U. S. 617, 29 L. Ed. 1004; *Liebke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Spalding v. New York*, 4 How. 21, 11 L. Ed. 858; *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236. And see ante, "Definition," XII. A.

By the fourth section of the act of 1841 it is declared that "the certificate of discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Spalding v.*

b. *Debts Not Affected by Discharge*—(1) *Taxes Levied by United States, State, County, etc.*—The first class of debts enumerated by the bankrupt act as constituting an exception to the above rule that a discharge releases a bankrupt from all of his provable debts, consists of such as are due as a tax levied by the United States, the state, county, district, or municipality in which the bankrupt resides.³⁹

(2) *Judgments in Certain Classes of Actions.*—Under the former bankrupt act, no debts created by the fraud of the bankrupt were discharged by proceedings in bankruptcy.⁴⁰ The bankrupt act of 1898, as it originally stood, excepted from the discharge all judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;⁴¹ indicating clearly that as to frauds in

New York, 4 How. 21, 11 L. Ed. 858; *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698.

The act of 1867, with the exception of the debts specified in the thirty-third section, provides that a discharge duly granted under the act shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

By § 5119 of the Revised statutes the discharge releases the bankrupt only from debts which were or might have been proved. *Long v. Bullard*, 117 U. S. 617, 621, 29 L. Ed. 1004.

As to what are provable debts, see post, "What Debts May Be Proved," XV, A, 2.

Demand of surety against maker of note.—By the fifth section of the United States Bankrupt Act, 1841 (5 Stat. at L. 444), the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act. Therefore, where the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it. *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698.

"The fourth section of the bankrupt law provides that a discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," etc. By the fifth section of the act, it is provided that 'all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them,' etc. *Wells*, as surety, was within this section, and might have proved his

demand against the bankrupt. He had not paid the last note, but he was liable to pay it, as security, and that gave him a right to prove the claim under the fifth section." *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698.

Debts subsequently accruing.—If a person be declared a bankrupt at a time when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. *Bridges v. Armour*, 5 How. 91, 12 L. Ed. 64.

"The witness in this case is also liable to objection on the ground of interest. This suit was pending at the time he was declared a bankrupt and obtained his discharge; and it is quite clear, if the defendants had eventually succeeded, the discharge would not have been a bar to his liability for the costs of the suit. The judgment would have been a debt accruing subsequent to the discharge, which could not have been proved under the act. Act of Congress, August 19, 1841, § 4 (5 Stat. at L. 443); *Haswell v. Thorogood*, 7 Barn. & C. 705; *Brough v. Adcock*, 7 Bing. 650. His future effects, therefore, would have been liable." *Bridges v. Armour*, 5 How. 91, 12 L. Ed. 64.

Liability of husband for paraphernal property to wife.—The liability of a husband to his wife for her paraphernal property being a provable debt is discharged by the discharge of the husband in bankruptcy. *Fleitas v. Richardson*, 147 U. S. 550, 37 L. Ed. 276.

29. **United States and state taxes.**—Bankrupt Act, 1898, § 17, (1).

40. **Debts created by fraud of bankrupt not discharged under former act.**—See post, "Debts Created by Fraud, Embezzlement, Misappropriation, or Defalcation," XII, F, 1, b, (4).

41. **Judgments in actions for fraud, false pretenses, etc.**—Bankrupt act, 1898, § 17 (2). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147; *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128.

"Under the bankrupt law of 1867 it was

general it was the intention of congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision of § 17 of the present act, relating to debts created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity.⁴² The amendment of 1903 adds to the above judgments

provided: 'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.' Rev. Stat. 5117. In the law of 1898, for reasons which have been the subject of much diversity of view in the courts, but which were sufficient in the judgment of congress in passing the act to necessitate a change, it is provided, instead of exempting debts created by fraud from the operation of the discharge, that only judgments in actions for fraud shall be discharged. Under this act (as it was before the passage of the act of February 5, 1903), claims grounded in fraud will not be discharged unless reduced to judgment, but the essential character of the fraud which is here meant has not been changed. By the decisions of this court, which are collected in the opinion delivered in *Forsythe v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723, supra, it was held, reviewing the former cases in this court, that, under the act of 1867, the fraud referred to meant positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud, which may exist without an imputation of bad faith. 'Such a construction of the statute,' it was said in *Neal v. Clark*, 95 U. S. 704, 709, 24 L. Ed. 586, 'is consonant with equity, and consistent with the object and intention of congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system.' This language, we think, equally applies to the present case. The difference is that under the act of 1898 claims for fraud prosecuted to judgment will not be discharged. The reason for this change, as suggested by Mr. Justice Brown, in delivering the opinion in *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, may be that congress did not intend to offer any inducement to change unliquidated claims into actions for fraud, and therefore limited the exception from the operation of the discharge to such cases only as had been litigated and reduced to actual judgment. When such is the case we think a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is one *ex delicto* or otherwise, but the real question is, was the relief granted in the judgment, based

upon actual as distinguished from constructive fraud of the bankrupt. If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned." *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340.

Judgment obtained by husband for criminal conversation with wife.—"The question herein arising is, whether the judgment obtained against the defendant, petitioner, for damages arising from the criminal conversation of the defendant with the plaintiff's wife, is released by the defendant's discharge in bankruptcy, or whether it is excepted from such release by reason or subdivision 2, § 17, of the bankruptcy act of July 1, 1898, which provides that 'a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another; * * *'. The averment in the petition, that the judgment was not recovered for a willful and malicious injury to the person or property of the plaintiff in the action, is a mere conclusion of law and not an averment of fact. If the judgment in question in this proceeding be one which was recovered in an action for willful and malicious injuries to the person or property of another, it was not released by the bankrupt's discharge; otherwise it was." *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754.

"We are of opinion that it was not released. We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful. A judgment upon such a cause of action is not released by the defendant's discharge in bankruptcy." *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754.

42. Provision construed.—*Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, fol-

which shall not be discharged, those for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.⁴³

(3) *Unscheduled Claims, etc.*—The third class of debts excepted from the general rule consists of those which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt,⁴⁴ unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.⁴⁵

(4) *Debts Created by Fraud, Embezzlement, Misappropriation, or Defalcation*—(a) *Provisions of Former and Present Act Stated.*—Under the bankrupt law as it existed prior to the enactment of the act of 1898 it was provided that “no debt created by the fraud or embezzlement of the bankrupt, or by his defalca-

lowed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

For a full treatment of the exceptions contained in the 4th clause of § 17 of the bankrupt act, see post, “Debts Created by Fraud, Embezzlement, Misappropriation, or Defalcation,” XII, F. 1, b. (4).

43. *Amendment of § 17, (2).*—*Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084.

Amendment as to alimony merely declaratory of meaning of original statute.—“It is urged that the amendment of the law made by the act of February 5, 1903, excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, cited supra, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to settling the law upon this subject and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both state and federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon v. Shufeldt*, [181 U. S. 575,] 45 L. Ed. 1009, it may be said to be merely declaratory of the true meaning and sense of the statute. *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Bailey v. Clark*, 21 Wall. 284, 288, 22 L. Ed. 651; *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 832.” *Wetmore v. Markoe*, 196 U. S. 68, 76, 77, 49 L. Ed. 390. See ante, “What Debts May Be Proved,” XV, A, 2.

44. *Unscheduled claims.*—Bankrupt act 1898, § 17, (3). *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

Generally, as to the necessity for scheduling debts, name of residence of creditor, etc., see ante, “Schedule of Property,” VIII.

45. *Creditors’ notice or knowledge of proceedings.*—Bankrupt Act, 1898, § 17, (3). *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

Actual knowledge of the proceedings contemplated by the above provision is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends. *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

“Plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that congress contemplated that there might be an intentional or inadvertent omission of the names of creditors from the schedule of debts, and provided against it by other provisions of the law; especially by that which makes it the duty of the referee to give notice to creditors (§ 38), and by that which imposes the duty on the bankrupt to appear at the meeting of creditors, for examination. The finding of the trial court is that defendant had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein.’ This is made more definite as to time by the court of appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about *Russell & Birkett*, was informed that they had gone through bankruptcy; and subsequently (November 17) the northern district was given as the district of the proceedings: The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (§ 65), and to move to revoke the discharge of the bankrupt (§ 15). It is hence argued that defendant in error must be held to have had ‘actual knowledge of the proceedings in bankruptcy,’ as those words of § 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error.” *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231.

tion as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."⁴⁶ The provisions of the present bankrupt act are to the effect that a discharge in bankruptcy shall not release the bankrupt from debts which "were created by his fraud, embezzle-

46. Provisions of bankrupt act of 1867 (Rev. Stat., § 5117).—*Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723; *Fleitas v. Richardson*, 147 U. S. 550, 37 L. Ed. 276; *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931; *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Palmer v. Hussey*, 119 U. S. 96, 30 L. Ed. 362; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; *Bayly v. University*, 106 U. S. 11, 27 L. Ed. 97; *Merchants Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204; *Wilmot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536; *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

"Debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, are not discharged by the certificate required to be given to the bankrupt by the thirty-second section of the bankrupt act, nor will any such certificate release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. Such debts, that is, debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or as a fiduciary agent, may be proved, and the dividend thereon, it is provided, shall be a payment on account of said debt." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

The bankrupt act of 1841, withheld the benefits of the act from all debts created by the bankrupt in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity; 5 Stat. 441, § 1, and, further declared (amongst other things) that no person should be entitled to a discharge who should apply trust funds to his own use. *Ib.*, § 4. *Hennequin v. Clews*, 111 U. S. 676, 679, 28 L. Ed. 565; *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

Existence of fiduciary debt no bar to discharge of other debts.—Under the bankrupt act of 1841 the existence of a fiduciary debt, contracted before the passage of the act, constitutes no objection to the discharge of the debtor from other debts.

Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236.

"The first section of the bankrupt law provides that, 'all persons whatsoever, residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity' shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it. The debts here specified are excepted from the operation of the act. This exception applies to the debts and not to the person, if he owe other debts. The language is, all persons owing debts, not of the description named, may apply, etc. Now, an indebtedness by an individual, not created as above stated, is within the provisions of the act, although he may be under fiduciary obligation. This is the natural import of the provision, and it is sustained by reason. It was proper that congress should not relieve from debts which had been incurred by a violation of good faith, whilst, from other obligations a full discharge to the same person should be given. But, to have refused a discharge because the individual owed a fiduciary debt, would, by withholding a general privilege, have superadded a penalty to a past transaction without notice. That this consideration influenced the legislature is shown by the fourth section, which provides, 'that no person who after the passage of the act shall apply trust funds to his own use,' shall be discharged. Now, if a person who owed a fiduciary debt, was not entitled to a discharge from other debts by the first section, this provision was useless. A misapplication of trust funds, as declared, covers the enumerated cases in the first section. But, whilst the first section only withholds from the jurisdiction of the bankrupt court fiduciary debts, the fourth declares that if such debts have been contracted subsequent to the law, the individual shall not be discharged. From this provision the strongest implication arises, that if the fiduciary debts were contracted before the passing of the act, the petitioner would, for other obligations, be entitled to a discharge. Viewing then the first and fourth sections of the act, we are of the opinion that fiduciary debts, contracted before the passage of the act, constitute no objection to a discharge of the same person for other debts." *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

ment, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."⁴⁷

(b) *Provisions Construed and Applied.*—Under the former bankrupt acts, the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, this character relating only to his defalcation.⁴⁸ Under the present act, however, the words, "while acting as an officer or in any fiduciary capacity," contained in § 17, cl. 4, have been held to extend to "fraud, embezzlement, and misappropriation," as well as "defalcation."⁴⁹ According to this construction, such clause is limited to frauds, embezzlement, misappropriations, or defalcations while acting in an official character, or in a fiduciary capacity, and does not apply to other debts or obligations

47. Provision of present act.—Bankrupt Act, 1898, § 17 (4). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128.

As to effect of proof of fiduciary debt and receipt of dividend thereon as estopping the creditor from saying that his debt was not within the law, even though the debt was not scheduled as a fiduciary one, see ante, "Form and Contents," VIII, B.

48. Provision of former act as to fraud and embezzlement construed.—*Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

49. Act of 1898, § 17, cl. 4, construed.—*Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762, affirming *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340.

"The intent of congress in changing the language of the act of 1867 seems to have been to restore the act of 1841, which, as already observed, extended the benefits of the law to every debtor who had not been guilty of defalcation as a public officer or in a fiduciary capacity, the act of 1898 adding, however, to the excepted class those against whom a judgment for fraud had been obtained." *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

"The fact that the second subdivision of § 17 excepted from the discharge 'all judgments in actions for frauds, or of obtaining property by false pretenses, or false representations,' indicates quite clearly that as to frauds in general it was the intention of congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision, of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity. Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in

subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not. This conclusion is fortified by reference to corresponding sections of the former bankrupt acts. Thus, by the first section of the act of 1841, 5 Stat. 440, the benefits of that act were extended to all persons owing debts 'which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.' It is entirely clear that under this section a discharge was not denied to the bankrupt by reason of debts fraudulently contracted, but only to such as were created by his defalcation as an officer, or while acting in a fiduciary capacity." *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

"Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger. In § 33, Rev. Stat., 5117, it was declared that; 'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.' The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, and that this character relates only to his defalcation. But under the act of 1898 there is no such severance, in the fourth paragraph as would authorize us to say that the term 'fiduciary capacity' did not extend back to the words 'fraud, embezzlement and misappropriation.' It was the opinion of the supreme court of Illinois that 'a mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established by previous bankruptcy legislation and ju-

fraudulently created.⁵⁰ It has been held that a debt was not created by a person while acting in "fiduciary character," merely because it was created under circumstances in which trust or confidence was reposed in the debtor, in the popular sense of this term,⁵¹ and that the phrase "in any other fiduciary capacity," in the act of 1841, referred, not to those trusts which the law implies from the contract, and which form an element in every agency, and in nearly all commercial transactions, but to technical trusts.⁵² It was the settled doctrine of the supreme court that the word "fraud" in the prior acts of congress defining the debts from which a bankrupt was not relieved by a discharge in bankruptcy, meant positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.⁵³ The essential character of fraud

dicial decisions, as to provide that debts created by fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer, or in a fiduciary capacity.' Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that congress would not have used such different language in § 17 from that used in § 33 of the act of 1867, without thereby intending a change of meaning. The view generally taken by the bankruptcy courts has been that the terms 'officer' and 'fiduciary capacity' extend to all the claims mentioned in paragraph 4, and are not confined to cases of defalcation. In *re Rhutassel*, 96 Fed. Rep. 597; In *re Lewensohn*, 99 Fed. Rep. 73; In *re Hirschman*, 104 Fed. Rep. 69; In *re Cole*, 106 Fed. Rep. 837; In *re Freche*, 109 Fed. Rep. 620; *Hargadine McKittrick Dry Goods Co. v. Hudson*, 111 Fed. Rep. 361. This is the natural and grammatical reading of the clause." *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

50. Limited to acts in official or fiduciary capacity.—*Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147.

51. Meaning of "fiduciary character."—*Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931.

"It is to be noted that the language of § 33 of the act of 1867 excepts debts created by the bankrupt 'while acting in any fiduciary character;' and the language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created. In this view, it was said in *Cronan v. Cotting*, supra (104 Mass. 245): 'We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase "while acting," etc., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its associa-

tion with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust.'" *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931.

Factor not a fiduciary debtor.—In *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236, it was held that a factor who owes his principal money received on the sale of his goods, is not a fiduciary debtor.

"We may remark here in passing that ever since the case of *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. *Neal v. Clark*, 95 U. S. 704, 708, 24 L. Ed. 586; *Hennequin v. Clews*, 111 U. S. 676, 679, 28 L. Ed. 565; *Noble v. Hammond*, 129 U. S. 65, 68, 32 L. Ed. 621; *Upshur v. Briscoe*, 138 U. S. 365, 375, 34 L. Ed. 931, as well as in cases in the state courts too numerous for citation." *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

52. Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621.

53. Meaning of "fraud."—*Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723; *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931; *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Palmer v. Hussey*, 119 U. S. 96, 30 L. Ed. 362; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586.

It does not apply to a debt created by purchasing in good faith, from an executor, bonds belonging to his decedent's estate at a discount, although such act was held to be a constructive fraud. *Noble v. Hammond*, 129 U. S. 65, 32 L.

meant has not, it would seem, been changed by the changes in the present bankrupt act.⁵⁴

(5) *Exceptions in Former Acts as to Debts Due United States.*—Under the bankrupt act of 1867 a debt due to the United States was not barred by the debtor's discharge with certificate,⁵⁵ though such debt were due from one who owed it as a surety only.⁵⁶ This rule was not affected by the right of the United States to prove its debts, and to priority of payment.⁵⁷

c. *Revival of Discharged Debt by New Promise.*—A debt, once discharged by

Ed. 621; *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586.

Nor does it include such fraud as the law implies from the purchase of property from the debtor with the intent thereby to hinder and delay creditors in the collection of their debts. *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309.

If goods sold by a debtor with intent to defraud his creditors are attached as his property in a chancery suit to recover a debt and set aside the sale, which is brought against him and the purchaser, and the latter, with sureties, executes to the complainants a replevin bond, authorized by statute, and conditioned that he, claiming the goods as his property, will pay the ascertained value of them as expressed in the bond, should he be cast in the suit, and they be decreed to be subject to the attachment, and liable thereunder to the satisfaction of the debt sued for, his liability on the bond is not a debt created by fraud within § 5117 of the Revised Statutes, which provides that such a debt shall not be barred by a discharge in bankruptcy; but if the petition in bankruptcy was filed after the execution of the bond, and before the rendition of the decree determining the right of property in the goods, his liability is a contingent one which, under § 5068 of the Revised Statutes, is provable against his estate in the proper bankrupt court. His discharge in bankruptcy releases him from further liability, but does not affect that of his sureties on the bond. *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309.

Nor does it refer to a debt arising from the conversion by a party to his own use of bonds held by him merely as a collateral security, for the payment of a debt, or the performance of a duty, and which he fails to restore, after the payment of the debt or performance of the duty, to the person who intrusted them to his keeping. *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565.

In all these cases the defendant was held to be released by the subsequent discharge in bankruptcy. *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621.

Such a construction of the statute is consonant with equity, and consistent with the object and intention of congress enacting the general law by which the honest citizen may be relieved from the

burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which prevades the entire bankrupt system. *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723, quoting *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586.

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong." *Forsyth v. Vehmeyer*, 177 U. S. 177, 182, 44 L. Ed. 723, cited in *Tinker v. Colwell*, 193 U. S. 473, 48 L. Ed. 754.

54. *Same character of fraud contemplated under present act.*—*Bullis v. O'Beirne*, 195 U. S. 606, 49 L. Ed. 340; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147.

55. *Debt due United States not discharged under act of 1867.*—*United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

"Where the bankrupt has in all things conformed to his duty under the bankrupt act, he is entitled to receive a discharge; and the thirty-fourth section provides that a discharge duly granted shall, with the exceptions specified in the preceding section, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. Debts due to the United States are not enumerated in the exceptions contained in § 33; but all admit that such debts may be proved in the bankrupt proceedings; and yet it is settled law that the certificate of discharge does not release any debt which the bankrupt owes to the United States. *United States v. Herron*, 20 Wall. 251, 253, 22 L. Ed. 275." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 636, 23 L. Ed. 336.

56. *Application to obligations of surety.*—*United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

57. *Not affected by right of United States to prove debts, etc.*—*United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Generally as to right to prove debts, see post, "Proof and Allowance of Claims," XV. As to priority of debts due United States, see post, "Priority of Debts Due United States and States under Former Statutes," XVII, D, 2, f.

the discharge of the debtor under the bankrupt act, will not be revived by anything short of a clear, distinct, and unequivocal promise by the debtor to pay.⁵⁸

2. UPON LIABILITY OF BANKRUPT'S CODEBTOR, GUARANTOR OR SURETY.—It is expressly provided by the bankrupt act that the liability of a person who is a codebtor with or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt.⁵⁹

58. **New promise as reviving discharged debt.**—A debtor by original obligation, in one of the Southern States, writing to his creditor, after he, the debtor, had applied for the benefit of the bankrupt act, and while the proceedings were pending, a discharge in which was finally granted to the debtor, gave, in the letter, a statement of his affairs and of the causes which led to his applying for the benefit of the bankrupt act. He continued: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay." Adding in a postscript: "All will be right betwixt me and my just creditors." Held, that the debt having been discharged by the discharge of the debtor under the bankrupt act, was not revived by what was written as above; that the promise to pay it was not clear, distinct, and unequivocal; short of which sort of promise none would revive a debt once discharged. *Allen v. Ferguson*, 18 Wall. 1, 21 L. Ed. 854.

"All the authorities agree in this, that the promise by which a discharged debt is revived must be clear, distinct, and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional. The rule is different in regard to the defence of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus, partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient. The question must be left to the jury with instructions that a promise must be found by them before the debtor is bound." *Allen v. Ferguson*, 18 Wall. 1, 21 L. Ed. 854. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

59. **Liability of codebtor, etc., not affected.**—Bankrupt Act, 1898, § 16.

Section 5118, Rev. Stat. (incorporating act, 1867, § 32), provides that "no discharge shall release, discharge, or affect any person liable for the same debt for

or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57; *United States v. Heron*, 20 Wall. 251, 22 L. Ed. 275.

"The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like." *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309.

Discharge of two of three partners.—

"The only remaining point relied on by plaintiff in error as a ground for reversal of the judgment below is that the defendants were sued in the action as general partners, and the judgment in favor of the plaintiffs determined that they were general partners; and that the adjudication in bankruptcy of Griffith and Wandram was a judgment against the two partners, which is a bar to any action subsequently brought by the creditor against the two defendants as such general partners. Against this view there is, we think, an insuperable objection. By § 5118 of the Revised Statutes, formerly § 33 of the act of March 2, 1867, ch. 176, 14 Stat. 533, the rule of the common law, as declared by this court in *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783, that a judgment against one upon a contract, merely joint, of several persons, bars an action against the others on the same contract, is rendered entirely inapplicable to adjudications in bankruptcy. That section provides: 'No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.' If the discharge of the two bankrupt partners, which is the final judgment in the proceedings, cannot estop the creditor from afterwards setting up the liability of the third partner for the joint debt, clearly the other and previous adjudication in the course of the proceedings cannot be held to have that effect." *Abendroth v. Van Dolsen*, 131 U. S. 66, 74, 33 L. Ed. 57.

3. DISCHARGE PERSONAL TO PARTY TO WHOM GRANTED.—A discharge in bankruptcy is personal to the party to whom it is granted, and to his representatives.⁶⁰

G. Revocation of Discharge—1. MANNER AND GROUNDS OF REVOCATION.—**In General.**—The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.⁶¹

60. Personal to one to whom granted and his representatives.—*Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931.

"We concur with the opinion of the court of appeals, that so far as the discharge itself is concerned, its only effect is personal to him, and does not avail to release the defendants in this suit from liability for the fraud committed by them."

Moyer v. Dewey, 103 U. S. 301, 302, 303, 26 L. Ed. 394.

The widow of the bankrupt, who was alleged to be a fraudulent grantee, held entitled to the benefit of his discharge, she having pleaded it. *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931.

"It is also assigned for error that the plea of the discharge of Briscoe in bankruptcy was personal to him and his representatives, and could not avail his widow; and the case of *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394, is relied on to sustain this view. But it is not applicable. In that case the bankrupt, after his discharge, confessed judgments founded on debts which existed prior to his discharge, and the suit was brought to reach property which had been conveyed by him to the defendants, before his bankruptcy, in fraud of his creditors. The defendants other than the bankrupt pleaded the discharge in bankruptcy, and he failed to answer. This court held that, so far as the discharge was concerned, its only effect was personal to the bankrupt, and did not avail to release the fraudulent grantees from liability for the fraud committed by them. It is manifest that the discharge would not have availed the bankrupt if he had pleaded it, and that it could not avail his fraudulent grantees. Moreover, in *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394, the transfer of property which was attacked took place prior to the bankruptcy, while that assailed in the present case was made subsequently thereto, so far as Mrs. Briscoe is concerned; and in that case the judgments which were rendered against the debtor subsequently to the discharge, were founded on debts which existed prior to the discharge. Therefore, the attacking creditors in that case were creditors at the date of the fraudulent transfer, and remained such, by the subsequent judg-

ments, at the date they brought their suit to set aside the fraudulent transfer. But in the present case the transfer to Mrs. Briscoe took place after the bankruptcy, and the debts here sued on were barred, and they were not revived by judgments taken subsequently to the discharge. As she derived her title, as is alleged, from Briscoe she is entitled to the full benefit of the position in which he stood at the time the alleged fraudulent transfer was made, and to all defenses resulting therefrom. She is entitled to plead the discharge in her own defense, and cannot be deprived of its benefit by the failure of his heirs to plead it. See, also, *Botts v. Patton*, 10 B. Mon. 452, 455." *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931.

As to pleading discharge in pending actions against bankrupt, see post, "Effect of Proceedings as Stay of Suits in Other Courts," XXI. B, 3, a.

61. Manner and grounds of revocation.—Bankrupt Act, 1898, § 15. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

Jurisdiction of circuit court to annul discharge obtained in district court.—The circuit court of the United States has no power to entertain an original bill brought by a creditor, who has come in and proved his debt against the bankrupt, for the purpose of annulling or vacating a discharge and certificate in bankruptcy, obtained in the district court upon imputations of fraud, done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who had taken a dividend out of the bankrupt's estate. The district court, which passed the decree in bankruptcy, can alone take cognizance of such a case. *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

Nor has the circuit court the power, under its general jurisdiction over frauds, to give relief either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, has assented to the bankrupt's discharge and certificate, and had taken a dividend out of the bankrupt's estate. *Commercial*

Right of Creditors Who Have Proved Claims to Make Such Application.

—The provision of a bankrupt act which declares that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt, while it excludes such a creditor from bringing a suit at law or in equity in any other court for his original debt, which had been proved against the bankrupt, cannot be construed to mean that he could not resort to the court, which had been deceived into granting the discharge, for the purpose of investigating the frauds which may have been committed by the bankrupt before a discharge had been granted to him, but not discovered until afterwards; and for the further purpose of obtaining from such court an annulment of the discharge which had been obtained from it by perjury and fraud.⁶²

2. VESTING OF TITLE TO PROPERTY IN TRUSTEE UPON REVOCATION.—Whenever a discharge in bankruptcy is revoked, the trustee shall, upon his appointment and qualification, be vested with the title to all the property of the bankrupt as of the date of the final decree revoking the discharge.⁶³

XIII. Reference of Cases after Adjudication.

A. Power of Court to Order Reference.—After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of his estate, or refer it generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.⁶⁴

B. Reference by Clerk.—Provision is made by the bankrupt act for reference of the case by the clerk to the referee in the absence of the judge from the district, or the division of the district in which the petition in bankruptcy is filed.⁶⁵

C. The Referee—1. CREATION OF OFFICE.—The office of referee is expressly created by the bankrupt act of 1898.⁶⁶

2. MEANING OF TERM "REFeree" AS USED IN THE BANKRUPT ACT.—It is expressly provided by the present bankrupt act that the term "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead,⁶⁷ and it is further provided that the term "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee,⁶⁸ but that the term "judge" shall mean

Bank *v.* Buckner, 20 How. 108, 15 L. Ed. 862.

Whether or not such a bill could be filed by a creditor who had not come in and proved his debt, and who was not a party to the decree in bankruptcy, is a question which the court does not now decide. Commercial Bank *v.* Buckner, 20 How. 108, 15 L. Ed. 862.

"Our conclusions in this case are, that the circuit courts of the United States have not jurisdiction to annul or vacate the discharge and certificate in bankruptcy obtained in the district court, upon imputations of fraud done in contemplation of bankruptcy by the bankrupt; or to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who has taken a dividend out of the bankrupt's estate." Commercial Bank *v.* Buckner, 20 How. 108, 15 L. Ed. 862.

62. Application by creditors who have proved claims.—Commercial Bank *v.* Buckner, 20 How. 108, 15 L. Ed. 862.

63. Vesting of title in trustee on revocation.—Bankrupt Act, 1898, § 70d.

64. Power of court to refer.—Bankrupt Act, 1898, § 22a. See *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1133.

As to reference of applications for injunctions, to stay proceedings of a court or officer of the United States or of a state, see ante, "Hearing and Decision on Application," IX, B. 2.

65. Reference by clerk in absence of judge.—Bankrupt Act, 1898, § 18.

66. Creation of office.—Bankrupt Act, 1898, § 33.

67. Meaning of "referee."—Bankrupt Act, 1898, § 1, cl. 21. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

68. Referee may be included in the term "court."—Bankrupt Act, 1898, § 1, cl. 7. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

a judge of a court of bankruptcy, not including the referee.⁶⁹

3. APPOINTMENT AND QUALIFICATION.—**Manner of Appointment.**—Referees are to be appointed by courts of bankruptcy within the territorial limits of which such courts respectively have jurisdiction.⁷⁰

Oath.—Referees are required to take the same oath of office as that prescribed for judges of United States courts.⁷¹

4. JURISDICTION, POWERS AND DUTIES OF REFEREES—*a. Jurisdiction and Powers.*—(1) *In General.*—The referee appointed by a court of bankruptcy exercises in each case referred to him much of the judicial authority of that court.⁷²

(2) *Enumeration of Particular Powers.*—Under the present bankrupt act referees exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness, or inability to act.⁷³ They perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by the bankrupt act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as in the act otherwise provided.⁷⁴

69. Referee not included in term "judge."—Bankrupt Act, 1898, § 1, cl. 16. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

70. Appointment by court of bankruptcy.—Bankrupt Act, 1898, § 34, cl. 1. *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183. See, also, *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

71. Oath of office.—Bankrupt Act, 1898, § 36. *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

72. Exercise judicial authority of bankruptcy court.—*White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

He is the representative and substitute of the bankruptcy court. *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183.

73. Taking possession and release of bankrupt's property.—Bankrupt Act, 1898, § 38, cl. 3. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

Provision construed.—"It is now said that the only power the referee has to direct the taking possession of property is given by subsection 3, of § 38a, providing that the referee may exercise the powers of the judge in that respect on a certificate of the clerk that the judge is absent or unable to act. But that provision seems to refer only to the seizure of the property by the marshal or a receiver prior to adjudication and the qualification of the trustee as provided by § 2, § 3e, and § 69, and it is at all events inapplicable here. We think the referee has the power to act in the first instance in matters such as this when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases 'much of the judicial authority of that court.' *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183. By petition for review the matter can be

carried to the bankruptcy court and the entire record and findings laid before that tribunal as was done here." *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

74. Performance of certain duties of bankruptcy courts.—Bankrupt Act of 1898, § 38, cl. 4. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

"General Order XII provides that after the order of reference reaches the referee, 'all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.'" *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

May require payment over to trustee of bankrupt's funds.—A referee in bankruptcy may properly order one holding money belonging to the bankrupt estate to appear within a certain time after service of such order and show cause why he should not be required to pay over such money to the trustee, and in case the response to such order is deemed insufficient he may order the holder of such money to make such payment, and may recommend that such holder be punished as for contempt for noncompliance with such order. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

Amendment of response to rule.—In *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, after the order of the referee that the holder of certain money should pay over the sum to the trustee in bankruptcy had been certified to the district court to determine its validity, and the decision of such court had been announced, a written opinion filed, and judgment was about to be entered, a respondent applied for leave to amend his response to the referee's order to show cause why he should not make such payment. It was held that such application was properly denied as coming too late.

b. *Duties.*—By express provisions in the bankrupt act it is provided that referees shall declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;⁷⁵ shall give notices to creditors as therein provided;⁷⁶ and shall make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges.⁷⁷

8. *ORDERS OF REFEREES.*—In all orders made by a referee, it shall be recited, according as the fact may be, that notice is given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.⁷⁸

9. *RECORDS OF REFEREES.*—**Necessity.**—The records of all proceedings in each case before a referee are to be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.⁷⁹

10. *CONTEMPTS BEFORE REFEREES*—a. *What Constitutes.*—It is provided by the bankrupt act that a person shall not, in proceedings before a referee, disobey or resist any lawful order, process, or writ; misbehave during a hearing or so near the place thereof as to obstruct the same; neglect to produce after having been ordered to do so any pertinent document; or refuse to appear after having been subpoenaed, or, upon appearing, refuse to take oath as a witness, or, after having taken the oath, refuse to be examined according to law.⁸⁰

b. *Punishment.*—The question as to the jurisdiction of courts of bankruptcy to punish for contempts committed before referees will be found treated elsewhere in this title.⁸¹ It is made the duty of the referee to certify the facts to the judge, if any person shall do any of the things forbidden in the section of the act under consideration. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.⁸²

11. *PROCEDURE IN CASES OF REFEREE'S ABSENCE OR DISABILITY.*—Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.⁸³

12. *REVIEW OF PROCEEDINGS BEFORE REFEREE.*—**Power of Bankruptcy Court over Records and Findings of Referee.**—The jurisdiction of courts

75. *Declaration of dividends, etc.*—Bankrupt Act, 1898, § 39, cl. 1. See post, "Payment of Dividends," XVI. E. 2. i; "Declaration and Payment of Dividends," XVII. F.

76. *Giving notice to creditors.*—Bankrupt Act, 1898, § 39, cl. 4. *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231. See ante, "Notices to Creditors," VI. C.

77. *Preparation and transmission of records.*—Bankrupt Act, 1898, § 39, cl. 5. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

78. *Requisite recitals in order.*—General Order Number XXVIII Adopted and Established by the Supreme Court of the United States November 28, 1898. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

79. *Necessity and manner of keeping.*—Bankrupt Act, 1898, § 42a. See the titles CONTEMPTS; RECORDS.

80. *Acts constituting contempt.*—Bank-

rupt Act, 1898, § 41a. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

It is however provided by the latter part of § 41, cl. a, "that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be paid or tendered to him."

81. *Jurisdiction of bankruptcy court to punish for contempt before referees.* See ante, "Punishment for Contempts before Referees," V. A. 2. b. (16)

82. *Punishment by judge.*—Bankrupt Act, 1898, § 41b. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

83. *Procedure in case of referee's absence or disability.*—Bankrupt Act, 1898, § 43.

of bankruptcy over the records or findings certified to them by referees has already been treated in this title.⁸⁴

Procedure to Obtain Review of Referee's Order.—When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of, and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.⁸⁵

XIV. Meetings of Creditors.

A. Time of Holding.—Express provision is made in the bankrupt act as to the time and place of holding the meetings of the creditors of the bankrupt.⁸⁶

B. Notice of Meeting.—Due notice must be given to creditors, of all meetings of creditors.⁸⁷

C. Powers and Duties of Judge or Referee at First Meeting.—At the first meeting of creditors the judge or referee shall preside,⁸⁸ and, before proceeding with the other business, may allow or disallow the claims of creditors there presented,⁸⁹ and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.⁹⁰

D. Powers and Duties of Creditors—1. **IN GENERAL.**—Under the present bankrupt act it is the duty of the creditors at each meeting to take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act.⁹¹

2. **VOTERS AT MEETINGS.**—**In General.**—Creditors shall pass upon matter submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as otherwise provided in the bankrupt act.⁹²

Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditor's meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.⁹³

XV. Proof and Allowance of Claims.

A. Proof—1. *Necessity That Debt, Demand, or Claim Be Provable.*—By the present bankrupt act it is expressly provided that the word "debt," as used in such act, shall include any debt, demand, or claim provable in bankruptcy,^{93a}

84. Power of bankruptcy court over records and findings.—See ante, "As to Records and Findings of Referees," V, A, 2, b, (10).

85. Procedure on petition for review of order.—General Order in Bankruptcy Number XXVII. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

86. Statutory provisions as to time of meeting.—Bankrupt Act, 1898, §§ 55a, 55d, 55e, 55f.

Must be after adjudication.—"The meeting of the creditors which may appoint the trustees and the committee, must be one held after the court has made an adjudication of bankruptcy and ordered such a meeting." *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

87. Notice.—See ante, "Notices to Creditors," VI, C.

88. Duty of judge or referee to preside.—Bankrupt Act, 1898, § 55b.

Under the act of 1867 it was provided that one of the registers of the district

court should preside. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755.

89. Allowance or disallowance of claims.—Bankrupt Act, 1898, § 55b. See post, "Proof and Allowance of Claims," XV.

90. Examination of bankrupt.—Bankrupt Act, 1898, § 55b. See ante, "Duties of Bankrupt," XI, A.

91. Duties of creditors.—Bankrupt Act, 1898, § 55c.

Appointment of assignee of trustee.—See post, "By Creditors," XVI, C, 2, a.

92. Right of creditors to vote at meeting.—Bankrupt Act, 1898, § 56a.

93. Creditors holding claims which are secured, etc.—Bankrupt Act, 1898, § 56b. See post, "Allowance of Claims of Secured Creditors and Those Having Priority," XV, B, 3.

93a. Meaning of "debt" in bankrupt act of 1898.—Bankrupt Act, 1898, § 1, cl. 11. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436.

"While the word 'claim' is used in its

and a "creditor" is held to include "any one who owns a demand or claim provable in bankruptcy, and may include his duly-authorized agent, attorney, or proxy."⁹⁴

2. WHAT DEBTS MAY BE PROVED.—a. *General Enumeration of Provable Debts.*—**Debts Which Are a Fixed Liability.**—Under the bankrupt act the debts of the bankrupt which may be proved and allowed against his estate are expressly enumerated. The first of these are those which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.⁹⁵

Debts Due as Costs.—The second class are those due as costs, taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.⁹⁶

Debts Founded on Claims for Taxable Costs Incurred by Creditor.—The third class are those founded upon a claim for taxable costs incurred in good

signification of the demand or assertion of a right in subd. 11 of § 2, in respect of 'all claims of bankrupts to their exceptions,' it is also used in many parts of the act, and, as we think, in § 25, as referring to debts (which by subsec. 11 of § 1 include 'any debt, demand or claim provable in bankruptcy'), presented for proof against estates in bankruptcy. *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. Ed. 1179; *In re Whitener*, 105 Fed. Rep. 180; *In re Columbia Real Estate Co.*, 112 Fed. Rep. 643, 645." *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116.

94. Persons included in term "creditor."—Bankrupt Act, 1898, § 1, cl. 9.

"Throughout the bankrupt acts the word creditor, says Mr Justice Blackburn, is used in the sense of a person having a claim which can be proved under the bankruptcy, to which he might have added, and one not required by the act to be paid in full in preference of all other creditors." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

95. Fixed liabilities as evidence by judgment or written instrument.—Bankrupt Act, 1898, § 63, a. (1). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009.

The act of 1867 provided that "debts due and payable from the bankrupt, at the time he is adjudged as such, and all debts then existing, but not payable until a future day, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

And again, "all demands against the bankrupt, for or on account of any goods or chattels wrongfully taken or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest." *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

Whenever a certificate of discharge will be a bar to a recovery in an action by the creditor the right to prove the debt under the commission must be unquestionable. *Humphries v. Blight*, 4 Dall. 370, 1 L. Ed. 870; so held in case of a note indorsed after a commission of bankruptcy had issued against the payee.

Claim for alimony not provable.—In *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009, the court, in holding that alimony is not provable in bankruptcy whether in arrears at the time of adjudication, or subsequently accruing, said: "Under the bankrupt act of 1867, it was held by the district court of the United States for the southern district of New York, in an able opinion of Judge Choate (which is believed to be the only one on the subject under that act) that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable debt nor barred by a discharge. In *re Lachemayer* (1878), 18 Nat. Bankr. Reg. 270; S. C. 14 Fed. Cas. 911. Like decisions have been made by Judge Brown in the same court under the present bankrupt act. In *re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321. And the same result has been reached in a careful opinion by Judge Lowell in the district court for the district of Massachusetts. In *re Nowell*, 99 Fed. Rep. 931." See ante, "Debts Not Affected by Discharge," XII, F. 1, b. And see, generally, the title DIVORCE.

96. Debts due as costs, etc.—Bankrupt Act, 1898, § 63, a. (2).

faith by a creditor before the filing of the petition in an action to recover a provable debt.⁹⁷

Debts Founded on Open Account, or Contract Express or Implied.—The fourth class are those founded upon an open account,⁹⁸ or upon a contract express or implied.⁹⁹

Claims Founded upon Provable Debts Reduced to Judgment after Filing of Petition.—The fifth class comprises those founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.¹

The liability of the husband to the wife for her paraphernal property, under the law of Louisiana is clearly provable by her against him as a debt under the bankrupt act of the United States.²

b. *Unliquidated and Contingent Claims against Bankrupt.*—Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.³

97. Claims for taxable costs incurred by creditor prior to petition.—Bankrupt Act, 1898, § 63, a. (3).

98. Debts founded upon open account.—Bankrupt Act, 1898, § 63, a. (4). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084.

99. Debts founded upon contract express or implied.—Bankrupt Act, 1898, § 63, a. (4). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009.

A claim for the conversion of personal property is a provable debt. *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, so holding in the case of a conversion of shares of stock by a stockbroker.

Right of claimant to waive tort.—Where a claim is founded upon an open account or upon a contract, express or implied, and can be proved under § 63a of the bankruptcy act, if the claimant chooses to waive the tort and to take his place with the other creditors, the claim is one provable under the act and barred by the discharge. *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762, affirming *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147.

1. Claim founded on provable debts reduced to judgment pending application for discharge.—Bankrupt Act, 1898, § 63, a. (5). *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

2. Claims of wife for paraphernal property.—*Fleitas v. Richardson*, 147 U. S. 550, 37 L. Ed. 276.

3. Unliquidated claims against bankrupt.—Bankrupt Act, 1898, § 63, b. *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084; *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147.

Section 63a and 63b construed and applied.—"Provable debts are defined by § 63, a copy of which appears in the margin. Paragraph a of this section includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph b, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph a. Certainly paragraph b does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated. *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. Ed. 1084. Whether the effect of paragraph b is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph a, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph a, as one 'founded upon an open account, or upon a contract, express or implied,' and might have been proved under § 63a had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate." *Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, followed in *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762.

In *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, after having obtained a divorce, the husband agreed in writing to pay to the wife annually a certain sum during her life, or while remaining unmarried, and also a certain amount for the support of her children. After the husband had been adjudicated a bankrupt and had been discharged, the wife sued for amounts unpaid on both these agreements. In holding that such demands were not provable claims the court said: "Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not,

3. BY WHOM PROVED—*a. In General.*—The proof of claim is to be made by the creditor.⁴ In case of assignment before proof, claims are to be supported by

in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898, 30 Stat. 544, yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which in our opinion is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232, speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841. The fifth section of that act gave the right to prove 'uncertain and contingent demands,' but it was held that a contract such as above described was not within that section." *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084.

"Section 63a provides for debts which may be proved, which, among others, are (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;' (4) 'founded upon an open account, or upon a contract express or implied.' In § 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph b, however, adds nothing to the class of debts which might be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63a, to be liquidated as the court should direct. We do not think that by the use of the language in § 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove. The language of § 63a of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. The act of 1867, § 19, 14 Stat. 517, 525, carried into the Revised Statutes as

§ 5068, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order, and the creditor was then to be allowed to prove for the amount so ascertained. Section 5 of the act of 1841, 5 Stat. 440, provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration." *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084.

Provision of act, 1841—Uncertain or contingent demands—Debts payable in futuro.—The fifth section of the bankrupt act of 1841 enacts that: "All creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts and claims under the act, and shall have a right when those debts or claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts in presenti." Under this section, so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable under the act. A claim for a breach of covenant that the grantor has an indefeasible estate in fee in land sold—the claim arising from the right of his wife, yet living, to be endowed of the estate—is of this character during the life of the husband. *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232. See, also, *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084; *Wolf v. Stix*, 99 U. S. 1, 8, 25 L. Ed. 309, 313.

Under the act of 1867 it was held that "contingent debts and liabilities of the bankrupt may also be claimed by creditors, and such claims may be allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

4. Proof by creditor.—See post, "Method of Proof," XV, A, 6.

Effect of failure of pledgee to appear

the depositions of the owner at the time of the commencement of proceedings.⁵

b. *Persons Contingently Liable for Bankrupt.*—Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.⁶

c. *Trustees of Other Estates Being Administered in Bankruptcy.*—The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as claims of other creditors.⁷

4. *AS OF WHAT DATE PROVABLE.*—Debts are provable against a bankrupt's estate as of the date of the commencement of the proceedings in bankruptcy.⁸

5. *TIME OF PROVING.—General Rule.*—Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication,⁹ or if they are liquidated by litigation and the final judgment is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment.¹⁰

and prove claim.—Until he shall be paid, the pledgee is entitled to the possession of the property which he holds under a valid pledge as security for his debt against the pledgors, notwithstanding a subsequent adjudication of bankruptcy against them; and his refusal to surrender it to their assignees is not a conversion of it. The failure of the pledgee to appear and prove his claim in the bankruptcy court forfeits only his right to participate in the distribution of the bankrupt's estate ordered by that court. *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589.

5. See post, "Method of Proof," XV, A. 6.

6. **Persons contingently liable on claim.**—Bankrupt Act, 1898, § 57 i.

Demand of surety against maker of note.—By the fifth section of the United States Bankrupt Act, 1841 (5 Stat. at L. 444), the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act. Therefore, where the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it. *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698.

7. **Trustees of other estates.**—Bankrupt Act, 1898, § 57m.

8. **As of what date provable.**—*Boatman's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 29 L. Ed. 174.

9. **To be proved within one year after adjudication.**—Bankrupt Act, 1898, § 57n. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

10. **Claims liquidated by litigation.**—Bankrupt Act, 1898, § 57n. *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

Filing of substituted or amended proof after expiration of year.—In *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179, *Otis, Wilcox & Co.*, having an admitted claim for \$4,421.64, sued the bankrupts in New York and Illinois and attached debts due to them by trustee process. This was within four months before the filing of the petition in bankruptcy, and therefore was ineffectual as against the appellant by § 67 of the act. But *Otis, Wilcox & Co.*, supposing that they had valid attachments, took judgments by default, and collected their debt from the parties trusted, agreeing to save the latter harmless from liability to others. Satisfaction was entered of record in each suit. Subsequently the trustee in bankruptcy demanded payment of these debtors of the bankrupt, and as they had no defense, *Otis, Wilcox & Co.*, paid over to the trustee the full amount of the respective debts. *Otis, Wilcox & Co.*, filed a claim in bankruptcy, and were allowed to prove their claim. On appeal to the supreme court from a decree of the circuit court of appeals affirming a decree of the district court, the supreme court, in affirming the decree said: "The adjudication of bankruptcy was on April 27, 1900. A petition and the original proof of claim of *Otis, Wilcox & Co.*, were filed on March 9, 1901. At this time the trustee in bankruptcy was suing for the debts in question, but by agreement time was given to the counsel for *Otis, Wilcox & Co.* to look into the matter. The payment to the trustee by the last named firm, although agreed upon before, was not made until April 29, 1901, more than a year after the adjudication, so that technically the record of satisfaction really was a bar until the time for proof had gone by. Subsequently, on November 12, 1901, an amended proof was filed by consent of the trustee, and was allowed as of November 4. We are of opinion that when the trustee accepted payment from *Otis, Wilcox*

As to Infants and Insane Persons.—The rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.¹¹

6. METHOD OF PROOF—*a. Of What Consists.*—It is provided by the present bankrupt act that proof of claims shall consist of a sworn statement, in writing,¹²

& Co. in pursuance of his previous agreement, with this proof on file, and in this way undid the satisfaction of record, he must be taken to have done so on the understanding that he accepted the consequence that the bar to the proof was removed. We follow the interpretation of the circuit court of appeals, that the admitted belief of Otis, Wilcox & Co., that they had been paid, was due to a mistake of fact, and the agreement to settle seemingly having been made within the year, the delay of actual payment for a day or two beyond, for convenience of counsel, ought not to affect the result." *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

"The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within § 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad. *Sanger v. Newton*, 134 Massachusetts 308. See *In re Parkes*, 10 N. B. R. 82; *In re Baxter*, 12 Fed. Rep. 72; *In re Glass*, 119 Fed. Rep. 509. The proceedings remained in the district court, notwithstanding the appeal, and the amendment properly was allowed there. It was little more than a form, as the facts had been agreed of record, and the filing was assented to by the trustee." *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

11. Rights of infants and insane persons.—Bankrupt Act, 1898, § 57n. *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179.

12. Sworn written statement.—Bankrupt Act, 1898, § 57a. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

As to the effect of such sworn proof, in case of objection, see post, "Hearing and Determination of Objections to Claims," XV. B., 2.

Provisions of general order XXI as to depositions.—1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court in the cause. When made to prove a debt due to a partnership, it must appear on oath that

the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer; or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open amount shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. 2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt. 3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter. 4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt. 5. The execution of any letter of attorney to represent a creditor, or of an assign-

signed by a creditor,¹³ setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.¹⁴

b. *Filing Instrument on Which Claim Founded.*—**In General.**—Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim.¹⁵

If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim.¹⁶

Withdrawal after Claim Allowed or Disallowed.—After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.¹⁷

7. **EFFECT OF PROVING DEBT UPON CREDITOR'S RIGHT OF ACTION.**—Under the bankrupt acts of 1841 and 1867, no debtor proving his debt was allowed to maintain any suit at law or in equity therefor against the bankrupt.¹⁸

ment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof. 6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly. General Orders and Forms in Bankruptcy. Adopted and Established by the Supreme Court of the United States November 28, 1898. 172 U. S. 660.

13. **Signature of creditor.**—Bankrupt Act, 1898, § 57a. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

14. **Requisite allegations of statement.**—Bankrupt Act, 1898, § 57a. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

Provisions of act 1867 as to proof of claims.—"Resident creditors are required to make proofs before one of the registers of the court in the district where the proceedings are pending, but all such proofs, in behalf of nonresident creditors, may be made before a commissioner or before a register in the judicial district where the creditor resides, and corporations may verify their claims by the oath or affirmation of their president, cashier,

or treasurer." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

"Claims against the estate of the bankrupt are required to be signed by the claimant and to be verified by his oath, and the requirement also is that the assignee shall register, in a book to be kept by him for the purpose, the names of the creditors who have proved their claims, in the order in which such proof is received, stating the time of its receipt and the amount and nature of the debt." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275. See, also, *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

Nature of proceedings to prove debt.—The supreme court has no jurisdiction to review a judgment of the circuit court, rendered in a proceeding upon an appeal from an order of the district court rejecting the claim of a supposed creditor against the estate of the bankrupt, and for the reason that a proceeding to prove a debt is part of the suit in bankruptcy, and not an independent suit at law or in equity. Such being the nature of the proceeding, it is a matter of no consequence whether the appeal from the district court to the circuit court was taken by the creditor or the assignee, for it has always been held that this court has no control over judgments or orders made by the circuit courts in mere bankruptcy proceedings. *Leggett v. Allen*, 110 U. S. 741, 28 L. Ed. 313, following *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923. See ante, "Appellate Jurisdiction," V. C.

15. **Filing instrument on which claim founded.**—Bankrupt Act, 1898, § 57b. *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

16. **Procedure where instrument lost or destroyed.**—Bankrupt Act, 1898, § 57b.

17. **Withdrawal after allowance or disallowance of claim.**—Bankrupt Act, 1898, § 57b.

18. **Effect of proof upon debtors' right of action.**—*United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Commercial*

8. **FILING OF CLAIMS AFTER PROOF.—In General.**—Claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.¹⁹

Sufficiency of Filing with Trustee.—It has been held that the delivery of a claim, properly proved, to the trustee within the prescribed time, is a sufficient filing within the meaning of the above provision of the bankruptcy act.²⁰ A trustee

Bank v. Buckner, 20 How. 108, 15 L. Ed. 862; Ex parte Christy, 3 How. 292, 11 L. Ed. 603.

Provision of acts of 1841 and 1867—Amendment of June 22, 1874.—Section 5105 of the Revised Statutes provided (as did the bankruptcy act of 1841, c. 9, § 5, 5 Stat. 445) that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby." This section was amended by the act of June 22, 1874, by adding thereto the following words: "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge." Scott v. Ellery, 142 U. S. 381, 35 L. Ed. 1050; New Lamp Chimney Co. v. Ansonia Brass, etc., Co., 91 U. S. 656, 23 L. Ed. 336.

As to the effect of this provision upon the creditor's right to obtain an annulment of a discharge procured by fraud, see ante, "Revocation of Discharge," XII, G.

Generally, as to the effect of bankruptcy proceedings upon actions by and against the bankrupt, see post, "Nature, Operation and Effect of Bankruptcy Proceedings," XXI.

19. **Filing of claims after proof.**—Bankrupt Act, 1898, § 57c. Orcutt Co. v. Green, 204 U. S. 96, 51 L. Ed. 390.

By the twenty-first general order in bankruptcy § 1, it is provided that "proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred." Orcutt Co. v. Green, 204 U. S. 96, 51 L. Ed. 390.

20. **Delivery to trustee as filing of proof.**—"The general orders of this court are provided for by § 30 of the bankruptcy act, which enacts that, 'All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the supreme court of the United States.' Under that section this court had the power to provide, as it has done in Order 21, that 'Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.' There is nothing in that provision inconsistent

with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must, therefore, take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether anyone but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim, properly proved, to the trustee is a sufficient filing. The law provides, subsection c of § 57, that the claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred; but that does not prohibit their being filed somewhere else prior to their allowance, and the order in bankruptcy in substance provides that they may be filed after being proved, with the trustee. Such order is equivalent to saying that proofs of debt (or claim) may be received by the trustee. When they are so received by him they are in legal effect received by the court, whose officer the trustee is. Having been received by the trustee, under authority of law, the proofs of debt are thereby sufficiently filed so far as the creditors are concerned, and it is the duty of the trustee to deliver them to the referee. If the trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court, and the creditors are in no way responsible therefor. The presentation and filing have been made within the time provided for and with one of the proper officers, and his failure to deliver to the referee cannot be held to be a failure on the part of the creditor to properly file his proofs." Orcutt Co. v. Green, 204 U. S. 96, 51 L. Ed. 390.

"If the presentation and delivery of these proofs of claim in the case before us with the trustee was sufficient within the meaning of the bankruptcy act, then the referee should have proceeded to determine the question of their allowance, when presented to him, the same as if they had been filed with him personally within the year subsequent to adjudication. We have been referred to no case in this court deciding the exact question, nor is there cited any case in the lower courts wherein it has been decided, with the exception of that of In re Seff, dis-

in bankruptcy cannot, however, file a proof of his own claim against the bankrupt, with himself;²¹ nor will it be sufficient if he deliver such proof to his own attorney to be filed with the referee, if such attorney fails to so file it.²²

B. Allowance—1. **IN GENERAL**.—Claims which have been duly proved are to be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.²³

2. **HEARING AND DETERMINATION OF OBJECTIONS TO CLAIMS**.—**In General**.—It is provided by the bankrupt act that objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.²⁴

strict court of United States, southern district of New York (not reported), where the question before us seems to have been directly before that court, and the decision was in favor of the sufficiency of the filing with the trustee. The parties hereto have cited a great many cases in the lower courts deciding questions somewhat analogous to the one now before us, but none in which this question has been decided. We, therefore, think it unnecessary to refer to them. We are of opinion, taking into consideration the various provisions of the fifty-seventh section of the bankruptcy act, in connection with No. 21 of the General Orders in Bankruptcy, adopted by this court, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the statute and the general order above mentioned." *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

21. **Trustee may not file his own claim with himself**.—*Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

22. **Delivery to trustee's attorney insufficient**.—*Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

23. **Allowance in absence of objection, etc.**—Bankrupt Act, 1898, § 57d. *Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390; *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

24. **Hearing and determination of objections**.—Bankrupt Act, 1898, § 57f. *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

"It is the objection, not the claim, which is pointed out for hearing and determination." *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

Sworn proof of claims prima facie evidence of its allegations.—"Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and conven-

ient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied." *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

"The only question warranting the appeal is whether the sworn proof of claim is prima facie evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all. The circuit court of appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an ex parte affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination. Notwithstanding these forcible considerations we agree with the circuit court of appeals. The prevailing opinion, not only in the second circuit but elsewhere, seems to have been that way. In *re Sumner*, 101 Fed. Rep. 224; In *re Shaw*, 109 Fed. Rep. 780; In *re Cannon*, 133 Fed. Rep. 837; In *re Carter*, 138 Fed. Rep. 846; In *re Doty*, 5 Am. B. Rep. 58. See also, In *re Saunders*, 2 Low. 444, 446; In *re Felter*, 7 Fed. Rep. 904, 906. The alternative would be that the mere interposition of an objection by any party in interest, § 57d, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. Section 57f. It is the objection, not the claim, which is pointed out for hearing and

By Whom Determined.—The claims must be passed upon and allowed or disallowed by the court or referee.²⁵ As already seen, courts of bankruptcy have jurisdiction to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."²⁶

Manner of Investigating Claim.—A claim of debt or damages against the bankrupt is investigated by chancery methods.²⁷

3. **ALLOWANCE OF CLAIMS OF SECURED CREDITORS AND THOSE HAVING PRIORITY.**—Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.²⁸

determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word "proof" as used in the act." *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584.

25. **Claims passed upon by court or referee.**—*Orcutt Co. v. Green*, 204 U. S. 96, 51 L. Ed. 390.

26. **Jurisdiction.**—See ante, "Allowance or Disallowance of Claims," V, A. 2, b, (2).

27. **Claims investigated according to chancery methods.**—*Barton v. Barbour*, 104 U. S. 125, 25 L. Ed. 672. See ante, "Nature of Jurisdiction and Manner of Exercise," V, A. 2, d. And see, generally, the titles EQUITY; JURISDICTION.

Procedure under act, 1867.—"To entitle a creditor to have his demand allowed, he must verify it in the manner provided by § 5077; and, when so verified, it must be delivered to the register having charge of the case. Section 5079. If the proof is satisfactory to the register, he is required to deliver it to the assignee, who must examine and compare it with the books and accounts of the bankrupt. It is the duty of the assignee, also, to register, in a book to be kept by him for that purpose, the names of the creditors who have proved their claims, in the order in which the proof is received, stating the time of the receipt of the proof, and the nature and amount of the debts. This book is open to the inspection of all creditors. Section 5080. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or when the proof shows the claim to be founded in fraud, illegality, or mistake. Section 5081. The court must allow all debts duly proved, and cause a list thereof to be made and certified to one of the reg-

isters. Section 5085." *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

"A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences. His remedies for the purpose of this proof are prescribed by the law. As has been seen, he must first submit his case to the register. It is then examined by the assignee, who must record it in a book open to the inspection of creditors. An opportunity is then given to parties in interest to call upon the district court to take further testimony, and pass upon the claim. That court must then decide, and from its decision an appeal may be taken to the circuit court, where further litigation may be had; but when that court acts, all parties are concluded. The judgment of that tribunal is final. From it no appeal lies." *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

28. **Allowance of claims of secured creditors, etc.**—Bankrupt Act, 1898, § 57c.

Under the act of 1867 (Rev. Stat., § 5075) it was provided that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Long v. Bullard*, 117 U. S. 617, 29 L. Ed. 1004.

Mortgagees who prove their debt in the bankruptcy proceedings against the mortgagor become creditors of his general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the bankrupt court may direct. *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370. See the title MORTGAGES AND DEEDS OF TRUST.

Determination of value of securities held by secured creditors.—"Section 57th provides: 'The value of securities held by secured creditors shall be determined by converting the same into money accord-

4. ALLOWANCE OF CLAIMS OF CREDITORS WHO HAVE RECEIVED PREFERENCES.—Under the present bankrupt act as it originally was prior to the amendment of February, 1903, it was provided that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.²⁹ This section of the act, as now amended, is as follows: "The claims of creditors who have received preferences, voidable under § 60, subdivision b, or to whom conveyances, transfers, assignments or encumbrances, void or voidable under § 67, subdivision e, have been made or given, shall not

ing to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.' The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course where there is fraud or a proceeding contrary to the contract the interposition of the court might properly be invoked." *Hiscock v. Varick Bank*, 206 U. S. 28, 40, 51 L. Ed. 945.

29. Allowance of preferred claims.—Surrender of preferences.—Bankrupt Act 1898, § 57g. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 526, 51 L. Ed. 596; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571; *Yaple v. Dahl-Millikan, etc., Co.*, 193 U. S. 526, 48 L. Ed. 776; *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380; *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

Under the act of 1887, claimants were forbidden to accept any preferences and the provision was that if any one did so, contrary to the prohibition of the act, he should not prove the debt or claim, nor should he receive any dividend until he should first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. *United States v. Herron*, 20 Wall 251, 22 L. Ed. 275. See, also, *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Pirie v. Chicago, etc., Co.*, 182 U. S. 433, 45 L. Ed. 1171.

"The provision of § 5084 of the Revised Statutes of the United States is as follows: 'Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provisions of the act of March two, eighteen hundred and sixty-seven,

chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference.'" *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 37, 39, 37 L. Ed. 68.

"Section 5021, as amended in 1874 (act of June 22, 1874, 18 Stat. 178, 181, c. 390, § 12), is as follows: 'Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended and such person, if the creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy.'" *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 37, 37 L. Ed. 68.

As to fraud imputed arising from knowledge of creditors' attorneys as constituting actual fraud, see post, "Preferences," XIX, C.

Meaning of "surrender" as used in § 57 g.—It has been held that the word "surrender" as used in § 57 g of the act of 1898, embraces both compelled or voluntary action. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790.

And the right of surrender exists as well after as before suit. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. Ed. 596.

Thus, a creditor in good faith retaining a voidable preference until he is deprived of the same by a judgment in a suit by the trustee of the bankrupt, may still subsequently prove his debt. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790.

"We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to

be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or encumbrances."³⁰

5. ALLOWANCE OF DEBTS DUE AS PENALTY OR FORFEITURE.—Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction, or proceedings out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.³¹

C. Reconsideration of Claims.—In General.—Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.³²

Recovery of Dividend upon Reconsideration and Rejection.—Whenever

stand on an equal footing with other creditors and prove his claims." *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 363, 364, 49 L. Ed. 790.

"We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor, having a preference, retained the preference, and at the same time prove his debt and participated in the distribution of the estate, an advantage would be secured not contemplated by the law. Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality." *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 361, 49 L. Ed. 790.

Application of provision.—Payments on a running account, in the usual course of business, by a person whose property had actually become insufficient to pay his debts, where new sales succeeded payments and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency and no reason to believe an intention to prefer, are not preferences, which must be surrendered as a condition to the allowance of proof of claims, under the bankruptcy act of 1898. *Pirie v. Chicago Title and Trust Company*, 182 U. S. 438, in which the decision proceeded on the finding of facts made pursuant to clause 3 of general orders in bankruptcy, XXXVI distinguished. *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, followed in *Yaple v. Dahl-Millikan, etc., Co.*, 193 U. S. 526, 48 L. Ed. 776.

"The facts as found in *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171, were so entirely different from those existing here that this case is not controlled by that. In view of similar vital differ-

ences it has been held by the circuit court of appeals for the first circuit, *Dickson v. Wyman*, 111 Fed. Rep. 726; Second Circuit, *In re Sagor and Brother*, 9 Am. Bank Rep. 361; Third Circuit, *Gans v. Ellison*, 114 Fed. Rep. 731; Eighth Circuit, *Kimball v. Rosenham Company*, 114 Fed. Rep. 85, that payments on a running account, where new sales succeed payments and the net result is to increase the value of the estate, do not constitute preferential transfers under § 60a." *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, followed in *Yaple v. Dahl-Millikan, etc., Co.*, 193 U. S. 526, 48 L. Ed. 776.

A creditor of a bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt. The levy was afterwards set aside, as an illegal preference within the purview of the bankrupt act in consequence of knowledge of the debtor's condition by the plaintiff's attorney. Held, that the creditor was not thereby precluded from proving his debt against the bankrupt; and that an endorser of the note of the bankrupt to the creditor, on which the judgment was founded, was not discharged from his liability as endorser by reason of the levy being declared in fraud of the provisions of the bankrupt law. Rev. Stat., § 5084, and § 5021 as amended by the act of June 22, 1874, 18 Stat. 178, 181. *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 37, 37 L. Ed. 68.

30. Provision of section as amended.—Act of Feb. 9, 1903, 487 (amending Bankruptcy Act of July 1, 1898).

"Section 57g of the bankrupt act, as amended by the act of February 3, 1903, 32 Stat. 797, 799, empowering the court to compel creditors to surrender preferences as a prerequisite to the proof of claims against the estate of the bankrupt, relates only to those creditors 'who have received preferences voidable under § 60, subdivision b.'" *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 510, 49 L. Ed. 571.

31. Debts due as penalties, etc.—Bankrupt Act, 1898, § 57 j.

32. Right to reconsider.—Bankrupt Act, 1898, § 57 l.

a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.³³

D. Review of Decisions on Claims.—See ante, "Appellate Jurisdiction," V, C.

XVI. Trustees or Assignees.

A. Trustees as Successors of Assignees under Former Acts.—Under the present bankrupt act trustees in bankruptcy, appointed by the court of bankruptcy, take the place and are vested with the powers of assignees in bankruptcy, under former bankrupt acts.³⁴

B. Status as Officer.—Both under the former and present bankrupt acts, the assignee or trustee is an officer, with certain prescribed powers and duties.³⁵

C. Appointment and Qualification—1. **WHO MAY BE APPOINTED.**—Trustees may be individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed,³⁶ or corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.³⁷

2. **MANNER OF APPOINTMENT**—a. *By Creditors.*—Under the present bankrupt act it is provided that the creditors of a bankrupt estate shall, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate.³⁸ Former bankrupt acts contained a similar provision as to the appointment of assignees and committees.³⁹

33. Recovery of dividend on reconsideration and rejection.—Bankrupt Act, 1898, § 57 1. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

Nature of proceedings.—A proceeding for a reconsideration of a claim, and for its rejection, is not a suit within the meaning of subdiv. b of § 23 of the present bankrupt act, and an order requiring repayment of a dividend paid, may be properly and legally made by the district court. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

34. Take place of assignees under former acts.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

35. Status as officer.—"An assignee in bankruptcy in England, and in this country when it had a bankrupt law, is an officer made by the statute of bankruptcy, with powers, privileges and duties prescribed by the statute, for the collection of the bankrupt's estate for an equal distribution of it among all of his creditors." *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164.

It is expressly provided by the present bankrupt act that the term "officer," as used in such act, shall include the trustee. Bankrupt Act, 1898, § 1, (18).

36. Individuals.—Bankrupt Act, 1898, § 45 a, (1).

37. Corporations.—Bankrupt Act, 1898, § 45 a, (2).

38. Appointment by creditors.—Bank-

rupt Act, 1898, § 44. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. See ante, "Meetings of Creditors," XIV.

Trustee not appointed in certain cases.—If the schedule of a voluntary bankrupt disclose no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called. General Orders and Forms in Bankruptcy. Adopted and Established by the Supreme Court of the United States November 28, 1898. 172 U. S. 658. See *Smalley v. Laugenour*, 196 U. S. 93, 49 L. Ed. 400.

39. Similar provision of former acts.—*Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. Ed. 268; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204. See, also, *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

"Assignees of the estate of the debtor are to be chosen by the creditors at their first meeting. Creditors not only appoint

b. *By Court*.—If the creditors do not thus appoint a trustee or trustees, it is the duty of the court to do so.⁴⁰

3. **BOND**—a. *Necessity, Form and Requisites*—(1) *In General*.—Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States with such sureties as shall be approved by the courts, conditioned for the faithful performance of their duties.⁴¹

(2) *Effect of Failure to Give Bond*.—If any trustee fails to give bond as required by the bankrupt act, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.⁴²

(3) *Amount of Bond*.—**Duty of Creditors to Fix**.—It is the duty of the creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, to fix the amount of the bond of the trustee,⁴³ and they may at any time increase the amount of such bond.⁴⁴

If the creditors do not fix the amount of the bond it is made the duty of the court to do so.⁴⁵

(4) *Joint or Several Bonds*.—Joint trustees may give joint or several bonds.⁴⁶

the assignee or assignees but, in certain cases and under certain conditions, they may remove any assignee, and vacancies in certain cases may be filled by the creditors, as provided in the eighteenth section of the act." United States v. Herron, 20 Wall. 251, 22 L. Ed. 275.

In *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 3 L. Ed. 496, it was queried whether under the act of 1800 the commissioners of a bankrupt had a right to appoint a second assignee, in case of the death of the first. The court held that: "Whether it was, or was not, a case in which the bankrupt law authorizes the appointment of the present assignee, we deem immaterial. The case is certainly not within the express letter of the statute, and it is only under its equitable, and perhaps, its proper construction, that the appointment of the new assignees (the present plaintiffs) can be supported. But the same equity which would support this appointment, would support the substitution of the new assignee for the former, in the existing action."

Presentation to and approval by court.—The resolution of a meeting of creditors for settling an estate by trustee and a committee, and the appointment of the trustees and committee, must be presented to the court and approved by it or they are of no force. *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

40. Appointment by court where not made by creditors.—Bankrupt Act, 1898, § 44. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Voorhees v. Bone-steel*, 16 Wall. 16, 21 L. Ed. 268. See ante, "Appointment or Removal of Trustees," V. A. 2, b. (17).

Appointment by register subject to courts' approval.—"Assignees of the es-

tate of the debtor, in a proceeding in bankruptcy, may be chosen by the creditors, or if they make no choice, at their first meeting, the judge, or, in case there is no opposing interest, the register, may make the appointment, subject to the approval of the judge." *Voorhees v. Bone-steel*, 16 Wall. 16, 21 L. Ed. 268.

41. Necessity and condition of bond.—Bankrupt Act, 1898, § 50 b.

Corporations may be sureties.—Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. Bankrupt Act, 1898, § 50 f.

Number of sureties.—There must be at least two sureties upon each bond. Bankrupt Act, 1898, § 50 e.

Value of sureties' property.—By § 50d of the bankrupt act it is provided that the court shall require evidence as to the actual value of the property of the sureties.

By § 50 of the act it is required that the actual value of the property of the sureties over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

Generally, as to number and qualification of sureties, see the title SURETYSHIP.

42. Effect of failure to give bond.—Bankrupt Act, 1898, § 50 k.

43. Duty of creditors to fix amount of bond.—Bankrupt Act, 1898, § 50 c.

44. May increase amount of bond.—Bankrupt Act, 1898, § 50 e.

45. Duty of court to fix amount where not done by creditors.—Bankrupt Act, 1898, § 50 c.

46. Joint or several bonds.—Bankrupt

b. *Filing*.—Bonds of trustees are required to be filed of record in the office of the clerk of the court.⁴⁷

c. *Suits on Bonds*.—(1) *Time of Bringing*.—Suits upon trustee's bonds may not be brought subsequent to two years after the estate has been closed.⁴⁸

(2) *In Whose Name Brought*.—Bonds of trustees may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.⁴⁹

D. Compensation.—1. **IN GENERAL**.—Under the present bankrupt act it is provided that trustees shall receive as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt,⁵⁰ and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the court, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.⁵¹

2. **APPORTIONMENT OF FEES AND COMMISSIONS**.—In the event of an estate being administered by three trustees instead of one trustee, or by successive trustees, the court is to apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.⁵²

3. **WITHHOLDING COMPENSATION IN CASE OF REMOVAL**.—The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.⁵³

E. Rights, Powers, Duties and Liabilities.—1. **RIGHTS AND POWERS**.—a. *In General*.—Assignees or trustees represent the creditors as well as the bankrupt.⁵⁴

Act, 1898, § 50 j. See, generally, the title BONDS.

47. **To be filed in office of clerk of court**.—Bankrupt Act, 1898, § 50 h.

48. **May not be brought more than two years after estate closed**.—Bankrupt Act, 1898, § 50 m.

49. **In whose name brought**.—Bankrupt Act, 1898, § 50 f.

50. **Fee of five dollars deposited on filing petition**.—Bankrupt Act, 1898, § 48 a.

51. **Commissions**.—Bankrupt Act, 1898, § 48 a.

Amendment of 1903 as to compensation.—By the act of 1903 subdivision a of § 48 was amended so as to read as follows: "a. Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the

court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition." (32 Stat. L. 799.) Act of Feb. 9, 1903, ch. 487 (Amending Bankruptcy Act of July 1, 1898), 38.

52. **Apportionment among several trustees**.—Bankrupt Act, 1898, § 48 b.

53. **Withholding compensation in case of removal**.—Bankrupt Act, 1898, § 48 c. See post, "Removal or Death of Trustee," XVI. G.

54. **Represent both creditors and bankrupt**.—Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523. See, also, Fowler v. Hart, 13 How. 373, 14 L. Ed. 186.

"An assignee in bankruptcy represents the general or unsecured creditors, and his duties relate chiefly to their interests. He is in no respect the agent or representative of secured creditors, who do not prove their claims. He need not take measures for the sale of encumbered property, unless the value of the property is greater than the encumbrance. He has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security. McHenry v. La Societe Francaise, 95 U. S. 58, 24 L. Ed. 370. He cannot enforce

They are officers,⁵⁵ appointed, and given certain powers and charged with certain duties in the collection of the bankrupt's estates and distribution of it among all of his creditors.⁵⁶ They are authorized to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound.⁵⁷ They are subject to the control, and direction of the proper court, and it may, for good cause shown, compel them to take the requisite steps for the full and complete protection of the rights of creditors.⁵⁸

b. *Title and Rights as to Property of Bankrupt*—(1) *General Rules*—(a) *Vested with Title to All Unexempt Property of Bankrupt*.—aa. *Rule Stated*.—The trustee of the estate of a bankrupt, upon his appointment and qualification,⁵⁹ and his successor or successors, if he shall have one or more,⁶⁰ upon his or their

contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law. Neither is it any part of his duty to protect the dower rights of the wife of the bankrupt against the consequences of her own acts before the bankruptcy, or to inquire whether the bankrupt or his wife can claim homestead rights as against incumbrances whose title is superior to his own. As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, he takes by his assignment, as a purchaser from the bankrupt, with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for the general creditors he may do, but nothing more, except that he may sue for and recover that which was conveyed in fraud of the rights of creditors, and set aside all fraudulent preferences. As to such preferences and conveyances he has all the rights of a judgment creditor, as well as the powers specifically conferred by the bankrupt law." *Dudley v. Easton*, 104 U. S. 99, 103, 26 L. Ed. 668. See, also, *MERCHANTS' BANK v. SLAGLE*, 106 U. S. 558, 27 L. Ed. 204.

Assignee represents corporation and creditors.—"An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him. It has been several times adjudged in this court, that, in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349." *Chubb v. Upton*, 95 U. S. 665, 667, 24 L. Ed. 523.

55. Are officers.—See ante, "Status as Officers," XVI, B.

56. Collection and distribution of estate.—*Booth v. Clark*, 17 How. 322, 15 L. Ed. 164. See ante, "Purpose," II, B.

The services of assignees are not to any party or parties, but in respect to the property itself, and to secure its proper application among all parties interested. *Meddaugh v. Wilson*, 151 U. S. 333, 38 L. Ed. 183.

Duty to care for interests of all having claims on property—Necessity for possession.—It is the duty of assignees in bankruptcy, as such, to look after the interests of all having claims upon the property. While it is true that ordinarily assignees in bankruptcy have possession of property, and such possession adds to their cares as well as to their compensation, yet the lack of possession, as where the property is already in the custody of the court through its receiver, does not relieve them from all duty, nor destroy their right to compensation. The duty of looking out for the interests of all having claims upon the property is as pronounced as though they had the actual possession, and the lack of possession is only to be considered in determining the amount of compensation. *Meddaugh v. Wilson*, 151 U. S. 333, 38 L. Ed. 183.

57. Right to recover property, set aside transactions, etc.—*Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731.

58. Subject to control of court.—*Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. Generally, as to control of courts over their officers, see the title COURTS.

59. Acquires title upon appointment and qualification.—*Bankrupt Act*, 1898, § 70 a. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108. See ante, "Appointment and Qualification," XVI, C.

60. Right and title of successor.—*Bankrupt Act*, 1898, § 70 a. *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018.

appointment and qualification, shall in turn be vested by operation of law⁶¹ with the title of the bankrupt, as of the date, he was adjudged a bankrupt,⁶² in all

61. Title vests by operation of law.—Bankrupt Act, 1898, § 70 a. *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Under the act of 1841, § 3, all property and rights of property of every bankrupt, by mere operation of law, ipso facto, from the time of the decree were deemed to be divested out of the bankrupt without any other act of conveyance whatsoever, and the same were vested by force of the decree in such assignee as, from time to time, should be appointed by the proper court for the purpose. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862; *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

Necessity for execution of instrument of conveyance by judge or register under act of 1867.—By § 14 of the act of 1867, it was provided that as soon as the assignee was appointed and qualified, the judge, or where there was no opposing interest, the register, should, by an instrument under his hand, assign and convey to the assignee all the estate real and personal of bankrupt, with all his deeds, books, and papers relating thereto; and such assignment should relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal should vest in the assignee. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755; *Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. Ed. 268; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Norton v. Switzer*, 93 U. S. 355; 23 L. Ed. 903; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

"Explicit, comprehensive, and unqualified as the words of that provision are, still the instrument of assignment is made even more extensively operative by what follows in the same section of the original enactment, which provides that all property conveyed by the bankrupt in fraud of his creditors, * * * and all his rights of action for property or estate, real or personal, and all other causes of

action arising from contract or from the taking or detention or injury to the property of the bankrupt, * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. 14 Stat. 523; Rev. Stat., § 5046." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

Acquisition of property by commissioners and transfer by them to assignees, under act, 1800.—The fifth section of the act, 1800, declared that it should be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, etc.; and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed." *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

Section 6, of the act of 1800 provided "that the commissioners shall assign, transfer or deliver over all and singular the said bankrupt's estate and effect aforesaid, with all muniments and evidences thereof." *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

62. Title vests as of date when adjudged bankrupt.—Bankrupt Act, 1898, § 70, a. *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

"It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21c, with actual or constructive possession, and placed in the custody of the bankruptcy court." *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

"A commission of bankruptcy relates to the act of bankruptcy, having the effect of an execution; it prevents the transmission of the bankrupt's property, from that time, to any but his assignees;

the same effect follows a voluntary assignment; both operate to transfer the property itself." *Brent v. Bank*, 10 Pet. 596, 616, 9 L. Ed. 547.

Act of 1867—Relation back of assignment to filing of petition.—Under the act of 1867, § 14 (Rev. Stat., § 5044), the assignment related back to the time of the commencement of the proceedings in bankruptcy. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755; *Morgan v. Campbell*, 22 Wall. 381, 22 L. Ed. 796; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407; *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606; *Wilkins v. Tourtelott*, 37 L. Ed. 951.

On the 23d of February, 1875, certain creditors filed their petition in the district court of the United States, praying that A. should be declared a bankrupt. On the 9th of March he appeared, and leave was given them to amend their petition, by adding new causes of bankruptcy or otherwise. On the 16th of April, he filed his answer, denying that the aggregate of the claims of the petitioners amounted to one-third of the debts provable against him. Time was thereupon allowed for other creditors to unite with the petitioners, and the previous leave to amend the petition was continued. On the 22d of that month one B. was permitted to unite with the petitioning creditors, and their petition was amended by alleging that A. within six months before the petition was filed committed, by the nonpayment of his commercial paper, an act of bankruptcy. The amount of A.'s debts then represented, was sufficient, and upon the alleged act of bankruptcy set forth in the amended petition A. was duly declared a bankrupt. On the 12th of July, 1875, an assignment was made to C. as assignee which included all the property and effects of every kind in which A. "was interested or entitled to have" on the 23d of February, 1875. C. filed, July 7, 1877, his bill to reach certain securities which had been transferred by A. on or about March 20, 1875. It was held, that the continuity of the proceedings in bankruptcy was unbroken and that the assignment was operative, according to its terms, although the act upon which the adjudication was had was first alleged in said amendment to the petition. That C.'s suit was not barred by the statute of limitations. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

Provision construed and applied.—"In *Hampton v. Rouse*, 22 Wall. 263, 275, 22 L. Ed. 755, it was declared by Mr. Justice Clifford, delivering the opinion of the court, that the plain meaning of this section (Rev. Stat., § 5044), was, that, 'until an assignee is appointed and qual-

ified, and the conveyance or assignment is made to him, the title to the property, whatever it may be, remains in the bankrupt.' It is equally plain that, when the assignment is made, it operates retrospectively. The title of the bankrupt in the interval is defeasible, and, when the assignment is made, is divested as of the date when the petition was filed. All titles derived under or through him, originating subsequently to that date, are, by force of law and without regard to the knowledge or the motives of the claimant, overreached and defeated. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866. The statute declares that the title of the assignee shall thus vest by relation to the commencement of the proceedings in bankruptcy, although the property is then attached on mesne process as the property of the debtor." *Conner v. Long*, 104 U. S. 228, 230, 26 L. Ed. 723.

"Until the debtor commits an act of bankruptcy it is doubtless true that any creditor may lawfully sue out any proper process to enforce the payment of debts overdue, and may proceed to judgment, execution, seizure, and sale of his property; but it is equally true that the appointment of an assignee under a decree in bankruptcy relates back to the commencement of the bankrupt proceedings, and that the instrument required to be executed, under the hand of the judge or register, assigns and conveys to the assignee all the estate, real and personal, of the bankrupt, including equitable as well as legal rights, and interests and things in action as well as those in possession, which belonged to the debtor at the time the petition in bankruptcy was filed in the district court." *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

"The bankruptcy act in force on December 1, 1873, was the act of March 2, 1867, ch. 176, 14 Stat. 517, the 14th section of which provided that the assignment to an assignee in bankruptcy 'shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.' The provision of Rev. Stat., § 5044, is, that the assignment 'shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.' Under these provi-

his property,⁶³ excepting that exempt by law from execution and liability for

sions, if the bankruptcy proceedings were commenced October 10, 1873, they were begun before the state court attachment was made, and the assignment, when made, related back to October 10, 1873, and vested title in the assignee as of that date, and overreached and defeated all claim under the attachment. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723. If the bankruptcy proceedings were not begun till March 5, 1874, the attachment, having been made within four months next preceding that date, was dissolved by the making of the assignment, and the title of the assignee vested as of March 5, 1874, which was before any execution levy." *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83.

"The fourteenth section of the bankrupt act declares that the assignment in bankruptcy shall relate back to the commencement of proceedings, and by operation of law vest the title of the estate of the bankrupt in the assignee, notwithstanding the same is then attached on mesne process as the property of the debtor. It is argued that a distress warrant, being the act of the landlord himself, is not an attachment upon mesne process. This is true according to the technical signification of the term, but the meaning of the term in this connection embraces any proceeding by which a lien is first acquired. The object of the law was evidently to prevent any one procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankrupt court; but if it did not exist the purpose of the law was to prevent its being brought into existence by any proceeding whatever. * * * The fourteenth section of the bankrupt law is not leveled at the mode of doing a thing, but at the thing itself. It was the object of this section to prevent the acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and any proceeding by which this is attempted is within the condemnation of the law." *Morgan v. Campbell*, 22 Wall. 281, 22 L. Ed. 796.

Provision as to relation back omitted from present act.—"According to the terms of the bankrupt act, the title of the bankrupt is vested in the trustee by operation of law as of the date of the adjudication. Act of 1898, § 70, a, e. By the act of 1867, it was provided that as soon as an assignee was appointed and qualified, the judge or register should, by instrument, assign or convey to him all of the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest

the title to such estate, both real and personal, in the assignee. But § 70a of the act of 1898 omits the provision that the trustee's title 'shall relate back to the commencement of the proceedings in bankruptcy,' and explicitly states that it shall vest 'as of the date he was adjudicated a bankrupt.'" *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945.

Order approving bond as evidence of vesting title.—A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. *Bankrupt Act*, 1898, § 21 e.

As to vesting of title on revocation of discharge, see ante, "Vesting of Title to Property in Trustee upon Revocation," XII, G, 2.

As to vesting of title on setting aside composition, see post, "Vesting of Title to Property in Trustee," XVIII, C, 2.

As to revesting in bankrupt on confirmation of composition, see post, "Revesting of Title to Property in Bankrupt," XVIII, B, 4.

63. Takes title to all unexempt property.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Swarts v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060. And see note to succeeding text.

"The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey. And the statute is something more than another mode of transferring property in invitum. It is a gift of privileges and expresses the conditions upon which they are conferred." *Page v. Edmunds*, 187 U. S. 596, 605, 47 L. Ed. 318.

"The eighteenth section of the act, 1800, contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall 'fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom, and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, moneys, or other effects and estate; and of all books, papers and writings relating thereunto, of which he or she was possessed; or in which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had, in trust for him or her, or for his or her use, at any time before or after the issuing of

the said commission; or whereby such bankrupt, or his or her family, then hath, or may have or expect, any profit, possibility of profit, benefit or advantage whatsoever, &c.' It then goes on further to provide, that the bankrupt shall, upon such examination, execute, in due form of law, such conveyance, assurance and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners, to vest the same in the 'assignees;' and also requires the bankrupt to deliver up 'all books, papers and writings relating thereunto,' which are in his possession, custody, or power; at the time of the examination; upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of the fifth section, we think it is cleared up and illustrated by that of the present. Here, the words 'profit, possibility of profit, benefit, or advantage whatsoever,' are used, and show that mere interests in present, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, 'whereby the bankrupt then hath, or may have or expect, any profit.' *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 103. See, also, *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

'The disclosure is required of estate and effects, in which the bankrupt was interested, as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, 'whatsoever and wheresoever.' The object of the provision was to make such conveyances auxiliary to, and confirmatory of, the assignments made by the commissioners; and we believe, that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act has been supposed to demonstrate the correctness of the construction of the statute contended for by the counsel for the original plaintiff. It declares, 'that if any estate real or personal, shall descend, revert to, or become vested in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, etc., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, etc.' This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy.' *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

Section 5046 of the Revised Statutes of the United States, which is an embodiment of § 14 of the act of March 2, 1867, ch. 176 (14 Stat. 522), provides as follows: "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section," which are exceptions, "be at once vested in such assignee." *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713. See, also, *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 831; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

Judgment as asset of bankrupts estate becomes property of assignee in bankruptcy. See *Brown v. Wygant*, 163 U. S. 618, 41 L. Ed. 284. And see, generally, the title JUDGMENTS AND DECREES.

Judgment upon bills of corporation.—In *First Nat. Bank v. Cook*, 154 U. S. 628, 24 L. Ed. 916, the supreme court, in affirming the order of the circuit court, directing an assignment to the trustees, of a judgment against a company on the bills of such company, transferred by the bankrupt to the appellant, said: "All the questions involved in this case were considered and decided at the present term in *Merchants' Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412, and *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407, except that which relates to the order of the circuit court directing an assignment to the trustees in bankruptcy of the judgment against the Ohio Lard and Sperm Oil Company upon the bills of that company, transferred by the bankrupt to the appellant with the other securities, and as to this we see no error in the action of the court below. The transfer of these bills as well as the others was void under the bankrupt law, and the title to them passed to the trustees in bankruptcy when appointed. The fact that in the hands of the bankrupt or his assignees the bills may not be good against the oil company does not affect this case. The bills whether good or bad belonged to the trustees, who have consequently the right to the judgment into which they have been merged. Whether the oil company will

debts.⁶⁴ The assignee or trustee is subrogated to all the rights, legal and equi-

have the same defenses to the judgment in the hands of the trustees that it would have had to the bills before judgment, is a question which we need not now decide. It is certain that the appellant cannot hold the judgment as against the trustees, any more than it could the bills."

Franchises.—If the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale. *New Orleans, etc., R. Co. v. Delamare*, 114 U. S. 501, 29 L. Ed. 244.

Seat in stock exchange.—"In *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264, it was ruled that the ownership of a seat in a stock and exchange board is property, not absolute and unqualified, but limited and restricted by the rules of the association; that such rules in imposing the condition upon the disposition of memberships that the proceeds should be first applied to the benefit of creditor members are not open to objection on the ground of public policy, or because in violation of the bankruptcy act; and that in the case of the bankruptcy of a member, his right to a seat would pass to his assignees, and the balance of the proceeds upon sale could be recovered for the benefit of the estate. While the property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528; *Powell v. Waldron*, 89 N. Y. 328; *Belton v. Hatch*, 109 N. Y. 593; *Habenicht v. Lissak*, 78 California, 351; *Weaver v. Fisher*, 110 Illinois 146." *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915. See, also, *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318.

Unpaid installments on stock in bankrupt insurance company.—The assignee of a bankrupt insurance company may recover from the holder of capital stock in the company, unpaid installments on such stock though the certificate of stock was not delivered or demanded. *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179.

Vested interests of bankrupt in trust property.—A devise of the income from property, to cease on the insolvency or bankruptcy of the devisee, is good; and a limitation over to his wife and children, upon the happening of such contingency, is valid, and the entire interest passes to them; but if the devise be to him and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from

that of his wife or children, and paid over to his assignee in bankruptcy. *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254.

"The cases on this point are well considered in *Lewin on Trusts*, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to him and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. *Page v. Way*, 3 Beav. 20; *Perry v. Roberts*, 1 Myl. & K. 4; *Rippon v. Norton*, 2 Beav. 63; *Lord v. Bunn*, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. *Twopenny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, Id. 642." *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254. See the titles SPENDTHRIFTS AND SPENDTHRIFT TRUSTS; TRUSTS AND TRUSTEES.

Defeasible title of vendee in goods procured by fraud.—Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirmance of the contract by the vendor. *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993.

64. Exempt property.—Bankrupt Act, 1898, § 70a. *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Swarts v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Pearshall v. Smith*, 149 U. S. 231, 37 L. Ed. 713; *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755; *Spindle v. Shreve*, 111 U. S. 542, 28 L. Ed. 512. See the titles EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTIONS.

As to right to exemption, see ante, "Exemptions of Property," XI. B.

As to setting out exemptions, see post, "Setting Apart Bankrupt's Exemptions," XVI, E, 2, k.

table, of the bankrupt.⁶⁵

bb. *Power of Court to Compel Surrender to Trustee.*—A court in bankruptcy has the power to compel, in a summary way, the surrender of money or other property of the bankrupt in the possession of such bankrupt, or of some one for him, without resorting to a suit for that purpose.⁶⁶

(b) *Acquires Only Right or Title of Bankrupt.*—Under the provisions of the bankrupt act the trustee or assignee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued;⁶⁷ and the purchaser from the trustee or assignee does not acquire

65. Subrogated to rights of bankrupt.—*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713; *Hammond v. Whitledge*, 204 U. S. 538, 51 L. Ed. 606. And see post, "Enumeration of Specific Property and Rights Passing to Trustee," XVI. E. 1, b. (2).

66. Court may, in summary way, compel surrender to trustee.—*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

"The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed. In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law. It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866, and on adjudication, title to the bankrupt's property became vested in the trustee. §§ 70, 21e. with actual or con-

structive possession, and placed in the custody of the bankruptcy court. There was no pretense that at the date of the filing of this petition in bankruptcy this money of the bankrupt, \$4,133.45 of which had been collected a few days, and \$10,100, a few hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another. The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent." *Mueller v. Nugent*, 184 U. S. 1, 14, 15, 46 L. Ed. 405.

Commitment until order obeyed not imprisonment for debt.—Commitment until surrender of property in accordance with the court's order is not an imprisonment for debt. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

Form of order of commitment.—In *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, it was held, that an order committing one until he should surrender certain money to the trustee, or should otherwise satisfy the trustee with respect thereto was not invalid because it did not run in the name of the United States.

Generally, as to jurisdiction of bankruptcy court over collection of bankrupt estates, see ante. "Collection and Distribution of Bankrupt Estates, and Determination of Controversies Relating Thereto," V. A. 2, b. (7).

67. Takes only right, title and interest of bankrupt.—*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986; *Reby v. Colehour*, 116 U. S. 153, 36 L. Ed. 922; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Hawkins v. Blake*, 108 U. S. 422, 27 L. Ed. 775; *Gibson v. Warden*, 14 Wall. 214, 20 L. Ed. 797; *Norton v. Hood*, 124 U. S. 20, 31 L. Ed. 364.

An assignment in bankruptcy only transfers to the assignee such property as the bankrupt had when the petition in bankruptcy was filed. *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949; *Norton v. Hood*, 124 U. S. 20, 31 L. Ed. 364; *Bacon v. International Bank*, 131 U. S. appx. ccsvi, 26 L. Ed. 439.

"Under the provisions of the bankrupt

by his purchase any greater rights than those possessed by such assignee or trustee.⁶⁸

(c) *Takes Title Subject to Equities and Encumbrances.*—It may be stated as a general and well-settled rule that the trustee or assignee in bankruptcy takes the title to the bankrupt's real and personal estate, subject to all equities, liens or encumbrances,⁶⁹ whether created by operation of law or by the act of the bankrupt,

act, all that passes to the assignee by the assignment in bankruptcy, or that can be sold by direction of the court, is property or rights of the bankrupt, or property conveyed by the bankrupt in fraud of creditors, unless, indeed, a person holding a mortgage or pledge of, or lien upon, property of the bankrupt elects to release the same. Rev. Stat., §§ 5034, 5046, 5061, 5066, 5075; Stat. 22d. June, 1874, c. 390, § 4; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Dudley v. Easton, 104 U. S. 99, 103, 26 L. Ed. 668." Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865.

Collateral in bank as security.—Where a person, more than two months before bankruptcy proceedings were begun, places in bank collateral to secure existing indebtedness or that which might thereafter be created, the rights of his assignee in bankruptcy as to such collateral, are only those possessed by the bankrupt at the commencement of the bankruptcy proceedings. Bacon v. International Bank, 131 U. S., appx. ccxvi, 26 L. Ed. 439.

Assignment does not bar dower.—An assignment of the husband's estate and sale thereof under the bankrupt act does not bar the wife's right of dower. Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865.

Assignee does not acquire separate estate of wife of bankrupt.—The personal acquisitions of a wife, in Georgia, being by a statute of that state not subject to the debts of her husband, her separate earnings from her individual labor and business, carried on with his consent, cannot be reached by his assignees in bankruptcy. Glenn v. Johnson, 18 Wall. 476, 21 L. Ed. 856. See the title SEPARATE ESTATE OF MARRIED WOMEN.

As to title to property in case of partnerships, see post, "Application of Bankrupt Acts to Partners and Partnership Estates," XX.

68. Rights acquired by purchaser from trustee.—See post, "Rights and Title of Purchaser," XVII, C, 4. b.

"The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee." Hauselt v. Harrison, 105 U. S. 401, 407, 26 L. Ed. 1075, quoting Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816.

69. Takes subject to equities, liens or encumbrances.—Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117;

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956; Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577; Hawkins v. Blake, 108 U. S. 422, 27 L. Ed. 775; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Doe v. Childress, 21 Wall. 642, 22 L. Ed. 549; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797; Cleveland Ins. Co. v. Reed, 24 How. 234, 16 L. Ed. 686.

"It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 936; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. Ed. 782. In the Hewit case there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid for. Such a conditional sale was good in New York state, where the contract was made, and it was held good as against the trustee in bankruptcy, because it was good against the bankrupt. It was further held that the property was not, under the facts and the law of New York, such as might have been levied upon and sold under judicial process against the bankrupt, nor could she have transferred it, within the meaning of § 70 of the bankrupt act. It was a clear case for the application of the doctrine that the trustee stands in the shoes of the bankrupt, and there was nothing in the act which made any inconsistent provision." Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 51 L. Ed. 1117.

Assignee or trustee takes subject to chattel mortgage.—A mortgage of goods and chattels in the state of New York, which is not accompanied by an immediate delivery and followed by an actual and continued possession of them, is void as against the creditors of the mortgagors,

subsequent purchasers, and mortgagees in good faith, if it be executed by a firm the members of which reside there, unless, pursuant to the statute, it be filed in the city or town where they respectively reside. A failure so to file it does not impair its validity as between the mortgagee and the mortgagors, or the assignee in bankruptcy of the latter. Where a controversy arose between the assignee in bankruptcy of the mortgagors, their execution creditors, and the mortgagee, touching the application of the fund in court derived from the sale of the personal property covered by a mortgage which was not so filed, held, that the creditors are entitled to payment, and that the residue of the fund, the same not being more than sufficient to satisfy the mortgage debt, belongs to the mortgagee, and is not chargeable with any expense incurred by the assignee in the execution of his trust. *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816.

"While the rights of creditors, whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the bankrupt law." *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816.

On May 29th, 1874, A. agreed to advance certain moneys to B. for the purchase of hides to be used in B.'s tannery and to be delivered to A., and also agreed to sell such hides, and to place all proceeds of such sales less commission and advances at the disposal of B. In November, 1874, B. being unable to complete the finishing and delivery of the hides, authorized A. to take possession of B.'s tannery and to run and use the same, together with such materials on hand as might be necessary to finish the hides then on hand in said tannery, and to take possession of and sell said hides in any state as may be to the best advantages of the parties, all sales guaranteed by A., the net proceeds of all said sales to be placed to the credit of B. after deducting advances and expenses of finishing the hides as per agreement. Upon petition in bankruptcy filed by B. four days after this second contract, it was held that while the

legal title to the hides rested in B., it was not an unqualified property but the legal effect of the contract was to create a charge upon the property in the nature not of a pledge but a mortgage, and the same was binding upon B.'s assignee in bankruptcy had he taken possession of the property. *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075.

Validity of chattel mortgage on after-acquired property.—In *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, the question arose as to the validity of a chattel mortgage (which had been duly filed) upon after-acquired property as against the trustee in bankruptcy of the mortgagor. The mortgagee took possession of the mortgaged property before the filing of the petition in bankruptcy, and the question raised was whether there was a violation of any provision of the bankruptcy act. It was held that the validity of such a mortgage was a local, and not a federal, question, and that in such case this court would follow the decisions of the state court; and as in Vermont such a mortgage was good, and the taking possession of the property related back to the date of the mortgage, even as against an assignee in insolvency, it was good as against the trustee in bankruptcy.

Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, reiterates the principle that whether such a mortgage as is referred to in the *Fairbanks Case* is good or bad depends upon the state law.

Rights of pledgee.—Until he shall be paid, the pledgee is entitled to the possession of the property which he holds under a valid pledge as security for his debt against the pledgors, notwithstanding a subsequent adjudication of bankruptcy against them; and his refusal to surrender it to their assignees is not a conversion of it. The failure of the pledgee to appear and prove his claim in the bankruptcy court forfeits only his right to participate in the distribution of the bankrupt's estate ordered by that court. *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589. See the title PLEDGE AND COLLATERAL SECURITY.

Neither the mortgagor nor his assignee in bankruptcy can object to the order in which the priority of valid and subsisting liens on the mortgaged premises is fixed by the decree of foreclosure. The subsequent bankruptcy of the pledgor of a negotiable instrument does not deprive the pledgees of their right to dispose of it upon his default. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

Effect of pledge without change of possession.—In *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, the *Racine Knitting Company* leased certain premises to the warehousing company on which premises the goods of the knitting company were placed. So-called ware-

which existed against the property in the hands of the bankrupt,⁷⁰ except in cases of attachment against the property of the bankrupt within a prescribed time pre-

house receipts were given to the knitting company by the warehousing company, acknowledging the receipt of the property at such place, but there was no change of possession in part and scarcely any in form. These receipts were in turn pledged by the knitting company to various banks and moneys obtained upon the security of such receipts from them. It was held that neither the receipts nor the so-called pledge could be asserted against any of the creditors of the knitting company, and there was no lien which could take precedence of the rights of the trustee in bankruptcy.

Superior rights of vendor under conditional sale contract.—Where a conditional sale contract is good, as between the parties, a vendor of articles sold and delivered under such a contract may remove such articles when not paid for; and such right is good as against the trustee. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782. See the title CHATTEL MORTGAGES AND CONDITIONAL SALES.

In *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid for. Such a conditional sale was good in New York state, where the contract was made, and it was held good as against the trustee in bankruptcy, because it was good against the bankrupt. It was further held that the property was not, under the facts and the law of New York, such as might have been levied upon and sold under judicial process against the bankrupt, nor could she have transferred it, within the meaning of § 70 of the bankrupt act. It was a clear case for the application of the doctrine that the trustee stands in the shoes of the bankrupt, and there was nothing in the act which made any inconsistent provision.

In *Norton v. Hood*, 124 U. S. 20, 31 L. Ed. 364, F. entered into an agreement with H. by which the former did not sell and transfer certain property to H. but only stipulated that he would sell and transfer it on condition that H. punctually make the payments specified therein; and it contained an express stipulation that the failure of H. or his assigns to punctually pay any of the amount stated, at the times fixed, was to operate as a discharge of F. from all his obligations therein contained. H. wholly failed to take the benefit of this agreement, but instead thereof, immediately after the first day of payment mentioned in it, he filed a petition in bankruptcy. By the terms of the agreement, all rights existing under

it in favor of H. had ceased prior to the filing of the petition in bankruptcy, and there was no right growing out of the agreement which passed, or could pass, to the assignee in bankruptcy, as representing H.

Landlord's claims for debt.—The Pennsylvania statute of June 16th, 1836, which provides that where property upon demised premises, and liable to distraint, is seized on execution and sold, the officer making the sale shall pay the rent (provided it does not exceed one year's rent) in preference to the judgment on which the execution issued, extends, by an equitable intendment, to a seizure of goods similarly situated, by an assignee in bankruptcy. A landlord's claim is accordingly, in Pennsylvania, first paid out of the bankrupt's goods liable to distress on demised premises, and before making a dividend of their proceeds among the creditors generally. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451.

70. Whether created by operation of law or act of bankrupt.—*Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589.

Property in hands of trustee not exempt from taxation.—Property in the hands of trustee in bankruptcy is not exempt by the act of 1898, from state and municipal taxes imposed upon similar property. *Swarts v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060.

"The question is not the extent of the power of congress over the subject of bankruptcy, but what congress intended by the act of 1898. By § 70 of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality, or which should exempt it from its obligations to either. If congress had the power to declare otherwise and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the circuit court of appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *In re Conhaim*, 100 Fed. Rep. 268; *In re Keller*, 109 Fed. Rep. 131; *In re Sims*, 118 Fed. Rep. 356." *Swarts v. Hammer*, 194 U. S. 441, 48 L. Ed. 1060. See the title TAXATION.

ceding the commencement of proceedings in bankruptcy,⁷¹ and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void.⁷² With these exceptions, the trustee or assignee takes the property in the same "plight and condition," that the bankrupt held it.⁷³

(d) *Acquires No Title to Property in Foreign Jurisdiction.*—Bankruptcy acts having no extraterritorial effect, a decree in bankruptcy will not, by operation of law, vest in the trustee or assignee, title to property in a foreign jurisdiction.⁷⁴

(2) *Enumeration of Specific Property and Rights Passing to Trustee.*—Under the provisions of the bankrupt act, the trustee is vested with the title of the bankrupt to all documents relating to his property;⁷⁵ interests in patents, patent rights, copyrights, and trademarks;⁷⁶ powers which he might have exercised for his own benefit, but not those which he might have exercised for some other per-

71. Exception as to attachment commencing within prescribed time before commencement of proceedings.—*Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816.

72. Exception where disposition of property fraudulent and void.—*Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668. See post, "Enumeration of Specific Property and Rights Passing to Trustee," XVI, E, 1, b, (2); "Provisions of Bankrupt Act as to Liens, Transfers and Preferences," XIX.

73. Takes in same "plight and condition" as held by bankrupt.—*Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 416, 51 L. Ed. 1117; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782.

As to trustee's right to redeem incumbered property or to sell subject to encumbrances, see post, "Redemption of Property," XVI, E, 1, b, (4).

As to set off against assignee or trustee, see post, "Set-Off and Counterclaim," XVII, E.

74. Property in foreign state not affected.—A decree in bankruptcy passed, in 1843, by the district court of the United States for the eastern district of Louisiana, did not pass to the assignee the title to a house and lot in the city of Galveston and state of Texas, which house and lot were the property of the bankrupt. Texas was then a foreign state, and whatever difference of opinion there may be with respect to the extraterritorial operation of a bankrupt law upon personal property, there is none as to its operation upon real estate. This court concurs with Sir William Grant, in 14 Ves. 537, that the validity of every disposition of real estate must depend upon the law of

the country in which that estate is situated. *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593.

"On the appointment and qualification of the assignee, the property of the bankrupt, under the act of congress, became vested in him, for the benefit of the creditors of the bankrupt. But there was no assignment in fact made by Hall. He made application for relief under the law, and may be said to be a voluntary bankrupt; but there was no other assignment of his effects than that which resulted from the operation of the law. As, under the constitution, congress exercised an exclusive jurisdiction over the subject of bankruptcy, the same rule of procedure extended throughout the Union. But the act of congress could have no extraterritorial effect." *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593.

In England, an assignee in bankruptcy is held to be vested with the personal property of the bankrupt which is in foreign countries; and her courts acknowledge the validity of the title of a foreign assignee to property in England, when such title emanates from a country which has a bankrupt law similar to her own. But this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union. *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164.

The bankrupt law of a foreign country cannot operate a legal transfer of property in this country. *Harrison v. Sterrv*, 5 Cranch 289, 3 L. Ed. 194.

75. Documents relating to property.—Bankrupt Act, 1898, § 70 a. (1). *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1013.

The act of 1867 contained a similar provision as to deeds, books and papers relating to the estate. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903.

76. Interests in patents, etc.—Bankrupt Act, 1898, § 70 a. (2). *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609; *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713.

son;⁷⁷ property transferred by him in fraud of his creditors;⁷⁸ property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;⁷⁹ and

77. Powers.—Bankrupt Act, 1898, § 70 a, (3). *Holden v. Stratton*, 198 U. S. 202, 203, 49 L. Ed. 1018; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318. See, generally, the title **POWERS**.

Power of appointment does not pass to an assignee in bankruptcy of the person in whom the power resides. *Brandies v. Cochrane*, 112 U. S. 344, 28 L. Ed. 760, following *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908.

Conveyance to wife with reservation of power of revocation or appointment.—Unless existing claims of creditors are thereby impaired, a voluntary settlement of property made by a husband upon his wife is not invalid. His reservation of a power of revocation or appointment to other uses does not impair the validity or efficiency of the conveyance in transferring the property to her, to hold until such power shall be executed; nor does it tend to create an imputation upon his good faith and honesty in the transaction. Such a power does not, in the event of his bankruptcy, pass to his assignee. *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908.

78. Property fraudulently transferred.—Bankrupt Act, 1898, § 70 a, (4). *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Wight v. Condict*, 154 U. S. 666, 26 L. Ed. 562; *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542.

Section 14 of the bankrupt act of March 2, 1867, ch. 176, 14 Stat. 522, provided that "all the property conveyed by the bankrupt in fraud of his creditors shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and he may sue for and recover the said estate, debts, and effects." This provision is also found in §§ 5046 and 5047 of the Revised Statutes. *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

"Property fraudulently conveyed vests in the assignee, who may recover the same and distribute its proceeds as the bankrupt act requires." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

For a full treatment of the effect of the bankrupt act on fraudulent conveyances, preferences, etc., see post, "Provisions of Bankrupt Act as to Liens, Transfers, and Preferences," XIX.

79. Property which might have been transferred or levied.—Bankrupt Act, 1898, § 70 a, (5). *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 936. See the title **EXECUTIONS**.

"By the assignment in bankruptcy, all the bankrupt's rights of action for property or estate and of redemption, together with his right and authority to sell, manage, dispose of and sue for the same, as they existed at the time the petition was filed, passed to the assignees. Rev. Stat., § 5046." *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915.

Proviso as to insurance policy.—Under § 70 a, (5), it is provided, "that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company insuring the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771. See, generally, the title **INSURANCE**.

In *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, the supreme court reversed the judgment of the circuit court of appeals and affirmed that of the district court, to the effect that the provisions of § 70a are not applicable to policies of insurance exempt under a state law, and that such policies are exempt under § 6 of the bankrupt act, though they are endowment policies payable during the life of the insured, and having cash surrender values.

"The circuit court of appeals held that the policies were not exempt, even although embraced by the state exemption, because of the requirements of § 70 of the bankrupt act of 1898. This was sustained upon the theory that § 6 of the bankrupt act, adopting the exemption laws of the several states, was modified, as to life insurance policies, by a proviso found in § 70a." *Holden v. Stratton*, 198 U. S. 202, 207, 49 L. Ed. 1018, reviewed and affirmed in *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771.

"Conflicting views as to the operation upon § 6 of the proviso in § 70a referred

rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, his property.⁸⁰ So, also, claims against the United States pass

to have been expounded by the circuit courts of appeal. Two of the leading cases are *Steele v. Buck*, 104 Fed. Rep. 968, holding that the proviso does not qualify the exemptions accorded by § 6, and the other decision by the court of appeals of the ninth circuit, in *In re Scheld*, 104 Fed. Rep. 870, holding that the effect of the proviso was to limit, as to policies of insurance, the broad terms of § 6, adopting the state exemption laws. Considering the matter originally, it is, we think, apparent that § 6 is couched in unlimited terms, and is accompanied with no qualification whatever. Even a superficial analysis of § 70a demonstrates that that section deals not with exemptions, but solely with the nature and character of property, title to which passes to the trustee in bankruptcy." *Holden v. Stratton*, 198 U. S. 202, 212, 49 L. Ed. 1018, reviewed and affirmed in *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771.

"The question in this case is whether the cash surrender value of a policy of insurance under §§ 70-a-5 of the bankruptcy act must be provided for in the policy, or whether it be sufficient, if the policy have such value by the concession or practice of the company. Section 70 provides that 'the trustee of the estate of a bankrupt upon his appointment and qualification * * * shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.'" *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, reviewing and approving *Holden v. Stratton*, 198 U. S. 202, 214, 49 L. Ed. 1018.

"What possible difference could it make whether the surrender value was stipu-

lated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'" *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, reviewing and approving *Holden v. Stratton*, 198 U. S. 202, 214, 49 L. Ed. 1018.

80. Rights of action, etc.—Bankrupt Act, 1898, § 70a (6). Revised Statutes, § 6046 (embodiment of the act of March 2, 1867). *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473. And see *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 3 L. Ed. 496.

In general, it may be affirmed that mere personal torts, which die with the party and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, ad rem and in re—possibilities, coupled with an interest and claim, growing out of, and adhering to property—may pass by assignment. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

Section 5047 of the Revised Statutes vested in the assignees all rights in equity and choses in action which the bankrupt had. *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

Debts due to bankrupt.—"Unless the assignee can collect what is due to the bankrupt, he can never perform the duty assigned to him as the representative of the bankrupt; and the first section of the bankrupt act expressly provides that the jurisdiction of the district courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy. 'Debts due' to the bankrupt, as well as all his rights of action, vest in the assignee by virtue of the adjudication in bankruptcy, and the appointment of the assignee as the representative of the bankrupt. *Shearman v. Bingham*, 7 Nat. Bank Reg. 493." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

"The words of the bankrupt act, § 13, are, that the debts assigned to him shall be vested in him, as if they had been contracts made with himself originally. Now, one necessary incident to such a contract would be, that the right of action would vest in his personal representative, and

to the trustee or assignee of the owner of such claims.⁸¹

the act of congress saves the suit from abatement, by authorizing the substitution of the executor or administrator, instead of the deceased plaintiff." *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 3 L. Ed. 496.

Unpaid balance of stock of bankrupt corporation.—The original holders of the stock of a corporation are liable for the unpaid balance at the suit of its assignee in bankruptcy, without any express promise to pay. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, reaffirmed in *Webster v. Upton*, 91 U. S. 63, 23 L. Ed. 384. See, also, *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224.

The original holder of stock in a corporation is liable for unpaid installments of stock, without an express promise to pay them; and a contract between a corporation or its agents and him, limiting his liability therefor, is void both as to the creditors of the company and its assignee in bankruptcy. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

Order of court as giving authority to sue.—Where, in a district court of the United States, a corporation was adjudged a bankrupt, an assignee appointed, and an order made that the balance unpaid upon the stock held by the several stockholders should be paid to him by a certain day, that notice of the order should be given by publication in a newspaper or otherwise, and that in default of payment he should collect the amount due from each delinquent stockholder, and it appearing that he had given the notice required, and that the defendant below had failed to make payment pursuant to the order, held, that the order was conclusive as to the right of the assignee to bring suit to enforce such payment. The court pronouncing the decree of bankruptcy had jurisdiction and authority to make the order; and it was not necessary that the stockholders should have received actual notice of the application therefor. In contemplation of law, they were before the court in all the proceedings touching the corporation of which they were members. It was competent for the court to order payment of the unpaid stock subscriptions, as the directors, under the instructions of a majority of the stockholders might, before the decree in bankruptcy, have done. The capital stock of an incorporated company is a fund set apart for the payment of its debts. As the company might have sued a stockholder for his unpaid subscription at law, the assignee succeeding to all its rights has the same remedy. It appearing in evidence that two certificates of stock in blank as to the stockholder's name were issued and delivered to the plaintiff in error, that she had paid to the company all that was then pay-

able, and received a dividend, and that her name was placed upon the stock list, she was estopped from denying her ownership. *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, followed in *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818.

81. Claims against United States.—Money received by United States from foreign governments for destruction of vessels.—"In this court, it is well settled that moneys received by the United States from a foreign government by way of indemnity for the destruction of American vessels, and granted by act of congress to the owners of those vessels, without directing to whom payment shall be made in case of death or insolvency, passed to the assignees in bankruptcy, for the benefit of the creditors of such owners, although such assignees have been appointed before the act of congress making the grant. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550." *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243. See, also, *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

"In *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108, the United States had stipulated with Spain that they would assume and pay certain claims of their citizens against Spain, and an award was made in favor of Vasse, one of the claimants, by a commission appointed as stipulated to examine and adjudicate the claims. Vasse had in the meantime become bankrupt, and the assignment in bankruptcy was held to carry the claim with it." *Blagge v. Balch*, 162 U. S. 439, 40 L. Ed. 1032. See, also, *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

"The ground that the government was the debtor, and the claim rested on its discretion; or in other words, that it was as uncertain as the pleasure of congress; and until the act of 1840 was passed, no claim existed against the United States, which could be judicially recognized as 'property or effects,' of the insolvent, we think is decided to the contrary, by this court. in *Comegys v. Vasse*, 1 Pet. 193, 196, 7 L. Ed. 108. Vasse assigned under the bankrupt law of 1800. He had been an underwriter on policies of insurance on vessels seized and condemned by the government of Spain. The owner had abandoned for a total loss, which the insurer had paid; and was the successor to the rights of the assured. The sentences of the Spanish prize courts were conclusive as to the right to the things condemned; and no claim existed on part of the insurer, that did not depend on the discretion and pleasure of the Spanish government. The equity was as remote, to say the least of it, in that case as in the one before us. By the treaty of 1819, Spain

(3) *Rejection of Onerous or Unprofitable Property.—In General.*—It has long been a recognized principle of the bankrupt law that the assignees or trustees

stipulated with this government to pay \$5,000,000 in full discharge of the unlawful seizures; leaving the United States to distribute the indemnity. Vasse had awarded to him \$8,846. *Comegys* was the surviving assignee of the bankrupt. Vasse instituted suit against him, to try the right to the money. This court held, that, although the illegal sentences of the Spanish prize courts were irreversible, the party had not lost all right to justice, or claim, upon principles of international law, to remuneration; that he had a right both to the justice of his own and the foreign sovereign; and that this right passed by the general assignment of the bankrupt. The treaty in that case (as the act of congress in this) operated on a pre-existing claim on a government. It follows, if the doctrine of donation did not apply in that case, neither can it in this. Had a similar claim on the part of Milnor existed against an individual, instead of the government, then there can be no doubt, he could have recovered by suit; or it would have been the subject of set-off; or could have been assigned. So, it would have passed to his administrator, in case of death. As the government was equally bound to do its debtor justice, in a different mode, with an individual, we think no sound distinction exists in the two cases; and therefore, order the decree to be affirmed." *Milnor v. Metz*, 16 Pet. 221, 10 L. Ed. 943.

The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States, passed to the assignees of a bankrupt, who held such rights, by the provisions of the bankrupt law of the United States, of the 4th of April, 1800. *Vasse v. Comegys*, 4 W. C. C. 570, reversed. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

"In *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108, was followed, and applied to the awards of the Alabama Claims Commission. The United States had demanded and received indemnity for losses sustained by their citizens, and had recognized as valid the class of claims to which the particular claim belonged, and had created a court to adjudicate thereon. it was held that the claim passed to the assignee in bankruptcy, and that payment of awards so made could not be regarded as a mere gratuity." *Blagoe v. Balch*, 162 U. S. 439, 40 L. Ed. 1032. See, also, *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

Claims against United States for cotton captured and sold.—Where cotton was captured by the military forces of the United

States and sold, and the proceeds were paid into the treasury, the claim of the owner against the government constitutes property, and passes to his assignee in bankruptcy, though, by reason of the bar arising from the lapse of time, it cannot be judicially enforced. *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

Claims of foreign subject resident in United States.—*A.*, a British subject resident in this country, was duly declared a bankrupt by the proper district court, December 10, 1868, and the conveyance of his estate was in the usual form made by the register to an assignee. At that time he had a claim against the United States, of which the commission organized under the treaty between the United States and Great Britain of May 8, 1871 (17 Stat. 863), took cognizance, and made an award for its payment. Held, that the claim passed to the assignee. *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473.

Effect of act of February 26, 1853.—The act of congress of February 26, 1853 (10 Stat. 170), to prevent frauds upon the treasury of the United States, applies only to cases of voluntary assignment of demands against the government. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which it aimed. *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

"In *Erwin v. United States*, 97 U. S. 392, 397, 24 L. Ed. 1065, this court said, speaking of the act of 1853, that it applied only to cases of voluntary assignment of demands against the government, and also: 'It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the court of claims.'" *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

In *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 736, 28 L. Ed. 861, this court cited *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065, as holding that the assignment by operation of law to an assignee in bankruptcy was not within the prohibition of § 2477 of the Revised Statutes. *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

"In *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229, the act of 1853 was under consideration. A person had made an assignment, in 1860, for the benefit of his creditors, which included all his rights, effects, credits and property of every description; and this court held that the assignment, although it covered whatever might be due to him under a contract which he had with the United States for

were not bound to accept property of an onerous or unprofitable character.⁸²

Right of Election as to Acceptance.—They can elect whether they will accept or not, after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to the creditors to compel a different conclusion.⁸³ If they decline to take the property, the bank-

the transportation of the mails in steam vessels, was not within the prohibition of the act of 1853, nor in violation of public policy. It is said (p. 560): 'In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor, of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? * * * We cannot believe that such a meritorious act as this comes within the evil which congress sought to suppress by the act of 1853.' See, also, *Wyman v. Halstead*, 109 U. S. 654, 27 L. Ed. 1068; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64; *Williams v. Heard*, 140 U. S. 529, 540, 35 L. Ed. 550. *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

French spoliation claims—Effect of act of March 3, 1891.—"The act of March 3, 1891, 26 Stat. 862, 897, 908, c. 540, was passed making appropriations to pay certain enumerated claims with the following proviso: 'Provided, that in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards.'" *Blagge v. Balch*, 162 U. S. 439, 40 L. Ed. 1032. See, also, *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

"In the provision of the appropriation act of March 3d, 1891, ch. 540, concerning the French spoliation claims the words 'personal representative' and 'legal representative' were used to designate the executor or administrator of the original sufferer; and money awarded by the court of claims to such a representative was held by this court to belong to the next of kin, to the exclusion of assignees in bankruptcy, upon the ground that the act expressly so provided. 26 Stat. 897, 908. *Blagge v. Balch*, 162 U. S. 439, 40 L. Ed. 1032." *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

"It appears to us that congress intended that the next of kin should be the beneficiaries in every case; that the limitation is express; and that creditors, legatees and assignees, all strangers to the blood, are excluded." *Blagge v. Balch*, 162 U. S.

439, 40 L. Ed. 1032. See, also, *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

A demand of a bankrupt, which is outlawed, must go to the assignee, for contingencies may arise in many ways which will give value to it. *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

82. Need not accept property of unprofitable character.—*American File Co. v. Garrett*, 110 U. S. 288, 28 L. Ed. 149; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609; *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791; *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 36 L. Ed. 632. And see *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

83. Right to elect—Remedy of creditors.—*Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609; *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408.

"It has long been a recognized principle of the bankrupt law, says Robson, that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate; and there are numerous decisions, English and American, which support the proposition; nor are the creditors without remedy in such a case, even if the assignee should erroneously or unwisely fail to take such possession, as the creditors may, by petition, apply to the court of original jurisdiction to compel him to carry out their wishes; and if the district court should deny their petition, they would have the right to demand a review of the decision by the circuit court, under the first clause of the second section of the bankrupt act. Robson (3d Ed.), 398." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

"If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith v. Gordon*, he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto. In *Sparhawk v.*

rupt can assert title thereto.⁸⁴

Doctrine Inapplicable Where Trustee Ignorant of Existence of Property.—This doctrine can have no application where the trustee is ignorant of the existence of the property in question, and has had no opportunity to make an election.⁸⁵

(4) *Redemption of Property.*—The trustee or assignee has, by virtue of the adjudication in bankruptcy, the right to redeem the property or estate of the bankrupt.⁸⁶

Yerkes, 142 U. S. 1, 35 L. Ed. 915, we held that as the conduct of the assignees was such as to show that they did not intend to take possession of the assets in controversy; as they avoided assuming any liability in respect thereof; and as they allowed the bankrupt after his discharge by the expenditure of labor and money to save the assets and render them valuable, they could not be permitted to assert title against him. That was a suit directly against the bankrupt, and this is in effect the same." *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791.

Facts held to show election not to accept title to patent for invention, vested in bankrupt at the time of bankruptcy. *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

Evidence held to show an election by assignees not to accept the rights of the bankrupt as to membership in stock exchange. *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915.

84. Bankrupt may assert title to rejected property.—*First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408.

The abandonment relates back to the commencement of the proceedings in bankruptcy, and the title stands as if no assignment had been made. *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

85. Doctrine inapplicable where no opportunity to elect.—*First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408; *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791.

"It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was according to the judgment below) it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property." *First Nat. Bank v. Lasater*, 196 U. S. 115, 118, 119, 49 L. Ed. 408.

In *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606, it was contended that the assignees in bankruptcy had abandoned the bankrupt's interest in remainder under a will, because they did not sell

such interest. It was held, however, that there was no such abandonment, as the assignees brought a bill in the nature of a bill quia timet apparently as soon as they learned of the existence of the fraud and of the fact that creditors of the bankrupt were seeking to reach and apply such interest in satisfaction of their debts.

86. Right to redeem property of bankrupt.—*Bankrupt Act*, 1876, § 14; *Rev. Stat.*, § 5046. *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915. See the titles CHATTEL MORTGAGES AND CONDITIONAL SALES; MORTGAGES AND DEEDS OF TRUST.

The act of 1841, § 11, contains a similar provision. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

"By the 11th section of the bankrupt law the court had power to order the assignee to redeem and discharge 'any mortgage or other pledge or deposit, or lien upon any property,' etc. It also necessarily had the power, on the sale of mortgaged premises, to distribute the proceeds as the law required." *Fowler v. Hart*, 13 How. 373, 379, 14 L. Ed. 186.

Redemption or sale subject to encumbrance.—"Among the rights which vest at once in the assignee by virtue of the adjudication in bankruptcy, and of his appointment as such assignee, is the right to redeem the property or estate of the bankrupt. *Act of 1867*, § 14; *Rev. Stat.*, § 5046. And, in order that it may be exercised for the benefit of creditors, the assignee is given express authority, 'under the order and direction of the court, to redeem and discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrance.' *Act of 1867*, § 14; *Rev. Stat.*, § 5066. This is a distinct recognition of the rights of the pledgee as against the assignee. Of course, where the pledge is in fraud of the bankrupt law, and consequently void, the assignee may disregard the contract of pledge, and recover the property for the benefit of creditors. Not so where the pledge, as in this case, was made in good faith, for a valuable consideration, and not in violation of the provisions of the bankrupt law." *Yeat-*

(5) *Conduct of Bankrupt's Business.*—Courts of bankruptcy may authorize the business of bankrupts to be conducted for limited periods by the trustees in bankruptcy, if necessary in the best interests of the estates.⁸⁷

(6) *Sale of Property.*—The power and duty of the trustee or assignee to sell property, and the manner of effecting such sale, is treated elsewhere in this title.⁸⁸

c. *Power to Arbitrate or Compromise Controversies.*—(1) *Submission to Arbitration.*—(a) *In General.*—The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.⁸⁹

(b) *Selection of Arbitrators.*—Three arbitrators are to be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen; or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.⁹⁰

(c) *Effect of Findings of Arbitrators.*—The written findings of the arbitrators, or the majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.⁹¹

(2) *Compromise.*—The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate, upon such terms as he may deem for the best interests of the estate.⁹²

2. ENUMERATION OF PARTICULAR DUTIES—a. *Accounting for and Paying Over Interest.*—Trustees are expressly required by the bankrupt act to perform certain specified duties. Thus, it is made their duty to account for and pay over to the estates under their control all interest received by them upon property of such estates.⁹³

man v. New Orleans Sav. Inst., 95 U. S. 764, 767, 24 L. Ed. 589.

An assignee in bankruptcy is not required to take measures for the sale of the mortgaged property of the bankrupt, unless its value exceeds the encumbrance. *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

"The assignee is not required to take measures for the sale of mortgaged property, unless its value is greater than the encumbrance. His duties relate chiefly to unsecured creditors, and he need not trouble himself about encumbered property, unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate. If he does, and it becomes necessary to adjust the liens before his sale, he may, under the ruling in *Clafin v. Houseman*, institute the necessary proceedings for that purpose in the courts of the United States, or of the state, as he chooses. If he does not, the secured creditor who wishes to make his security available must act; and, having obtained leave of the bankrupt court to bring his action for that purpose, he may proceed in the state court, if the assignee does not object, or in the courts of the United States, at his election." *McHenry v. La Societe Francaise*, 95 U. S. 58, 60, 24 L. Ed. 370.

Generally, as to sales by trustees, see post, "Administration and Distribution of Estate," XVII.

As to validity or invalidity of encum-

brances, liens, transfers, etc., see post, "Provisions of Bankrupt Act as to Liens, Transfers and Preferences," XIX.

87. *Conduct of bankrupt's business.*—See ante, "Authorizing Continuance of Business of Bankrupt," V, A, 2, b, (5).

88. *Sale by trustee.*—See post, "Administration and Distribution of Estate," XVII.

89. *Power to submit to arbitration.*—Bankrupt Act, 1898, § 26 a. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

Generally, as to when arbitration is proper, procedure, effect, etc., see the title ARBITRATION AND AWARD. ante, p. 464.

90. *Manner of selecting arbitrators.*—Bankrupt Act, 1898, § 26 b.

91. *Effect of findings, filing, etc.*—Bankrupt Act, 1898, § 26 c. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175. See the title VERDICT.

92. *Compromise by trustee.*—Bankrupt Act, 1898, § 27. See *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

Under the act of 1841, § 11, the assignee was clothed with authority by and under the direction of the proper court in bankruptcy, to compound any debts or other claims or securities due or belonging to the estate of the bankrupt. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

Generally, as to propriety of compromise, procedure, etc., see the title COMPROMISE AND SETTLEMENT.

93. *Accounting for and payment of interest.*—Bankrupt Act, 1898, § 47 a, (1).

b. *Collection and Reduction of Property to Money and Closing Up Estate.*—It is the duty of trustees to collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and to close up the estate as expeditiously as is compatible with the best interests of the parties in interest.⁹⁴

c. *Deposit of Moneys Received.*—It is the duty of trustees to deposit all moneys received by them in one of the designated depositories.⁹⁵

d. *Disbursement of Money.*—Trustees are required to disburse money only by check or draft on the depositories in which it has been deposited.⁹⁶

94. Collection of property and closing estate.—Bankrupt Act, 1898, § 47 a, (2). *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43.

The 10th section of the act of 1841 declares, that in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors, and that such distribution of the assets, so far as can be done consistently with the rights of third persons having adverse claims thereto, shall be made as often as once in six months; and that all the proceedings in bankruptcy in each case, if practicable, shall be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

As to jurisdiction of courts of bankruptcy closing and reopening estates, see ante, "Closing Estates and Discharging Trustees," V, A, 2, b, (8).

Appointment of special master to collect estates.—In *Royal Ins. Co. v. Miller*, 199 U. S. 333, 50 L. Ed. 226, a bank had been declared bankrupt, and trustees appointed who took charge of its assets. Proceedings were subsequently begun in the United States district court by creditors of the bankrupt against the trustees, and a special master was appointed with power to collect the assets of the bankrupt estate. It was held that the mere designation as special master did not have the effect of depriving the appointee of the substantial powers conferred upon him by the decree of the court appointing him.

95. Deposit of money received.—Bankrupt Act, 1898, § 47 a (3).

Designation of depositories for money.—By § 61 of the bankrupt act, 1898, it is provided that "courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residence of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institution, and may, from time

to time, as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

As to the provisions of the former bankrupt act, and the former and present rule in bankruptcy as to deposits and disbursements, see notes to succeeding text.

96. Disbursement by check or draft.—Bankrupt Act, 1898, § 47 a, (4).

Provisions of former bankrupt act as to deposits and disbursements.—Section 995 of the Revised Statutes required that "all moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court;" and § 996 provided that "no money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." *State Nat. Bank v. Dodge*, 124 U. S. 333, 344, 345, 31 L. Ed. 458.

Rules of court as to deposit and payment.—Under the present rules and orders in bankruptcy, "no moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks." Rule XXIX of the General Orders and Forms in Bankruptcy. Adopted and Established

e. *Furnishing Information Concerning Estates.*—It is the duty of trustees to furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest.⁹⁷

f. *Keeping Accounts.*—It is the duty of trustees to keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts.⁹⁸ The accounts and papers of trustees shall be open to

by the Supreme Court of the United States November 28, 1898. 172 U. S. 663.

Under the former rules in bankruptcy, Rule 28 in bankruptcy was in these words: "The district court in each district shall designate certain national banks, if there are any within the judicial district, or, if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee and the clerk of said court shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits or payments have been made by him during the preceding month, and, if any, he shall state the gross amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository unless upon a check, or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks." *State Nat. Bank v. Dodge*, 124 U. S. 333, 339, 340, 31 L. Ed. 458.

In *State Nat. Bank v. Dodge*, 124 U. S. 333, 31 L. Ed. 458, the supreme court in reference to Rule 28 in bankruptcy, said: "The requirement in that rule, that 'every assignee and the clerk of said court shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository,' seems to us to be abundantly satisfied by interpreting it as meaning that the assignee and the

clerk shall deposit all sums received by them severally, that is, respectively, on account of any bankrupt's estate, in one designated depository. The requirement of Rule 28, that the check or warrant for drawing money from the depository shall state the account for which it is drawn, that is, the name of the estate, contains no indication that the bank is expected to keep a separate account with each estate; because, if it had been the intention that a separate account should be opened with each estate, it would naturally have been required that each check should direct the bank to charge the amount to such particular estate. Such was not the requirement of the rule, and such was not the form of the check used. The rule was fully complied with in the present case. It did not require that the deposits should be made to the credit of each particular estate, but merely that the moneys should be deposited by the clerk. If it had been intended that the bank should keep a separate account with each bankrupt case, the requirement of the rule that each check should specify the account for which it was drawn, would have been superfluous, because no check otherwise drawn could or would have been paid."

"The deposits being, as required, in the name and to the credit of the court, the bank was authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits; and the order or check for withdrawing the money, in stating the cause in or on account of which it was drawn, was a memorandum imposing no duty upon the bank, but only operating for the convenience of the court and its officers, in keeping its accounts. The obvious purpose of the memoranda of numbers in the deposit book of the court and upon the checks, was to enable the court and the clerk to properly keep the accounts, and that the checks might operate as vouchers, showing the manner in which the moneys in any particular case were distributed, and to enable the clerk to show to the court that he had deposited the funds which he had received. There is no evidence anywhere of any intention that the bank should be controlled by the numbers in paying any check drawn upon it." *State Nat. Bank v. Dodge*, 124 U. S. 333, 345, 31 L. Ed. 458.

97. *Furnishing information concerning estates.*—Bankrupt Act, 1898, § 47 a, (5).

98. *Keeping accounts.*—Bankrupt Act, 1898, § 47 a, (6).

"Just and true accounts are to be kept by the assignees, and they are to make

the inspection of officers and all parties in interest.⁹⁹

g. *Submission of Statement at Final Creditor's Meeting*.—It is the duty of trustees to lay before the final meeting of the creditors detailed statements of the administration of the estates.¹

h. *Final Reports and Accounts*.—It is the duties of the trustees to make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors.²

Audit of Accounts.—All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.³

i. *Payment of Dividends*.—It is the duty of trustees to pay dividends within ten days after they are declared by the referees.⁴

j. *Written Reports as to Condition of Estates, Funds on Hand, etc.*—Trustees are required to report to the courts in writing, the conditions of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts.⁵

k. *Setting Apart Bankrupt's Exemptions*.—It is the duty of trustees to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.⁶

full report of the same to the creditors at a meeting to be called for the purpose, and the creditors are to determine whether any and what part of the net proceeds of the estate shall be distributed as a dividend, and if the creditors order a dividend, it is made the duty of the assignee to prepare a list of the creditors entitled to the same, and to compute and set opposite to the name of each creditor the dividend to which he is entitled out of the net proceeds of the estate set apart for that purpose. Preparatory to the final dividend the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a final settlement of his account." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

As to accounts by trustees of bankrupt partnership estates, see post, "Application of Bankrupt Acts to Partners and Partnership Estates," XX.

99. **Accounts, etc., to be open to inspection**.—Bankrupt Act, 1898, § 49.

1. **Statements at final creditors' meeting**.—Bankrupt Act, 1898, § 47 a. (7).

2. **Final reports and accounts**.—Bankrupt Act, 1898, § 47 a. (8).

3. **Audit of account by referee**.—General Order in Bankruptcy, Number 17; 172 U. S. 658.

4. **Payment of dividends**.—Bankrupt Act, 1898, § 47, a. (9). See post, "Declaration and Payment of Dividends," XVII. F.

5. **Written reports as to condition of estates, money on hand, etc.**—Bankrupt Act, 1898, § 47 a. (10).

6. **Setting apart bankrupt's exemption and report thereon**.—Bankrupt Act, 1898, § 47 a. (11); *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061.

"The bankruptcy court is expressly

vested with jurisdiction 'to determine all claims of bankrupts to their exemptions. Section 2, cl. 11. Where there is a trustee he sets apart the exemptions, and reports thereon to the court, § 47, cl. 11; where no trustee has been appointed, under general order XV, the court acts in the first instance." *Smalley v. Laugenour*, 196 U. S. 93, 97, 49 L. Ed. 400.

Duty to make inventory of property and report articles set off.—The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. General Order in Bankruptcy No. 17, 172 U. S. 658.

May not administer exempt property notwithstanding waiver.—Withholding discharge pending determination as to waiver. —Although power is thus given to set aside exempt property, authority is not thereby conferred upon the bankruptcy to administer such exempt property, even though such exemption has been waived by the bankrupt in favor of certain creditors. It would seem, however, that under such circumstances, the discharge of the bankrupt might be postponed until a reasonable time in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor under

1. *Effect of Failure to File Reports or Statements.*—Failure of the trustee to file any report or statement which it is his duty to file may be ground for his removal.⁷

3. **LIABILITY OF TRUSTEES FOR PENALTIES OR FORFEITURES OF BANKRUPT.**—Under the present bankrupt act it is provided that trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under the act, of whose estate they are respectively trustees.⁸

F. Actions by or against Trustees—1. **RIGHT TO SUE AND LIABILITY TO SUIT**—a. *In General.*—Actions at law or suits in equity may, in a proper case, be brought by the trustee or assignee against any person to recover interests of the bankrupt held adversely, or by any person against such trustee or assignee touching any property vested in such trustee or assignee.⁹

b. *Institution of Suits to Recover Property of Estate, and Subject it to Claims of Creditors*—(1) *Trustee Vested with Rights of Bankrupt.*—As has already been seen, the trustee or assignee, both under present and former bankrupt acts, is clothed with the power and duty to sue whenever suit is necessary, and he is given the same right in any litigation he may institute which the bankrupt would have had if no decree in bankruptcy had been rendered.¹⁰

(2) *Rights Not Possessed by Bankrupt or Creditors.*—In addition to the right of suit possessed by the bankrupt, the trustee or assignee may sue and recover in cases where the bankrupt could not have sustained the action, and set aside transactions which would have been binding on the bankrupt himself.¹¹ It is only through the instrumentality of trustees or assignees that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy or which he conceals from, and fails to surrender to, his trustees or assignees.¹²

c. *Prosecution or Defense of Pending Suits.*—The right of the trustee, to prosecute or defend, as such, pending suits by or against the bankrupt, is treated elsewhere in this title.¹³

such waiver. *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061.

Right of creditors to contest claim to exemptions.—Creditors being notified of the proceedings in bankruptcy, as provided by the bankruptcy act, if they desire to contest the claim to exemption, may do so, or they can invoke the supervision and revision of the order by the circuit court of appeals, but if they do not do so, they cannot question its validity in the state courts, unless, indeed, it be absolutely void. *Smalley v. Laugenour*, 196 U. S. 93, 97, 49 L. Ed. 400.

7. **Effect of failure to file report or statement.**—See post, "Power to Remove," XVI, G, 1.

8. **Liability of trustees for penalties, etc., of bankrupt.**—Bankrupt Act, 1898, § 50 i.

9. **Right to sue or liability to suit.**—Revised Statutes, § 5057. *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57.

10. **Clothed with rights of bankrupts as to suits.**—*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915. See ante, "Enumeration of Specific Property and Rights Passing to Trustee," XVI, E, 1, b, (2).

Vesting of right of action in executor of assignee.—Upon the death of an as-

signee under the bankrupt law of the United States, the right of action, for a debt due to the bankrupt, vested in the executor of the assignee. *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 3 L. Ed. 496.

11. **Right to sue and recover where bankrupt could not maintain action.**—*Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731. And see *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381.

12. **Recovery of property fraudulently transferred or concealed.**—*Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

The failure of the assignee to sue within two years will not transfer the right of action to a creditor. *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394.

For a full treatment of the recovery of property fraudulently conveyed, or concealed, avoidance of preferences, liens, et., see post, "Provisions of Bankrupt Act as to Liens, Transfers and Preferences," XIX.

13. **Prosecution or defense of pending suits.**—See post, "Prosecution or Defense of Pending Suits," XXI, B, 3, b.

2. **LIMITATIONS.—In General.**—It is provided by the present bankrupt act that suits shall not be brought by or against the trustee of a bankrupt estate subsequent to two years after the estate has been closed.¹⁴ The act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such persons against such assignees, to two years after decree of bankruptcy or first accrual of cause of suit.¹⁵ The act of 1867 required suits between assignees in bankruptcy and adverse claimants to be brought within two years from the time when the cause of action accrued for or against such assignee.¹⁶

14. Limitation of actions by or against trustees under the bankrupt act, 1898.—Bankrupt Act, 1898, § 11 d.

For a full treatment of the question of limitation of actions, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**.

15. Provision of act, 1841, § 8.—*Bank v. Ogden*, 2 Wall. 57, 17 L. Ed. 818; *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60.

The limitation of the 8th section of the bankrupt act of 1841 does not apply to suits by assignees of their grantees for the recovery of real estate until after two years from the taking of adverse possession. *Bank v. Ogden*, 2 Wall. 57, 17 L. Ed. 818.

16. Section 5057 of the Revised Statutes, which is an embodiment of § 2 of the act of March 2, 1867, ch. 176 (14 Stat. 518), provided as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when the assignee is appointed." *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713. See, also, the following cases decided under or interpreting this section: *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Sargent v. Helton*, 115 U. S. 348, 29 L. Ed. 412; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395; *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Webb v. Barnwell*, 116 U. S. 193, 29 L. Ed. 595; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Wisner v. Brown*, 122 U. S. 214, 30 L. Ed. 1205; *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304; 127 U. S. 484, 32 L. Ed. 189; *Green v. Taylor*, 132 U. S. 415, 33 L. Ed. 411; *Avery v. Cleary*, 132 U. S.

604, 33 L. Ed. 469, affirmed in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 33 L. Ed. 473; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. Ed. 313; *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

The object of this statute was to secure a prompt determination of all questions arising in bankruptcy proceedings and a speedy distribution of the assets or bankrupts among their creditors. *Avery v. Cleary*, 132 U. S. 604, 33 L. Ed. 469, affirmed in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 33 L. Ed. 473.

Section 5057 merely limits the remedy.—*Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197, the supreme court on writ of error to the supreme court of Wyoming Territory held that the latter court erred in holding that § 5057 of the United States Revised Statutes as to suits by and against assignees in bankruptcy was not a statute merely limiting the remedy but that it imposed an absolute limit; that after two years the assignee could neither sue nor be sued, but his office, for the purpose of commencing any suit must be regarded as having expired. To same effect, see *Upton v. Kent*, reported in note to above case, 105 U. S. 646, 26 L. Ed. 1200.

To what proceedings applicable.—Section 5057 applies to all suits brought in any court, by an assignee, not only where the suit is concerning an adverse interest in property transferred to him by the assignment, but also where he is suing to recover on a simple debt or other money obligation. *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304.

"We concur with the supreme court of Pennsylvania that the limitation of § 5057 of the Revised Statutes did not apply. That limitation is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claim existed while in the hands of the bankrupt and before assignment. In *re Conant*, 5 Blatchford 54; *Clark v. Clark*, 17 How. 315, 321, 15 L. Ed. 77; *Phelps v. McDonald*, 99 U. S. 298, 306, 25 L. Ed. 473; *French v. Merrill*, 132 Mass. 525." *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791, affirmed in *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

"Speedy administration as well as equal distribution of the assets among the

When Statute Begins to Run in Actions Based on Fraud.—The statute of limitations does not begin to run against an action by an assignee or trustee to

creditors is the policy of the bankrupt act, and the former is almost as necessary as the latter to accomplish the beneficent ends for which the law was passed. Impressed with that view, congress enacted the limitations contained in the second section of the bankrupt act, which, like other statutes of limitation, must receive a reasonable construction. Beyond doubt, it applies to all judicial contests between the assignee and other persons touching the property or right of property of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. *Bailey v. Glover*, 21 Wall. 342, 346, 22 L. Ed. 636." *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57.

Relates to suits by or against assignee with respect to parties other than bankrupt.—The statutory requirement that all suits by or against an assignee in bankruptcy shall be brought within two years from the time the cause of action accrued, relates to suits by or against him with respect to parties other than the bankrupt. *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473.

A writ of error brought by the assignee in bankruptcy to the judgment of a state court against a person shortly afterwards adjudged a bankrupt is a suit within the meaning of the limitation clause of the bankrupt law. *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304.

Does not accrue until appointment.—The cause of action does not accrue to the assignee until his appointment. *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381.

Running of statute once commenced not interrupted by conveyance.—A conveyance by the assignee in bankruptcy cannot prevent the operation of the bar of the statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation, dating from the time of the conveyance. Nor can it interrupt the running of the statute against the claim or right, when it has once commenced to run as against the assignee. The purchaser takes the right cum onere subject to the continuance of the running of the statute, and subject to the fact that a part of the two years has already run as against the claim or right, while it was in the hands of the assignee, and to the consequence that when sufficient additional time shall have run against it, in the hands of the purchaser, to make up the entire two years, the claim or right will be wholly barred. No initiation of a new period of limitation, under any statute, begins to run in favor of the purchaser at the time of his

purchase, whether the two years wholly elapsed, or only a part thereof elapsed, while the claim was owned by the assignee. *Green v. Taylor*, 132 U. S. 415, 33 L. Ed. 411.

"In *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57, and in *Wisner v. Brown*, 122 U. S. 214, 30 L. Ed. 1205, it was held by this court that purchasers of property from an assignee in bankruptcy could not maintain a suit in equity against third persons claiming adverse interests in such property, if, at the time of the purchase from the assignee, his right of action was, under the bankruptcy act, barred by the lapse of time." *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

Relation back of amended petition.—"This bill was filed on the 7th of July, 1877. It was amended twice, but the amendments were chiefly verbal. Their effect was only to give greater precision to the charges already made. The framework of the bill remained the same. No new cause of action was introduced. The changes were not such as could have any effect with respect to the statutory limitation as to suits by or against assignees in bankruptcy. The limitation in such a case is two years. Rev. Stat., § 5057. The time begins to run when the assignee is appointed. *Bump on Bankruptcy*, 558." *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866. See, generally, the title AMENDMENTS, vol. 1, p. 288.

Suit held a continuation of former proceedings.—In *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207, the assignee, in January, 1876, filed his petition in the district court under Revised Statutes, § 5063. The claimants appeared and answered the petition. After issues made, and the parties had gone into proofs, for reasons not disclosed by the record, the assignee, by leave of court, and without notice to the defendants, withdrew his petition "without prejudice," etc. Shortly afterwards, another suit was commenced by the assignee in the circuit court in December, 1879, the bill setting out substantially the same facts as those alleged in his petition in the district court. The defendants in their answer resisted the claim of the assignee upon the same grounds relied upon in the original proceeding in the district court. They also filed their cross bill, seeking a decree for the surrender of the lands to them, and an accounting by the assignee in respect to the rents by him received. It was held that the suit in the district and in the circuit court were to be regarded as the same suit under § 5057, and that the question between the assignee and the grantees as to the title to the lands in dispute was raised in apt time.

Where one of two securities held by a creditor of a bankrupt is delivered to the

set aside fraudulent conveyances, etc., until the discovery of the fraud,¹⁷ and this rule also applies to the right of a purchaser of property from a trustee to assert title against one claiming interest in such property.¹⁸ There must not, however, be negligence or laches upon the part of the trustee or assignee, or purchaser from him, in coming to the knowledge of the fraud which is the foundation of his suit, and which is relied upon to defeat the limitation of two years.¹⁹

assignee, the cause of action as to such security accrues to the creditor at the time of such delivery, and is barred by the lapse of two years as prescribed in the act of 1867, § 2, and Rev. Stat., § 5057. *Doe v. Hyde*, 114 U. S. 247, 29 L. Ed. 142.

17. Statute runs only from discovery of fraud.—*Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395, affirming *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636, and distinguishing *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, and *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; *Avery v. Cleary*, 132 U. S. 604, 33 L. Ed. 469, affirmed in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 613, 33 L. Ed. 473; *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713.

The policy of the bankrupt law is speedy as well as equal distribution of the bankrupt's assets among his creditors, and the one is almost as important as the other. Hence the clause limiting the commencement of actions by and against the assignee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his. But though this clause in terms includes all suits at law or in equity, the general principle applies here, that where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered. And this doctrine is equally applicable on principle and authority to suits at law as well as in equity. *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

"Although this court has attached to § 5057 of the Revised Statutes a qualification, that qualification is that where relief is sought on the ground of fraud, it is necessary, in order to postpone the right of action on the part of the assignee in bankruptcy until the discovery of the fraud, that ignorance of it should have been produced by affirmative acts of the guilty party, in concealing the facts, and that there should have been no fault or want of diligence or care on the part of the person who claims the right of action; in other words, that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the

fraud is discovered by, or becomes known to, the party suing, or those in privity with him, or ought to have been so discovered or known." *Pearsall v. Smith*, 149 U. S. 231, 37 L. Ed. 713.

Omissions from schedule as fraudulent concealment preventing bar of statute.—

"The ground upon which the plaintiff claims exemption from the limitation of two years is that the schedules in bankruptcy omitted all mention of the policies in question, and that the fact that the policies existed was 'concealed and withheld' by the bankrupt in his lifetime, and, since his death, by his administrator. If it be assumed that Ellis had not, prior to his bankruptcy, delivered the assignment of May 19, 1877, and that his interests and rights in these policies were transferable to his assignee, the mere fact that he omitted any mention of the policies in his schedules in bankruptcy, and that neither he nor his administrator gave information of them to the assignee, would not establish fraud within the meaning of the rule announced in *Bailey v. Glover*. The omission from the schedules of any reference to the policies, and the failure to call the attention of the assignee to them, may have been caused by an honest belief, upon the part of Ellis, that they belonged to his children, or were not such property as the law required to be surrendered to the assignee; and, therefore, he lodged the assignment to Morse—possibly after his bankruptcy—with the insurance company." *Avery v. Cleary*, 132 U. S. 604, 610, 33 L. Ed. 469, affirmed in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 613, 33 L. Ed. 473.

18. Application of rule to purchaser of property from trustee.—The right of the purchaser of property from a trustee in bankruptcy to assert title against one claiming an interest in such property will not be barred under § 5057 of the Revised Statutes, though more than two years have elapsed, where the title of the defendant was acquired by fraud on the trustee and both purchaser and the trustee were ignorant of such fraud. Under these circumstances action may be brought within two years from the discovery of the fraud. *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

19. Trustee or assignee must not be guilty of laches or negligence.—*Avery v. Cleary*, 132 U. S. 604, 33 L. Ed. 469, affirmed in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 613, 33 L. Ed. 473.

Generally, as to the effect of laches

Defense of Statute May Not Be Raised for First Time on Appeal.—

The principle that it is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by the statute of limitations, to raise the point for the first time in an appellate court, applies to suits by trustees or assignees in bankruptcy.²⁰

3. JURISDICTION.—The question of jurisdiction of proceedings between trustees and adverse claimants of the bankrupt's property, has been treated in an earlier section of this title.²¹

4. NATURE OF SUITS RELATING TO ADVERSE CLAIMS.—Suits by an assignee or trustee against any person claiming an adverse interest, or by any such person against an assignee or trustee touching any property or rights of the bankrupt transferable to or vested in such assignee or trustee, are no part of the bankruptcy proceedings. They are in aid of such a proceeding, but while progressing are entirely separate from and independent of it. They are used by the bankrupt court to settle the rights of parties who are not subject to its jurisdiction in the suit in bankruptcy, and who, therefore, cannot be affected by any judgment or decree that may be made in that cause.²²

5. CONCLUSIVENESS OF DECISION IN CONTROVERSY AS TO RIGHT TO PROPERTY.—Where a party contests with his own assignee in bankruptcy the right to a fund, and the controversy is decided in favor of the assignee by the circuit court, whose decree is affirmed by the supreme court, the same question cannot be litigated again.²³

G. Removal or Death of Trustee—**1. POWER TO REMOVE.**—Courts of bankruptcy, may, upon complaints of creditors, remove trustees for cause upon hearings and after notices to them.²⁴ General order in bankruptcy, num-

upon the right of action, see the titles LACHES; NEGLIGENCE.

Insufficient facts to put assignee on inquiry.—An assignee in bankruptcy is not necessarily put on inquiry as to the fraudulent nature of a transfer of property, so as to make the lapse of two years a bar to a suit by him, merely because it is shown that on his examination the bankrupt refused to answer certain questions, on the ground that his answers might incriminate him, as there was an indictment for a criminal offense under the bankrupt laws of the United States then pending against him. *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395.

20. May not be first raised on appeal.—*Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197. To same effect, see *Upton v. Kent*, reported in note to above case, 105 U. S. 646, 26 L. Ed. 1200. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

21. Jurisdiction of proceedings between trustee and adverse claimants.—See ante, "Proceedings between Trustees and Adverse Claimants of Bankrupt's Property," V. B. 1.

Inadequacy of legal remedy as essential to equity jurisdiction.—In actions by a trustee to recover the value of property fraudulently concealed and sold by the bankrupt, the usual rule applies that equity will not take jurisdiction where an action at law will afford a full, adequate and complete remedy. See the titles EQUITY; JURISDICTION.

Where a bill is filed by the assignee against the bankrupt and another alleging that the bankrupt, before the adjudication, and with intent to defraud creditors, concealed his property and sold it, and, after obtaining his discharge, invested the proceeds in business which he carried on in the name of the other defendant, such bill should be dismissed where the plaintiff fails to connect the other defendant with the fraudulent withholding of assets; such dismissal, however, to be without prejudice to an action at law against the bankrupt. *Kramer v. Cohn*, 119 U. S. 355, 30 L. Ed. 439.

22. Nature of suits between trustees or assignees and adverse claimants.—*Wisswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923.

23. Conclusiveness of decision as to right to fund.—*Clark v. Hackett*, 1 Black 77, 17 L. Ed. 69. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

24. Power of court to remove.—See ante, "Appointment or Removal of Trustees," V. A, 2, b, (17).

"Assignees are in the first instance chosen by the creditors; but they may be removed by the court, after due notice, for any cause which, in the judgment of court, renders such removal necessary or expedient." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

As to power of court to withhold compensation on removal, see ante, "With-

ber 17, expressly provides for the removal of the trustee under certain circumstances.²⁵

2. EFFECT OF DEATH OR REMOVAL OF TRUSTEE.—It is expressly provided by the bankrupt act that the death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.²⁶

H. Discharge of Trustees.—Courts of bankruptcy have the power to close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees.²⁷

XVII. Administration and Distribution of Estate.

A. Powers and Duties of Trustees.—The general powers and duties of trustees with regard to the administration of a bankrupt estate have already been treated in a preceding section of this title.²⁸

B. Appraisal of Property.—All real and personal property belonging to bankrupt estates is to be appraised by three disinterested appraisers,²⁹ who are to be appointed by, and must report to, the court.³⁰

C. Sale of Property—1. **RIGHT AND DUTY TO SELL.**—The real and personal property of bankrupt estates is, when practicable, to be sold by the trustees subject to the approval of the court.³¹ The bankruptcy court may, under

holding Compensation in Case of Removal," XVI, D, 3.

Removal of assignee by creditors.—Under the act of 1867, creditors not only appointed the assignee or assignees, but, in certain cases and under certain conditions, they might remove any assignee, and vacancies might, in certain cases, be filled by the creditors as provided in the eighteenth section of the act. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

25. Provision of general order number 17.—"In case the trustee shall neglect to file any report or statement which it is made his duty to file or to make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at the time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk." General Order in Bankruptcy No. 17, 172 U. S. 658.

26. Effect of death or removal on pending suits.—Bankrupt Act, 1898, § 46.

27. Jurisdiction to approve accounts and discharge trustees.—See ante, "Closing Estates and Discharging Trustees," V, A, 2, b, (8).

28. General powers and duties of trustees in administration of estate.—See ante, "Rights, Powers, Duties and Liabilities," XVI, E.

Property and assets of bankrupt corporations to be distributed as in case of natural persons.—"All the property and as-

sets of any corporation declared bankrupt by proceedings under the bankrupt act shall be distributed to the creditors of the corporation in the manner therein provided in respect to natural persons." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 333.

As to conclusiveness of order of court under which proceeds of sale distributed by trustees, see post, "Conclusiveness and Effect of Adjudication," XXI, C.

29. Appraisal of property.—Bankrupt Act, 1898, § 70 b.

30. Appointment of and report of appraisers.—Bankrupt Act, 1898, § 70b.

31. Sale of property subject to courts approval.—Bankrupt Act, 1898, § 70b.

By § 9 of the act of 1841 all sales, transfers, and other conveyances of the bankrupt's property, and rights of property, are required to be made by the assignee at such times and in such manner as shall be ordered and appointed by the court in bankruptcy. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

By § 5062 of the Revised Statutes it is provided that "the assignee shall sell all such unnumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors." *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

Assignee vested with bankrupt's power to sell and dispose of property.—By the assignment in bankruptcy, the bankrupt's right and authority to sell, manage and dispose of the estate and property of every nature is vested in the assignee, subject to the orders and directions of the court. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Sparhawk v. Yerkes*, 142 U.

proper circumstances, order the sale of property, the title to any portion of which is in dispute,³² and may order property to be sold free of encumbrances.³³

S. 1, 35 L. Ed. 915. See ante, "Title and Rights as to Property of Bankrupt," XVI, E, 1. b.

Sale of encumbered property by trustee without order of court and notice.—Although district courts of the United States, sitting in bankruptcy, have power to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and although as a general thing, if they order a sale so that the purchaser shall take a title so discharged the purchaser will have a title wholly unencumbered, yet to pass in this way an unencumbered title of property previously mortgaged, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way we have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien. And if a sale be made without any notice to him, his mortgage is not discharged. *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116.

"Authority is doubtless possessed by the assignee to sell the property of the bankrupt, whether the same is or is not encumbered, but when he sells encumbered property without any special order from the court, he sells the same subject to any and all lawful encumbrances, and can convey no better or higher interest than the bankrupt could have done. In such a case it will be taken for granted that the assignee sold only such right or title to the property as was vested in him as the representative of the bankrupt, and therefore that he sold it subject to the encumbrances." *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116.

As to the power of the trustee to redeem encumbered property or sell subject to incumbrances, see ante, "Redemption of Property," XVI, E, 1. b. (4).

32. Sale of property title to which is in dispute under Rev. Stat., § 5063.—It is provided as follows by § 5063 of the Revised Statutes: "Whenever it appears to the satisfaction of the bankruptcy court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property, in any suit or controversy between the parties, in any court. But this provision shall not prevent the

recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale." *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Wisner v. Brown*, 122 U. S. 214, 30 L. Ed. 1205.

"District courts, though constituted courts of bankruptcy, do not possess the power under the twenty-fifth section of the bankrupt act to order, in a summary way, the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt, or from some former owner. *Knight v. Cheney*, 5 Nat. Bank Reg. 305." *Gifford v. Helms*, 98 U. S. 248, 25 L. Ed. 57.

33. Sale free of encumbrance.—In order that a sale of a bankrupt's realty by order of court free from a mortgage creditor's lien may be valid, as to him, and may discharge his lien, he must be a party to the proceedings. *Factors', etc., Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. Ed. 582, affirming *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116. See, also, *McKenna v. Simpson*, 129 U. S. 506, 512, 32 L. Ed. 774; *Avery v. Popper*, 179 U. S. 305, 45 L. Ed. 203.

The district court of the United States, sitting in bankruptcy, had power to decree a sale of the mortgaged property of a bankrupt; and if there are more mortgages than one, and the proceeds of sale are insufficient to discharge the eldest mortgage, the purchaser will hold the property free and clear of all encumbrances arising from the junior mortgage. *Houston v. City Bank*, 6 How. 486, 12 L. Ed. 526.

"The power of the district court over mortgages, in cases of bankruptcy, was fully argued and considered in the two cases reported in *Ex parte City Bank*, 3 How. 292, 11 L. Ed. 603, and *Nugent v. Boyd*, 3 How. 426, 11 L. Ed. 664, as appears by the opinions delivered by the court, and the opinions of the justices who dissented. But whatever difference of opinion existed as to some of the propositions maintained in these cases by the majority of the court, there has been no division of opinion upon a question like the one presented in this record. And the court are unanimously of opinion, that the sale made by the assignee of the property in question is valid, and that the pur-

2. **TERMS OF SALE.—Amount for Which to Be Sold.**—Under the present bankrupt act property shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.³⁴

Power to Sell on Credit.—Under the power granted by statute to sell all the unencumbered estate on such terms as he thinks most for the interest of the creditors, it has been held that the assignee might sell for credit if it seemed best for the interest of the creditors so to do.³⁵

3. **RIGHT OF BANKRUPT TO PURCHASE.**—After one has been adjudicated a bankrupt, and has surrendered his property to be administered in bankruptcy, it has been held that he is as much at liberty to purchase if he has the means, any of the property so surrendered, as any other person.³⁶

4. **CONVEYANCE OF TITLE BY TRUSTEE—a. Duty to Convey.**—The title to property of a bankrupt estate which has been sold shall be conveyed to the purchaser by the trustee.³⁷

b. *Rights and Title of Purchaser.*—**Acquires Only Rights of Trustee or Assignee.**—The purchaser from the trustee or assignee in bankruptcy does not acquire by his purchase any greater rights than those possessed by such trustee or assignee.³⁸ He acquires only the interest of the bankrupt as of the date of

chasers are entitled to hold it free and discharged from the mortgage to the City Bank, and from all other encumbrances mentioned in the proceedings." *Houston v. City Bank*, 6 How. 486, 12 L. Ed. 526.

Real property, in Louisiana, was bound by a judicial mortgage. The owners of the property then took the benefit of the Bankrupt Act of the United States. A creditor of the bankrupt then filed a petition against the assignee, alleging that he had a mortgage upon the same property, prior in date to the judicial mortgage, but that, by some error, other property had been named, and praying to have the error corrected. Of this proceeding the judgment creditor had no notice. The court being satisfied of the error, ordered the mortgage to be reformed, and thus gave the judgment creditor the second lien instead of the first; and then decreed that the property should be sold free of all encumbrances. Of this proceeding, and also of the distribution of the proceeds of sale, the judgment creditor had notice, but omitted to protect his rights. In consequence of this neglect, he cannot afterwards assert his claim against a purchaser, who has bought the property as being free from all encumbrances. *Fowler v. Hart*, 13 How. 373, 14 L. Ed. 186.

34. **Not to be sold for less than 75 per cent. of appraised value.**—Bankrupt Act, 1898, § 70 b.

35. **Power to sell for credit under Rev. Stat., § 5062.**—*Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

36. **Right of bankrupt to purchase at trustee's sale.**—*Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

Right of bankrupt to purchase at trustee's sale before discharge.—The bankrupt, having complied with the law, is, after the lapse of six months, entitled as a matter of course to his discharge. His right to purchase property surrendered,

cannot, therefore, depend on his actual discharge. *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

37. **Conveyance of title by trustee.**—Bankrupt Act, 1898, § 70 c.

38. **Purchaser acquires only rights of trustee or assignee.**—*Greene v. Taylor*, 132 U. S. 415, 33 L. Ed. 411; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Crawford v. Halsey*, 124 U. S. 648, 31 L. Ed. 572; *Easton v. German-American Bank*, 127 U. S. 532, 32 L. Ed. 210; *Roby v. Colehour*, 146 U. S. 153, 36 L. Ed. 922; *Cramer v. Wilson*, 195 U. S. 408, 49 L. Ed. 256; *Cleveland Ins. Co. v. Reed*, 24 How. 284, 16 L. Ed. 686.

The conveyance to the assignee passes to the latter only such interest as the bankrupt in fact had, and when the bankrupt buys from the assignee, he purchases only such as he could rightfully have conveyed originally to his assignee. *Roby v. Colehour*, 146 U. S. 153, 36 L. Ed. 922.

Purchase by bankrupt subject to previous declaration of trust by him.—A bankrupt who purchases from his assignee in bankruptcy real estate to which he held the legal title at the time of the assignment is not thereby discharged from an obligation to account to a third party for an interest in the land as defined in a declaration of trust by the bankrupt, made before the bankruptcy, but takes title subject to that claim. *Roby v. Colehour*, 146 U. S. 153, 36 L. Ed. 922.

"Roby's claim is that his purchase of the lands from his assignee in bankruptcy, the legal title to which was in him, of record, discharged him from all obligation to recognize any claim, upon the part of either of the Colehours, arising out of the relations existing between them and him prior to his bankruptcy. If, at the time of filing his petition in bankruptcy, he was bound by his relations to the Colehours, although holding the legal title, to account to them for their portions of

adjudication,³⁹ and the conveyance by the trustee or assignee does not pass any interest in the property subsequently acquired by the bankrupt.⁴⁰

Running of Statute against Purchaser.—Where the statute of limitations has begun to run against a claim or right in the hands of the trustee or assignee at the time of the purchase from him, the purchaser takes the right subject to the limitation.⁴¹

5. SETTING ASIDE SALE AND ORDERING RESALE.—A sale of the bankrupt's property made by order of the court of bankruptcy, may be set aside under proper circumstances, and a resale ordered;⁴² and such second sale may, in turn, be set aside and the first sale reinstated.⁴³

D. Payment of Taxes, Priority of Debts and Order of Payment—

1. PAYMENT OF TAXES.—Under the present bankrupt act it is provided that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors,⁴⁴ and upon filing the receipts of

the lands, as defined in any previous declaration of trust to which he was a party or to which he assented, or by which he was bound, he was not discharged from that obligation by merely purchasing the lands from his assignee in bankruptcy. It does not appear that any issue was framed and determined in the bankruptcy court as between him or his assignee and the Colehours. The conveyance to his assignee passed to the latter only such interest as he, in fact, had, and when he bought from the assignee he purchased only such as he could rightfully have conveyed, originally, to his assignee. If, before he went into bankruptcy, the Colehours had any interest in the lands, which they could assert, as between themselves and him, he could not, by simply purchasing it from his assignee, acquire an absolute title, freed from their claim. We are of opinion that the proceedings in bankruptcy against Roby, and the purchase from his assignee, did not defeat the claims now asserted by the Colehours in these lands, and which were recognized by the decree below." *Roby v. Colehour*, 146 U. S. 153, 36 L. Ed. 922.

Right of purchaser to enforce claim by suit.—It would seem that a transfer of a valuable right of property by the assignee is valid and effectual though the grantee may be compelled to bring suit to enforce his right to the property. *Traer v. Clews*, 115 U. S. 528, 29 L. Ed. 467.

39. Acquires only interest of bankrupt as of date of adjudication.—*Cramer v. Wilson*, 195 U. S. 408, 49 L. Ed. 256. See ante, "Title and Rights as to Property of Bankrupt," XVI, E. 1, b.

40. Trustee's deed does not pass subsequently acquired interest of bankrupt.—*Cramer v. Wilson*, 195 U. S. 408, 49 L. Ed. 256.

41. As to running of statute of limitations against purchaser from assignee, see ante, "Limitations," XVI, F, 2.

42. Setting aside sale and ordering resale.—See *Conroy v. Crane*, 110 U. S. 403, 28 L. Ed. 191. And see, generally, the title JUDICIAL SALES, and cross references there found.

Effect of concealment of valuable claims by bankrupt.—Where a valuable claim is concealed by the bankrupt from his assignee, or is vaguely described in the schedule and afterwards purchased by or for the bankrupt for a nominal consideration, such sale may be set aside as invalid and the proceeds of the claim distributed among the creditors. *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77.

43. Reinstatement of first sale.—Right to rents and profits.—Where a sale made by order of the court of bankruptcy is set aside for nonpayment of bid and resale made to another party who takes possession, but on review the second sale is set aside for error therein, and the first sale reinstated, and possession given to the first vendee on payment by him, the latter is not entitled to recover from the one in possession under the second sale, rents and profits during the time of such possession. *Conroy v. Crane*, 110 U. S. 403, 28 L. Ed. 191.

44. Payment of taxes in advance of dividends.—Bankrupt Act, 1898, § 64a. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

The act of 1867, § 28, placed second in order of priority all taxes and assessments under the laws of the United States. *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

All state taxes and assessments were placed third in order of priority by this act. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Act of 1867 and present act compared.—"It is to be noted that there is a very significant difference in this respect, in the act of 1898, from the provisions of the bankrupt act of 1867, 14 Stat. 530, c. 176, the law in force last before, and doubtless in the view of congress when the present law was drafted. That act, of 1867, gave priority of payment to all debts due to the United States, and all taxes and assessments under the laws thereof, all debts due to the state in which the proceedings in bankruptcy were pend-

the proper public officers for such payment, he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.⁴⁵

2. ORDER OF PRIORITY AND PAYMENT OF DEBTS—*a. Costs of Preserving Estate.*—The bankrupt act of 1898, expressly enumerates the debts which are to have priority and to be paid in full out of bankrupt estates, and their order of payment. First among these is the actual and necessary costs of preserving the estate subsequent to filing the petition.⁴⁶

b. Filing Fees in Involuntary Cases, and Expenses of Recovering Property.—The second class of debts enumerated under the original act of 1898 are the filing fees paid by creditors in involuntary cases.⁴⁷ Under the act as amended in 1903 this class now includes, in addition to such filing fees, the reasonable expenses incurred by creditors in recovering, for the benefit of the estate, property transferred or concealed by the bankrupt.⁴⁸

c. Costs of Administration, Witness and Attorneys' Fees.—Third in the order of priority is the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorneys' fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow.⁴⁹

ing, and all taxes and assessments made under the laws of such state, and provided that nothing contained in the act should interfere with the assessment and collection of taxes by the authority of the United States or any state. The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district or municipality." *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

Section 64a of present bankrupt act construed and applied.—Section 64a of the bankrupt act covers all taxes. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

It includes yearly license fees imposed by state laws on corporations organized under the laws of such state, regardless of where the business is carried on. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

It also includes taxes assessed on returns made prior to, though not collectible until after the adjudication. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

Taxes due to any state, and not only those due to the state in which proceedings are instituted, are preferred under § 64a. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

45. Determination as to legality of taxes.—Bankrupt Act, 1898, § 64a. *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

46. Costs of preservation of estate.—Bankrupt Act, 1898, § 64b, (1).

The act of 1867 placed first in order of priority and payment in full, "fees, costs and expenses of suits and of the several proceedings under this act, and for the

custody of property, as herein provided." *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Compensation of assignees or trustees a direct charge upon property and prior to claims of creditors and stockholders.—The services of assignees in bankruptcy not being to any party or parties but in respect to the property itself, and to secure its proper application among all parties interested, it is clearly in accordance with the settled rules of equity jurisprudence, as well as with the practice in bankrupt proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders. *Meddaugh v. Wilson*, 151 U. S. 333, 38 L. Ed. 183.

47. Filing fees.—Bankrupt Act, 1898, § 64 b, (2).

48. Expenses of recovering property.—By the amendment of February, 1903, clause two of subdivision b of § 64 of said act was amended so as to read as follows: "(2) The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery." (32 Stat. L. 806.) Act of Feb. 9, 1903, ch. 487 (amending Bankruptcy Act, July 1, 1898), 38.

49. Cost of administration, witness and attorneys' fees.—Bankrupt Act, 1898, § 64 b, (3).

d. *Wages of Workmen, Clerks or Servants.*—The fourth class of debts consists of wages due to workmen, clerks, or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant.⁵⁰

e. *Debts Owning to Persons Entitled to Priority.*—The fifth class of debts consists of those owing to any person who by the laws of the states or the United States is entitled to priority.⁵¹

50. Wages due to workmen, clerks or servants.—Bankrupt Act, 1898, § 64 b, (4). *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436.

By the act of 1867 the fourth class of claims in order of priority consisted of "wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Rights of assignee of claim.—In *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436, it was held that an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor was entitled to priority of payment under § 64 of the bankrupt act, when the assignment occurred prior to the commencement of such bankrupt proceedings.

"The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage earner; if to the person, it is available only to him, if to the claim, it passes with the transfer to the assignee. In support of the proposition that the right is personal to the wage earner, and enforceable only by him, it is argued that it is not wages earned within the prescribed time which are given priority, but wages 'due to workmen, clerks or servants,' that when the claim is assigned to another it is no longer 'due to workmen, clerks or servants,' but to the assignee, and therefore when presented by him lacks one of the characteristics which the law makes essential to priority. In this argument it is assumed that the wages must be 'due' to the earner at the time of the presentment of the claim for proof, or at least at the time of the commencement of the proceedings in bankruptcy. Without that assumption the argument fails to support the conclusion. But the statute lends no countenance to this assumption. It nowhere expressly or by fair implication says that the wages must be due to the earner at the time of the presentment of the claim, or of the beginning of the proceedings, and we find no warrant for supplying such a restriction. Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within

the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority.'" *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436.

"The question certified has never been passed upon by any circuit court or appeals, and in the district courts the decisions upon it are conflicting. In *re Westlund et al.*, 99 Fed. Rep. 399; In *re St. Louis Ice Company*, 147 Fed. Rep. 752; In *re North Carolina Car Company* [semble], 127 Fed. Rep. 178, where the right of the assignee to priority was denied; In *re Brown*, Federal Cases, 1974 [Act of 1867]; In *re Harmon*, 128 Fed. Rep. 170, where, on facts slightly but not essentially different, the right of the assignee to priority was affirmed." *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436.

"These debts were exactly within the description of those to which the bankruptcy act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred, and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are 'debts to have priority.'" *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436.

51. Debts owing to persons entitled to priority.—Bankrupt Act, 1898, § 64 b, (5).

Under the act of 1867 the fifth class of claims in order of priority consisted of all debts due to any persons, who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if the act had not been passed. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

Proof and allowance of claims for services rendered in connection with general assignment for benefit of creditors.—A claim for professional services rendered to a bankrupt corporation in a preparation of a general assignment, valid under the law of Tennessee, is not entitled to be paid as a preferential claim out of the estate of a corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary

f. *Priority of Debts Due United States and States under Former Statutes*—(1) *Debts Due United States*.—**Act 1790**.—The first statutory provision giving priority to debts due the United States in case of insolvency of the debtor is found in the duty collection act of August 4, 1790, ch. 62, § 45:⁵² and the priority was first applied to bonds for the payment of duties and to persons engaged in commerce.⁵³

Acts of 1797 and 1799.—Then came the act of March 3, 1797, ch. 75, which extended the right of priority of the United States to other claims of debtors, and gave the definition of the term insolvency, in its application to the purposes of the act.⁵⁴ The sixty-fifth section of the collection act of 1799 con-

bankrupt within four months after the making of the assignment, such assignment being set aside as in contravention of the bankrupt law. *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165.

The charge for the preparation of such a deed may however be proved as an unsecured claim. *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165.

A claim for professional advice and legal services rendered to an assignee for the benefit of creditors, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, is not entitled to be proved as a preferential claim against the bankrupt estate under the deed, but so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165.

A claim against an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor held not to be allowable as a preferential claim when the necessary effect of the adjudication would be set aside the assignment under which the assignee was acting. *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165.

52. Provisions of act, 1790.—"Where any bond for the payment of duties shall not be satisfied on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognizance thereof. And in all cases of insolvency, or where the estate in the hands of the executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond shall be first satisfied." *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308.

The claim of the United States to priority does not stand upon any sovereign prerogative, but is exclusively founded on the actual provisions of our own statutes; the same policy which governed in the case of the royal prerogative may be clearly traced in their statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a

strait and narrow interpretation; like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms. *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308.

53. First applied to bonds for payment of duties, etc.—*United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308.

54. The act of March 3, 1797, § 5, enacts "that where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of the executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt to the United States shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which the debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to the cases in which a legal act of bankruptcy shall be committed." *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513; *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017; *United States v. Bank*, 6 Pet. 29, 8 L. Ed. 308. And see cases cited to succeeding text.

"After maturely considering this doubtful statute, and comparing it with other acts in *pari materia*, it is the opinion of the majority of the court, that the preference given to the United States by the 5th section, is not confined to revenue officers and persons accountable for public money, but extends to debtors generally." *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304.

No priority as to debts due United States before act of 1797.—The 5th section of the act of congress of the 3d of March, 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury, until after the act was passed. *United States v. Bryan*, 9 Cranch 374, 3 L. Ed. 764.

Priority attaches to claim of surety paying money to government.—The same right of priority which belongs to the

tained a similar provision.⁵⁵ The act of 1797, § 5, was substantially copied in

government, attaches to the claim of an individual who, as surety, has paid money to the government. *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86.

55. Provision of act of 1799.—*Brent v. Bank*, 10 Pet. 596, 9 L. Ed. 547. See, also, the following cases citing or construing the above acts of 1797 and 1799: *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189; *Conard v. Nicoll*, 4 Pet. 291, 7 L. Ed. 862; *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86; *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308; *Field v. United States*, 9 Pet. 182, 9 L. Ed. 94; *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017; *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304; *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *Prince v. Bartlett*, 8 Cranch 431, 3 L. Ed. 614; *United States v. Bryan*, 9 Cranch 374, 3 L. Ed. 764; *Thelusson v. Smith*, 2 Wheat. 396, 4 L. Ed. 271; *Allen v. United States*, 17 Wall. 207, 21 L. Ed. 553.

Acts construed and applied.—It has been the uniform construction of the 5th section of the act of 1797, and of the similar provision in the 65th section of the collection act of 1799, that whether in a case of insolvency, death or assignment, the property of the debtor passes to the assignee, executor or administrator; the priority of the United States operating, **not to prevent the transmission of the property**, but giving them a preference in payment out of the proceeds. This preference in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither are overreached by the statutes; it has never been decided, that it affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority. Another rule is settled by these cases; that the priority does not attach to property legally transferred to a creditor on respondentia; though he may hold it subject to an account, equity or trust for the borrower; such transfer will be protected against the United States; though not an out and out sale in the course of business, so as to divest the equitable as well as the legal interest of the party. *Brent v. Bank*, 10 Pet. 596, 9 L. Ed. 547.

"From the language employed in this section, and the construction given to it, from time to time, by this court, these rules are clearly established: 1st, That no lien was created by the statute: 2d, The priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: 3d, No evidence can be received of the in-

solvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and 4th, Whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304; *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *Prince v. Bartlett*, 8 Cranch 431, 3 L. Ed. 614; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 439, 7 L. Ed. 189; *Conard v. Nicoll*, 4 Pet. 291, 308, 7 L. Ed. 862; *Brent v. Bank*, 10 Pet. 596, 9 L. Ed. 547; *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017.

Meaning of "insolvency" under former acts.—There can be little doubt but that the word insolvency, mentioned in the act of 1790, ch. 35, § 45, and repeated in the act of 1797, ch. 74, § 5, and of 1799, ch. 128, § 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency. *Thelusson v. Smith*, 2 Wheat. 396, 4 L. Ed. 271.

All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress, 1797; and it is manifest that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions. *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017.

"Those affected are persons 'indebted to the United States.' This language is general, and it is without qualification. The form of the indebtedness is immaterial. It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute. The debtors may be joint or several and principals or sureties. Here, again, no distinction is made by the statute. All are included. *Beaston v. Farmers' Bank*, 12 Pet. 102, 134, 9 L. Ed. 1017; *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304." *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513.

Wherever the common law would hold a debt to be debitum in præsentī, solvendum in futuro, the statutes giving the United States priority embrace it, just as

§ 3466 of the Revised Statutes.⁵⁶

The bankrupt act of 1867 placed second, in order of priority and payment, all debts due to the United States,⁵⁷ and placed them on an equality in this respect with all taxes and assessments under the laws of the United States.⁵⁸ Under this act the United States was entitled to priority of payment out of the effects of its bankrupt or insolvent debtor, whether he was principal or surety, or was solely, or only jointly with others, liable, and it was immaterial where the debt was contracted.⁵⁹

(2) *Debts Due State*.—Under the bankrupt act of 1867 all debts due to the

much as if it were presently payable. *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308.

A party who obtains from a disbursing officer public moneys without right thereto, and with full knowledge that they are such, becomes indebted to the United States, within the meaning of the fifth section of the act of congress of March 3, 1797 (1 Stat. 515), and, in the event of his insolvency, the United States is entitled to priority of payment out of his assets. *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997.

Corporations are to be deemed and considered persons, within the provisions of the fifth section of the act of congress of 1797 and the priority of the United States exists as to debts due by them to the United States. *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017.

56. The Revised Statutes, in § 3466, provided that "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537.

"This section is substantially a copy of § 5 of the act of March 3, 1797, c. 20 entitled 'An act to provide more effectually for the settlement of accounts between the United States and receivers of public money.' Statutes passed before 1797 embody similar provisions, and also declare that parties who are sureties of insolvents may pay to the United States any balance due to them, and have the same priority in the payment of their demands out of the estates of such insolvents as the United States would have if no such payment were made." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537.

Section 3466 inapplicable to demands against insolvent national banks.—*Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537. See the title BANKS AND BANKING.

57. *Debts due United States*.—*Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *New Jersey v. Anderson*, 203 U. S. 489, 51 L. Ed. 284.

"Debts due to the United States, it is expressly provided, shall be entitled to preference or priority over all other claims except the claims for fees, costs, and expenses of suits and other proceedings under the bankrupt act, and for the custody of the bankrupt's property." *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

58. *Equal in priority with taxes and assessments under laws of the United States*.—*Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513. See ante, "Payment of Taxes," XVII, D, 1.

59. *Right to priority regardless of nature of debtor's liability, etc.*—*Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513.

The United States was the creditor of a firm, A., B., & C., doing business in London, and consisting of several persons, some of whom resided there. The others resided in this country, and, with another partner, constituted the firm of A. & Co. The members of the latter firm were duly declared bankrupt, and a trustee was appointed under the forty-third section of the bankrupt act of March 2, 1867. Held, that the relations of the bankrupt members of the firm of A., B., & Co. to the United States are the same as if they were severally liable to the United States; and that the United States is entitled to the payment of its debt out of their separate property, in preference and priority to all other debts due by them or either of them, or by the firm of A. & Co. The United States was under no obligation to prove its debt in the bankruptcy proceedings, or pursue the partnership effects of A., B., & Co. before filing this bill against the trustee; and the circuit court had original jurisdiction of the case thereby made, although the fund arose, and the trustee was appointed, under the bankrupt act. *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513.

state in which the proceedings in bankruptcy were pending were placed third in order of priority, and on a parity with state taxes and assessments.⁶⁰

3. APPLICATION OF SUBSEQUENTLY-ACQUIRED PROPERTY WHERE CONFIRMATION OF COMPOSITION SET ASIDE OR DISCHARGE REVOKED.—In the event of the confirmation of a composition being set aside or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.⁶¹

E. Set-Off and Counterclaim—1. WHEN PROPER.—**General Rule.**—In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.⁶²

60. **Debts due state.**—*United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284.

61. **Application of subsequently acquired property where confirmation of composition set aside, etc.**—*Bankrupt Act*, 1898, § 64 c. See ante, "Discharge of Bankrupt," XII; post, "Composition with Creditors," XVIII.

62. **Allowance of set-off or counterclaim.**—*Bankrupt Act*, 1898, § 68 a; *Bankrupt Act*, 1867, § 20. *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571; *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Gray v. Rello*, 18 Wall. 629, 21 L. Ed. 927.

Section 5073 of the Revised Statutes provides that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." *Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 29 L. Ed. 174; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769. "Debts are provable against a bankrupt's estate as of the date of the commencement of the proceedings in bankruptcy. Rev. Stat., § 5067. As § 5073 relates to the amount which may be allowed upon such proof, it is clear that the mutual debts or mutual credits there referred to must be such as are in existence at the same date." *Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 29 L. Ed. 174.

The 42d section of the act of 1800 directs that where it shall appear to the commissioners, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them, at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other; and what shall appear to be due on either side, on the balance of such account, after such set-off, and no

more, shall be claimed or paid on either side, respectively. The term "debt," as used in this section, is fairly to be construed to mean any debt for which the act provides. A debt which may be proved before the commissioners, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section. *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.

Purpose of enactment.—In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, the court, after setting out the provisions of § 20 of the act of 1867, said: "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."

Terms "debts" and "credits" correlative.—"In our act the terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of the section or its context for extending the term 'credits' so as to include trusts. Generally we know that 'credit' and 'trust' are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the twentieth section of the bankrupt act. To authorize a set-off there must be mutual credits or mutual debts." *Libby v. Hopkins*, 104 U. S. 303, 309, 26 L. Ed. 769. See, also, *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571.

Under the bankrupt law of the United States of 1800, a joint debt may be set off against the separate claim of the assignee of one of the partners. But such set-off could not have been made at law, independent of the bankrupt act. *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.

Set-off between bank and bankrupt depositor.—It has been held that a bank holding notes against a bankrupt depositor having a balance in bank at the time of the filing of the petition in bankruptcy,

Effect of Further Credit by Preferred Creditor without Security.—

If a creditor has been preferred and afterwards, in good faith, gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.⁶³

2. WHEN NOT ALLOWED.—A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate.⁶⁴

may set off such balance against such notes, in the absence of fraud or collusion between the bank and the bankrupt amounting to the creation of a fraudulent preference. *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380.

"Section 68a of the bankruptcy act of 1898 is almost a literal reproduction of § 20 of the act of 1867. So far as we have been able to discover the holdings were uniform under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt. In *re Petrie*, 7 N. B. R. 332; S. C., Fed. Cas. No. 11,040; *Blair v. Allen*, 3 Dill. 101; S. C., Fed. Cas. No. 1483; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483. In *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832, the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference." *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380. See the title BANKS AND BANKING.

A banker, who was a director of an insurance company, can set off against its demand for money it deposited with him, bearing interest and payable on call, the amount due on its policies issued to and held by him. The company having been adjudicated a bankrupt, his right to such a set-off is equally available against its assignee. *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483.

63. Where further credit given by preferred creditor without further security.—Bankrupt Act, 1898, § 60 c. *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Yaple v. Dahl-Millikan, etc., Co.*, 193 U. S. 526, 48 L. Ed. 776.

Provision construed.—"It will be noticed that the words used in paragraph 'c' [of § 60 of the act, 1898] are not 'the bankrupt's estate,' but 'the debtor's estate.' 'Debtor' is also found in the preceding clause as descriptive of the one to whom the credit is given. While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that 'the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off.' It is the non-payment and not the fact that the property remains still a part of the debtor's

estate which entitles to a set-off. It would seem that if congress intended that which the trial court held to be the meaning of the statute, it would have said 'which becomes a part of the bankrupt's estate' or 'which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy.' Further, congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the creditor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property." *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190.

64. Set-off or counterclaim not provable against the estate.—Bankrupt Act, 1898, § 68b, (1); Bankrupt Act, 1867, § 20. *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731.

Where a bankrupt owes a debt to two persons jointly, and holds a joint note given by one of them and a third person, the two claims are not subject to set-off under the bankrupt act, being neither mutual debts nor (without more) mutual credits. *Gray v. Rolfe*, 18 Wall. 629, 21 L. Ed. 927.

A. and B. were joint makers of certain notes, which were transferred to an insurance company. B. and C. held policies in this company which became due in consequence of loss by fire. The company being bankrupt, its assignee claimed the full amount of the notes from A. and B. B. sought to set off against his half of the liability the claim due to him and C. on the policies of insurance, the latter consenting thereto. Held, that this was

or was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.⁶⁵

F. Declaration and Payment of Dividends—1. **IN GENERAL**.—Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.⁶⁶

2. **TIME OF DECLARATION**.—**The first dividend** shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount

not a case for set-off within the bankrupt act, the two obligations having been contracted without any reference to each other. *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927.

Where one of two joint debtors becomes bankrupt, it seems that the creditor may set off the debt against his separate indebtedness to the bankrupt, because each joint debtor is liable to him as *solido* for the whole debt; but, if this be conceded, it does not follow that if one of two joint creditors becomes bankrupt, the common debtor may set off against the debt a separate claim which he has against the bankrupt, for this would be unjust to the other joint creditor. *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927.

"The case of *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29, which arose out of the bankrupt act of 1800, has been pressed upon our attention by the counsel of the appellant, on the supposition that it is decisive in his favor. The clause relating to set-off contained in that act does not materially differ from the corresponding clause in the act of 1867. Mutual credits given, and mutual debts existing, before the bankruptcy, are made the ground of set-off in both acts." *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927.

Set-off of claims on corporations against liability for assessment on stock.—"It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation in a suit by an assignee in bankruptcy. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498. The ground upon which this rule stands is thus stated by Mr. Justice Miller in *Sawyer v. Hoag*: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging in equity to all its creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." *Scovill v. Thayer*, 105 U. S. 143, 152, 26 L. Ed. 968.

65. Purchase or transfer after filing of petition.—Bankrupt Act, 1898, § 68b, (2). *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380; *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571.

In *Western Tie, etc., Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, the plaintiff, a corporation and a creditor of H, had an agreement with the latter to deduct from the earnings of each laborer employed by it the value of the supplies received by such laborer from H. The corporation attempted, in proving its claims against the estate of H, after his bankruptcy, to set off the sum of \$2,210.73 due H, for supplies, and retained by the creditor corporation with knowledge of H's insolvency and within four months of the filing of the petition in bankruptcy. It was held that the creditor was not entitled to such set-off, under § 68, b, (2) of the bankrupt act.

The act of 1867, § 20 (Rev. Stat., § 5073), provided "that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the petition." *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769.

66. Dividends on all allowed claims—Exceptions.—Bankrupt Act, 1898, § 65 a.

Duties of creditors and assignees under act of 1867.—The creditors are to determine whether any and what part of the net proceeds of the estate shall be distributed as a dividend, and if the creditors order a dividend it is made the duty of the assignee to prepare a list of the creditors entitled to the same, and to compute and set opposite to the name of each creditor the dividend to which he is entitled out of the net proceeds of the estate set apart for that purpose. Preparatory to the final dividend the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a final settlement of his account. *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275.

A joint debt may be proved under a separate commission, and a full dividend received. It is equity alone which can restrain the joint creditor from receiving his full dividend, until the joint effects are exhausted. *Oxley v. Tucker*, 1 Cr. C. C. 419, reversed. *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.

necessary to pay debts which have priority and such claims as have not been, but probably will be allowed, equals five per centum or more of such allowed claims.⁶⁷

Dividends subsequent to the first are to be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate.⁶⁸

Dividends may be declared oftener and in smaller proportions if the judge shall so order.⁶⁹

3. TIME OF PAYMENT.—Dividends are to be paid by the trustees within ten days after their declaration by the referees.⁷⁰

4. EFFECT OF PROOF OF SUBSEQUENT CLAIMS, ETC.—The rights of creditors who have received dividends, or in whose favor the final dividends have been declared are not to be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends;⁷¹ but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.⁷²

5. RIGHTS OF RESIDENT CREDITORS IN CASE OF FOREIGN ADJUDICATION OF BANKRUPTCY.—Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.⁷³

6. LIMITATION OF CLAIMANT'S RIGHT TO COLLECT FROM ESTATE.—The claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of the bankrupt act.⁷⁴

7. PRACTICE IN CASE OF UNCLAIMED DIVIDENDS—a. Dividends Remaining Unclaimed for Six Months.—Dividends which remain unclaimed for six months after the final dividend has been declared are to be paid by the trustee into court.⁷⁵

b. Dividends Remaining Unclaimed for One Year.—Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full, the balance shall be paid to the bankrupt.⁷⁶ In case, however, unclaimed dividends belong to minors; such minors may have one year after arriving at majority to claim such dividends.⁷⁷

67. Time of declaration of first dividend.
—Bankrupt Act, 1898, § 65b.

68. Declaration of subsequent dividends.
—Bankrupt Act, 1898, § 65b.

69. Judge may order more frequent declarations, etc.—Bankrupt Act, 1898, § 65b.

Amendment of 1903.—By the act of 1903, subdivision b of § 65 was amended so as to read as follows: "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as to the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts

which have priority and such claims as probably will be allowed: And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared." (32 Stat. L. 800.) Act of February 9, 1903, ch. 187 (amending Bankruptcy Act of July 1, 1898), 38.

70. Time of payment.—See ante, "Payment of Dividends," XVI, E, 2, i.

71. Effect of proof of subsequent claims.
—Bankrupt Act, 1898, § 65c.

72. Rights of creditors proving and securing allowance of such claims.—Bankrupt Act, 1898, § 65c.

73. Dividends in case of foreign adjudication.—Bankrupt Act, 1898, § 65d.

74. Limitation to right of collection.—Bankrupt Act, 1898, § 65e.

75. Dividends unclaimed for six months.
—Bankrupt Act, 1898, § 66a.

76. Distribution when unclaimed for one year.—Bankrupt Act, 1898, § 66b.

77. Minors may claim within one year after majority.—Bankrupt Act, 1898, § 66b.

8. **RECOVERY OF DIVIDENDS UPON RECONSIDERATION AND REJECTION OF CLAIMS.**—The right to thus recover dividends has already been treated in a previous section of this title.⁷⁸

G. Closing and Reopening Estates.—Duty of Trustees to Close Up Estate.—The duty of the trustee to close up the bankrupt estate as expeditiously as possible has already been treated of among the particular duties of the trustee.⁷⁹

Jurisdiction of Bankruptcy Courts Over Closing and Reopening Estates.—Jurisdiction has been expressly conferred upon courts of bankruptcy in the matter of closing and reopening estates.⁸⁰

H. Expenses of Administration.—The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of estates in which they were incurred.⁸¹

XVIII. Compositions with Creditors.

A. Right of Bankrupt to Offer.—A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.⁸²

B. Confirmation of Composition—1. APPLICATION.—An application for the confirmation of a composition may be filed in the court of bankruptcy⁸³ after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the costs of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.⁸⁴

78. Recovery of dividends upon reconsideration and rejection of claims.—See ante, "Reconsideration of Claims," XV, C.

79. Duty of trustee to close up estate.—See ante, "Enumeration of Particular Duties," XVI, E, 2.

80. Jurisdiction as to closing and reopening estates.—See ante, "Closing Estates and Discharging Trustees," V, A, 2, b, (8).

In *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204, the court, referring to powers and duties of trustees appointed under Rev. Stat., § 5103, said: "The court by order is to direct all acts and things needful to be done to carry into effect the resolution of the creditors, and the winding up and settlement of any estate under the provision of this section shall be deemed to be proceedings in bankruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy."

81. Expenses of administration.—Bankrupt Act, 1898, § 62.

82. When composition may be offered.—Bankrupt Act, 1898, § 12a. See ante, "Schedule of Property," VIII; "Duties of Bankrupt," XI, A.

Provision for composition a proceeding in bankruptcy.—"We do not understand that there is any power in the debtor to invoke this remedy until proceedings in

bankruptcy have been commenced by him or against him under the bankrupt law. Nor can the district court make the necessary order establishing the composition except in such proceedings, either voluntary or involuntary. The composition proceeding is, therefore, a part of the proceedings in bankruptcy, and one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means. The seventeenth section itself is one of many amending the bankrupt law in numerous particulars, and is declared to be an amendment of § 43 of the original act of 1867. We are very clear, therefore, that the provision for composition is a proceeding in bankruptcy under the bankrupt act, whether reference be had to the language of the act of 1867 or of the revised statutes, that debts created by fraud shall not be discharged under it. See opinion of Mr. Chief Justice Waite, in *re Holmes and Lissberger*, 15 Blatchf. 170." *Wilmot v. Mudge*, 103 U. S. 217, 219, 26 L. Ed. 536.

83. As to jurisdiction of courts of bankruptcy to confirm or reject compositions. see ante, "As to Compositions between Debtors and Creditors," V, A, 2, b, (9).

84. Acceptance by creditors and deposit of money, etc.—Bankrupt Act, 1898, § 12b. "The seventeenth section of the act of 1874, ch. 390, introduced the system of

2. **HEARING AND DECISION UPON APPLICATION**.—a. *Time and Place of Hearing.*—A date and place, with reference to the convenience of the parties in interest, is to be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.⁸⁵

b. *When Composition May Properly Be Confirmed.*—It is provided by the bankrupt act that the judge shall confirm a composition if satisfied that it is for the best interests of the creditors;⁸⁶ that the bankrupt has not been guilty of any of the acts or fail to perform any of the duties which would be a bar to his discharge;⁸⁷ and that the offer and its acceptance are in good faith and have not been made or procured except as in the act provided, or by any means, promises, or acts in the bankrupt act forbidden.⁸⁸

3. **PROCEDURE UPON CONFIRMATION.**—Upon the confirmation of a composition the consideration is to be distributed as the judge shall direct, and the case be dismissed.⁸⁹

4. **REVESTING OF TITLE TO PROPERTY IN BANKRUPT.**—Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.⁹⁰

5. **PROCEDURE WHERE COMPOSITION NOT CONFIRMED.**—Whenever a composition is not confirmed, the bankrupt estate is to be distributed in bankruptcy as provided in the bankrupt act.⁹¹

6. **EFFECT OF CONFIRMATION AS DISCHARGE FROM DEBT.**—The confirmation of a composition operates to discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.⁹² If, however, a certain class of debts cannot be discharged by proceed-

composition which, when the proposal of the bankrupt to pay a certain proportion of his debts had been accepted by a majority in number and three-fourths in value of the creditors, and confirmed by the signatures of the parties and approved by the court, 'shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.' 18 Stat., pt. 3, p. 183. *Wilmot v. Mudge*, 103 U. S. 217, 218, 26 L. Ed. 536.

'As evidence that it is the holder of the promissory note who is to be named in the schedule as one having the right to appear at the composition meeting, the statute, 18 Stat. 182, § 17, says: 'When a debt arises on a bill of exchange or promissory note, if the debtor be ignorant of the holder of such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.' As the statute required that the composition resolution to be valid 'must be passed by a majority in number and three-fourths in value of the creditors of the debtor,' the above mode of identifying the creditor and the amount of his debt shows that it is not indispensable that every person con-

tingently interested in a debt of the bankrupt should have notice or take part in the composition proceedings.' *Liebke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744.

85. **Time and place of hearing.**—Bankrupt Act, 1898, § 12c.

86. **Must be for best interests of creditors.**—Bankrupt Act of 1898, § 12d, (1).

87. **Bankrupt must not have been guilty of any offense or neglect.**—Bankrupt Act, 1898, § 12d, (2).

88. **Offer and acceptance to be in good faith.**—Bankrupt Act, 1898, § 12d, (3).

Copy of order confirming or setting aside a composition as evidence.—A certified copy of an order confirming or setting aside a composition shall be evidence of the jurisdiction of the court, regularity of the proceedings, and of the fact that the order was made. Bankrupt Act, 1898, § 21f.

89. **Distribution of consideration and dismissal of case.**—Bankrupt Act, 1898, § 12e.

90. **Revesting of title on confirmation.**—Bankrupt Act, 1898, § 70f.

Copy of order of confirmation as evidence of revesting of title.—A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. Bankrupt Act, 1898, § 21g.

91. **Administration in usual manner where composition rejected.**—Bankrupt Act, 1898, § 12e.

92. **Confirmation as discharge from debts.**—Bankrupt Act, 1898, § 14c. *Liebke*

ings in bankruptcy, then they cannot be discharged by this proceeding, for it is a proceeding in bankruptcy.⁹³

C. Setting Aside Compositions—1. **POWER OF JUDGE TO SET ASIDE AND GROUNDS THEREFOR.**—The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed,⁹⁴ set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition,⁹⁵ and that the knowledge thereof has come to the petitioners since the confirmation of such composition.⁹⁶

2. **VESTING OF TITLE TO PROPERTY IN TRUSTEE.**—Whenever a composition is set aside, the trustee shall, upon his appointment and qualification, be vested as provided in the bankrupt act with the title to all the property of the bankrupt as of the date of the final decree setting aside the composition.⁹⁷

v. Thomas, 116 U. S. 605, 29 L. Ed. 744; *Wilmot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536. See ante, "Effect of Discharge," XII, F.

"It is of the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and rendered his property he should be released from all his debts, except those of a fiduciary character or founded in fraud, of which this is not one. And the case of *Wilmot v. Mudge*, 103 U. S. 217, 29 L. Ed. 536, decides that though no written discharge be granted, a lawful composition and its performance by the party has the same effect. That case holds that § 17 of the act of 1874, which governs this case, is a part of the bankrupt law, and the proceedings under it discharge all debts which can be discharged under the law, as to creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed." *Liebke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744.

93. Not a discharge of debts not dischargeable by proceedings in bankruptcy.—*Wilmot v. Mudge*, 103 U. S. 217, 29 L. Ed. 536.

"If all other debts may be discharged by a composition in bankruptcy, then the debtor and the other creditors get its benefit and are bound by it, while the one whose debt may not be thus discharged does not. He neither takes its benefit nor is he bound by it. In this manner both provisions of the bankrupt law can stand and be consistent. Thus construed there is no conflict between them, and each has its appropriate sphere of operation and the effect which the lawmakers intended." *Wilmot v. Mudge*, 103 U. S. 217, 29 L. Ed. 536.

Composition not a discharge from debts specified in Rev. Stat., § 5117.—"The proposition argued here, namely, that a composition in a bankruptcy case, ratified by order of the district court, operates as a discharge of the bankrupt from all his debts, including those arising from fraud

or growing out of a fiduciary relation, as well as others, was decided adversely by this court some two years after the present writ of error was sued out, in the case of *Wilmot v. Mudge*, 103 U. S. 217, 29 L. Ed. 536. It is there held that notwithstanding the comprehensive terms in which § 17 of the act of June 22, 1874, ch. 390, declares such a composition to be binding, it was not intended to repeal § 5117 of the Revised Statutes, which enacts that 'no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.'"
Bayly v. University, 106 U. S. 11, 12, 13, 27 L. Ed. 97.

"A case bearing a strong analogy to this is that of *Wilmot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536, in which it was decided that a composition order, under the act of June 22, 1874, ch. 390, was a bankruptcy proceeding, and that, notwithstanding the act declared that such a composition should be binding on all the creditors, it did not discharge the bankrupt from debts created by fraud; because that act was in *pari materia* with the general bankrupt law, and was not inconsistent with § 5117 of the Revised Statutes, in regard to debts created by fraud. That was a stronger case than this in favor of the argument that a composition was a proceeding which took the case out of the other provisions of the bankrupt law, for the statute which authorized it was passed long after the general law and after the revision." *Merchants' Bank v. Slagle*, 106 U. S. 558, 562, 27 L. Ed. 204. See ante, "Debts Not Affected by Discharge," XII, F, 1, b.

94. Power of judge to set aside on application within six months, etc.—Bankrupt Act, 1898, § 13.

95. Reinstatement of case on proof of fraud.—Bankrupt Act, 1898, § 13.

96. Subsequent knowledge of petitioners as to fraud.—Bankrupt Act, 1898, § 13.

97. Vesting of title of property in trustee.—Bankrupt Act, 1898, § 70d.

XIX. Provisions of Bankrupt Act as to Liens, Transfers, and Preferences.

A. Liens—1. **WHAT CLAIMS ARE NOT LIENS AGAINST BANKRUPT ESTATE.**—Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt are not liens against his estate under the present bankrupt act.⁹⁸

2. **SUBROGATION OF TRUSTEE TO RIGHTS OF CREDITOR AS AGAINST LIENS.**—Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.⁹⁹

3. **DISSOLUTION OF LIENS OBTAINED THROUGH LEGAL PROCEEDINGS WITHIN FOUR MONTHS BEFORE FILING THE PETITION.**—**In General.**—Under the present bankrupt act it is provided that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference,¹ or the party or parties to be benefited thereby had reasonable cause to believe that defendant was insolvent and in contemplation of bankruptcy,² or that such lien was sought and permitted in fraud of the provisions of the bankrupt act.³ It is further provided by a subsequent section of the present bankrupt act that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless such lien is preserved, by order of the court, for the benefit of the estate, and the court may order such conveyance as may be necessary to carry the purposes of the section into effect.⁴

98. Claims not liens against estate.—Bankrupt Act, 1898, § 67a.

99. Subrogation of trustee to rights of creditor.—Bankrupt Act, 1898, § 67b. See, generally, the title SUBROGATION.

1. **Lien obtained through legal proceedings while defendant insolvent, etc.**—Bankrupt Act, 1898, § 67c, (1). *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967; *McHarg v. Staake*, 202 U. S. 150, 50 L. Ed. 971; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577.

2. **Knowledge of beneficiaries as to insolvency.**—Bankrupt Act, 1898, § 67c, (2). *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

3. **Lien sought and permitted in fraud of bankrupt act.**—Bankrupt Act, 1898, § 67c, (3). *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

4. **Invalidity of levies, judgments, attachments, etc., obtained through legal proceedings within four months prior to petition.**—Bankrupt Act, 1898, § 67f. *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *First*

Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967; *McHarg v. Staake*, 202 U. S. 150, 50 L. Ed. 971.

Provision construed and applied.—In *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, the court after setting out the language of § 67f, said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged therefrom, but not otherwise."

"This section (67f) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case

The former bankrupt acts also contained provisions invalidating liens, securities, etc., obtained in contemplation of bankruptcy or in fraud upon the bankrupt act.⁵

the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, 'for the benefit of the estate'—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors. The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy." *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967.

Provision inapplicable to judgment or decree enforcing pre-existing lien.—A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment announced by the statute which is plainly confined to the judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial. *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, in which case it was held that *Metcalf Brothers & Co.*, by the commencement of their creditors' action more than the prescribed time prior to the filing of the petition, acquired a lien on the property of the bankrupt superior to the title of the trustee thereto.

Filing petition as releasing proceeds of execution sale.—Where a sheriff after selling under an execution and before paying over to the judgment creditor, is enjoined in a state court by another creditor from so doing, and immediately after the state court has set the restraining order aside, and while the money is still in the hands of the sheriff, and within the time allowed for the return of the execution, and before it is returned, a petition in bankruptcy is

filed against the judgment debtor, the money does not belong to the judgment creditor but goes, under § 67f of the bankrupt act of 1898, to the trustee in bankruptcy. *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555.

Liability of plaintiff in attachment and purchaser at sheriff's sale for conversion.—"It is the title to property, subject to an attachment, only when levied within four months next preceding the commencement of the bankruptcy proceedings, which becomes vested in the assignee by relation, the same attachment being thereby dissolved as of that date. One consequence is, that if property of the debtor levied on under such an attachment has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the sheriff, or before the assignments have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold; for the latter not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not thereby transferred to the assignee; but the attachment being dissolved upon that event, the right to the proceeds of the sale passes under the assignment, released from the claims of all parties to the attachment suit, as of the date of the commencement of the proceedings in bankruptcy. And in such a case the plaintiff in the attachment suit, having received the proceeds of the sale on his judgment, would be liable to an action by the assignee for that sum of money had and received to his use; or, if it remained in the hands of the sheriff, the assignee might become a party to the action, and obtain an order of the court requiring the amount to be paid directly to himself. Another result is, that if the property has been sold under the attachment after the commencement of the bankruptcy proceedings, no title passes by the sale, for the property ceased, at that time, to be the property of the bankrupt, and became the property of the assignee, a stranger to the action and not affected by it; and both the plaintiff in the attachment and the purchaser at the sheriff's sale would be liable to the assignee for a conversion of his property—the one for having caused its sale, the other for having taken possession of it as owner." *Conner v. Long*, 104 U. S. 228, 231, 232, 26 L. Ed. 723.

5. The last proviso of the second section of the act of 1841 saving all liens, mortgages or other securities on property, which may be valid by the laws of the states respectively, subjects them, nevertheless, to the condition that they shall

Preservation of Lien for Benefit of Estate.—It is expressly provided under the present bankrupt act, that if the dissolution of the above mentioned liens would not be for the best interests of the bankrupt estate such liens shall not be dissolved, but shall, on due notice and order of the court, be preserved for the benefit of the estate, and shall pass to and be preserved by the trustee for the benefit of such estate.⁶

4. LIENS WHICH ARE NOT AFFECTED BY BANKRUPT ACT.—Liens given or accepted in good faith and not in contemplation of or in fraud upon the bankrupt act, and for a present consideration, which has been recorded according to law, if record thereof was necessary in order to impart notice, are not affected by the present bankrupt act.⁷ Nor will the title obtained by a levy, judgment, attachment,

nor "be inconsistent with the second and fifth sections of the act." *Shawhan v. Wheritt*, 7 How. 627, 12 L. Ed. 847.

"Liens or securities which would be otherwise valid by the state laws, being made void by the second section when obtained after notice of an act of bankruptcy, are, consequently, not saved by this proviso; but the property subject to them vests in the assignee discharged from such lien, and if the property has been sold under process from a state court, the creditor is liable to refund the money thus received to the assignee of the bankrupt. Having obtained this preference *mala fide*, in fraud of the bankrupt law, he cannot be suffered to retain the fruits of it to the injury of other creditors; otherwise, the whole policy and aim of the law would be frustrated." *Shawhan v. Wheritt*, 7 How. 627, 12 L. Ed. 847.

No creditor can by instituting proceedings in a state court, after the commission of an act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by such fraudulent deed, if he has notice of the commission of an act of bankruptcy by the debtor. It passes to the assignee of the bankrupt for the benefit of all the creditors. A lien thus acquired is not saved by the proviso of the second section of the bankrupt law. That proviso does not protect liens which are inconsistent with the second and fifth sections of the act, and these sections declare such a lien to be void. *Shawhan v. Wheritt*, 7 How. 627, 12 L. Ed. 847.

Under the act of 1867, § 14 (Rev. Stat., § 5044), it was provided that an assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all property and estate, both real and personal, of the bankrupt, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings. *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Yeaman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589; *Morgan v. Campbell*, 22 Wall. 381, 22 L. Ed. 796; *Chapman v.*

Brewer, 114 U. S. 158, 29 L. Ed. 83; *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Davis v. Friedlander*, 104 U. S. 570, 26 L. Ed. 818; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407.

"This clause evidently refers to those cases of original process of attachment, which only become perfected liens by the judgment which may ensue." *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

"The object of the law was evidently to prevent any one procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankrupt court; but if it did not exist, the purpose of the law was to prevent its being brought into existence by any proceeding whatever. * * * The fourteenth section of the bankrupt law is not levelled at the mode of doing a thing, but at the thing itself. It was the object of this section to prevent the acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and any proceeding by which this is attempted is within the condemnation of the law." *Morgan v. Campbell*, 22 Wall. 381, 22 L. Ed. 796.

6. Preservation of lien for benefit of estate.—Bankrupt Act, 1898, §§ 67c, 67f. *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967; *M. Harg v. Staake*, 202 U. S. 150, 50 L. Ed. 971.

7. Validity of liens given in good faith, etc.—Bankrupt Act, 1898, § 67d. *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945.

"The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the state vested him with; on the other hand, it provided, § 67d: 'Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.' *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, is not to the contrary, and explained in

or other lien of a bona fide purchaser be impaired or discharged by the provisions of § 67f of the present act.⁸ Provisions are also found in the earlier bankrupt acts for the preservation and protection of such rights, liens, mortgages or securities, etc., as were valid under state laws and not inconsistent with other portions of such acts.⁹

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782." *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945.

"The present bankrupt act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed." *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, citing *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986.

8. Title or lien of bona fide purchaser not impaired by § 67f.—The last clause of this section contains a proviso to the effect "that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause of inquiry." *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967.

9. The second section of the act of 1841 contained this proviso: "That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the state respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." *Norton v. Boyd*, 3 How. 426, 11 L. Ed. 664; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847; *Savage v. Best*, 3 How. 111, 11 L. Ed. 518.

In some of the states, attachments are issued on mesne process by which the property is held to await the result of the suit. This constitutes a lien, which was saved by the proviso in the bankrupt act of 1841. *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841.

"It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common-law liens, and not statute liens; liens after judgment, and not liens before judgment; or to assert that it is the policy of the bankrupt act to save the lien of a factor or bailee, while it annuls that of the judgment or execution creditor. It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws of any state, is exempted by the express language of the act." *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841.

"In order to test its sufficiency, we must first inquire, whether an attachment of property under the process peculiar to New Hampshire and some other states

creates a lien or security on the property attached, within the true meaning and intention of the proviso of the second section of the bankrupt act. The words of this proviso are as follows: 'And provided, also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.' As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will not be necessary to give them further attention. Taking the words of the proviso, disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, etc., from any construction of the act that shall in any wise annul, destroy, or impair them; and, furthermore, to test their validity, we are referred to the laws of the states respectively." *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841, affirmed in *Colby v. Ledden*, 7 How. 626, 12 L. Ed. 847. See, also, *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847.

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and this lien is as absolute before the levy as it is afterwards. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. *Savage v. Best*, 3 How. 111, 11 L. Ed. 518.

Under the act of 1867, § 14, an attachment which, under state laws, is a valid lien, laid more than four months previously to the proceedings in bankruptcy begun, is not dissolved by the transfer to the assignee in bankruptcy. *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589. And see *Morgan v. Campbell*, 22 Wall. 381, 22 L. Ed. 796; *Davis v. Friedlander*, 104 U. S. 570, 26 L. Ed. 818.

And if such assignee do not intervene (which in any such case he may do), and have the attachment dissolved, or the cause transferred to the federal court sitting in bankruptcy, but, on the contrary, allow the property to be sold under judgment in the proceedings in attachment, the

B. Conveyances, Assignments or Encumbrances to Delay or Defraud Creditors—1. INVALIDITY OF SUCH TRANSACTIONS.—General Provisions of Former and Present Bankrupt Acts.—Both under the former and present bankrupt acts, all conveyances, transfers, assignments or encumbrances of his property, or portions thereof, made or given within a certain time by a person adjudged a bankrupt under the provisions of such act, are null and void as against the creditors of such debtor,¹⁰ except as to purchasers in good faith and for a

purchaser, in a case free from fraud, will hold against him; that is to say, the assignee cannot attack collaterally such purchaser's title. *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549.

"It has been held many times in the various courts of the country, that as to the class of attachments not within the four months' limitation, the bankruptcy proceedings do not work their dissolution; that the debtor's title passes to the assignee, subject to the creditor's lien acquired by virtue of the attachment, and that a judgment to be enforced against the property attached, but not against the person of the debtor or any other property, may be entered, although a discharge has been granted, and is pleaded in bar of the action. Numerous cases to this effect are collected in *Bump on Bankruptcy*." *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549.

As to the general rule that the trustee or assignee takes subject to all equities, liens and encumbrances, see ante, "Takes Title Subject to Equities and Encumbrances," XVI, E, 1, b, (1), (c).

As to right of trustee or assignee to redeem property of bankrupt, see ante, "Redemption of Property," XVI, E, 1, b, (4).

10. Invalidity of fraudulent transactions, etc.—Bankrupt Act, 1898, §§ 67c, 70e; Bankrupt Act, 1841, § 14; Bankrupt Act, 1867, §§ 35 and 39, Rev. Stat., §§ 5128, 5129, 5046, 5047. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Means v. Dowd*, 128 U. S. 273, 32 L. Ed. 429; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Sessions v. Johnson*, 95 U. S.

347, 24 L. Ed. 596; *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51; *Smith v. Vodges*, 92 U. S. 183, 23 L. Ed. 481; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 23 L. Ed. 336; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542; *Little v. Alexander*, 21 Wall. 500, 22 L. Ed. 625; *Fox v. Gardner*, 21 Wall. 475, 22 L. Ed. 685; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933; *Bartolow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *Harrell v. Beall*, 17 Wall. 590, 21 L. Ed. 692; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198; *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Second Nat. Bank v. Hunt*, 11 Wall. 391, 20 L. Ed. 190; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862; *Hudgins v. Kemp*, 20 How. 45, 15 L. Ed. 853; *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 104.

Provisions of act of 1867, § 35, as to transfers and preferences stated and construed.—The first clause of the act of 1867, § 35, reads thus: "If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, assignment, transfer, or conveyance, or to be benefited thereby or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." See cases in following note.

The second clause of § 35 of the act of 1867 reads thus: "And if any person be-

present fair consideration,¹¹ where made or given subsequent to the passage of

ing insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of the act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." See the following list of cases decided under § 35 of the act of 1867, and citing, construing, or applying the same. *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *Harrell v. Beall*, 17 Wall. 590, 21 L. Ed. 692; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Fox v. Gardner*, 21 Wall. 475, 22 L. Ed. 685; *Little v. Alexander*, 21 Wall. 500, 22 L. Ed. 625; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164. See, also, cases cited ante, n. 10, p. 933.

The two clauses of the 35th section of the bankrupt act, differ mainly in their application to two different classes of recipients of the bankrupt's property or means, that is to say, the first clause is limited to a creditor, a person having a claim against the bankrupt, or who is under any liability for him, and who receives money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him. *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797.

"The first clause of the 35th section avoids certain acts of the bankrupt touching his effects, if done within four months before the filing of the petition in bankruptcy. The second clause imposes the

like result, if the transaction be within six months of that time. To bring a case within the first clause the act must have been done by a person insolvent, or in contemplation of insolvency, with a view to give a preference to a creditor or person having a claim against, or who is under a liability for, the bankrupt, and such person must have reason to believe that the transaction is in fraud of the statute. The category of the second clause contains the same requirement of insolvency, or contemplation of insolvency, on the part of the person doing the act. The recipient may be any one who has reason to believe him insolvent or acting in contemplation of insolvency, and that the act was done by him to prevent the property from coming into the hands of his assignee in bankruptcy, and from being distributed under the bankrupt law. Upon comparing the two clauses carefully together, we are satisfied that the first clause was intended to refer to the past and the second to the present. The language employed in the first clause imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it." *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797.

By the act of 1867, § 39, it is provided that if a person shall be adjudged a bankrupt on petition of his creditors, for the commission of an act held to constitute an act of bankruptcy, "the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended or that the debtor was insolvent. And such creditor shall not be allowed to prove his debt in bankruptcy." *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723. See, also, *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389.

For transactions held to be preferences under this act, see post, "What Constitutes Preference within Meaning of Bankrupt Act," XIX. C. 1, b.

11. Exceptions as to purchasers in good faith, etc.—Bankrupt Act, 1898, § 67c. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175.

The sale by a person in fact insolvent and made within six months of a bank-

such acts,¹² and within a specified period of time prior to the filing of the petition,¹³

ruptcy subsequently decreed, is not necessarily and without regard to its character, void under the thirty-fifth section of the bankrupt act of 1867. *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198.

If it was made in good faith, for the honest purpose of discharging debt, and in the confident expectation that by so doing the person could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the bankrupt act, and to withdraw his property from its control, and the vendee knew or had reasonable cause to believe that the vendor's intention was of this character, it will be avoided. Thus two things must concur to avoid the sale: The fraudulent design of the bankrupt and the knowledge of it on the part of the vendee, or reasonable cause to believe it existed. *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198.

Conveyance by husband to wife of property purchased with her money.—If money, which a married woman might have had secured to her own use, is allowed to go into the business of her husband, be mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife upon the occurrence of his bankruptcy is a fraud upon his creditors, and void. *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51.

Deeds for land by debtor pending suit and for less than value.—Deeds of large tracts of land made by a grantor when deeply in debt, and when suits were pending against him, and who shortly afterwards petitioned for the benefit of the bankrupt act, the possession and occupation of the land continuing the same after the sale as before, and the consideration money one-half only of the actual value, held to be fraudulent and void as against creditors. *Hudgins v. Kemp*, 20 How. 45, 15 L. Ed. 853.

Agreement by insolvent for future delivery of property.—An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors. Such an agreement does not create any lien upon

the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the bankrupt act. Any subsequent sale, made in pursuance of the agreement, does not take effect by relation at its date. *Second Nat. Bank v. Hunt*, 11 Wall. 391, 20 L. Ed. 190.

A sale by a retail country merchant then insolvent of his entire stock, suddenly, is a sale "not made in the usual and ordinary course" of his business; and, therefore, prima facie evidence of fraud, within the 35th section of the bankrupt law. The presumption of fraud arising from the unusual nature of such a sale can be overcome only by proof on the part of the buyer that he pursued in good faith all reasonable means to find out the pecuniary condition of the vendor. One purchasing in such a case from a vendee who he knows has used no such means, but on the contrary has bought under other suspicious circumstances, takes with full knowledge of the infirmity of the title. And as against either or both purchasers the assignee in bankruptcy may set the sale aside if made within six months before a decree in bankruptcy, even though a fair money consideration have been paid by each. *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489.

12. Transactions subsequent to passage of act.—Bankrupt Act, 1898, § 67e. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832. And see cases cited ante, n. 10, p. 933.

Provisions applicable to transactions after approval of act.—In *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832, the court was of opinion that the proviso to the fiftieth section of the bankrupt act of 1867, declaring that no petition or other proceeding under it should be commenced before the first day of June, 1867, was limited in its effect to such commencement, and that any act done after its approval, March 2, 1867, in fraud of the purpose of the statute, was within its prohibitions.

Application to corporations.—"All payments, conveyances, and assignments declared fraudulent and void by the act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company." *New Lamp Chimney Co. v. Ansonia Brass etc. Co.*, 91 U. S. 656, 23 L. Ed. 336.

13. Transactions must have been within specified time preceding filing of petition.—By the act of 1867 (Rev. Stat. § 5128), as originally enacted, the payment, assignment, transfer or other disposition of his property must have been within six months before the filing of the petition by or against the bankrupt. *Gibson v.*

with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them.¹⁴ All property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid¹⁵ shall, if he be adjudged a bankrupt, and the same is

Warden, 14 Wall. 244, 20 L. Ed. 797; Cook v. Tullis, 18 Wall. 332, 340, 21 L. Ed. 933; Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; Medsker v. Bonebrake, 108 U. S. 66, 27 L. Ed. 654.

By the amendment of 1874 this period was shortened to four months. Medsker v. Bonebrake, 108 U. S. 66, 27 L. Ed. 654.

"It is evident that the bill is framed upon the idea that § 5128 of the Revised Statutes was in force, and that the periods within which such conveyances by an insolvent could be assailed as void under the bankrupt law were four and six months, and all its allegations seemed aimed at such acts as would be unassailable after those periods. But the act of 1874 has shortened these periods to four and two months in cases of involuntary bankruptcy. 18 Stat. 180, ch. 390, § 10." Medsker v. Bonebrake, 108 U. S. 66, 27 L. Ed. 654.

The bankrupt act of 1898, § 67e, prescribes the same period of four months prior to the filing of the petition. Bards v. First Nat. Bank, 178 U. S. 524, 44 L. Ed. 1175; Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171; Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577.

Relation back of transfer in pursuance of prior agreements.—In Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075, as against the claims of an assignee in bankruptcy, a transfer made immediately before the adjudication in bankruptcy was held to relate back and to carry into effect an agreement entered into long before, and therefore not to be vitiated by the bankruptcy proceedings. Cited on this point in South Branch Lumber Co. v. Ott, 142 U. S. 622, 35 L. Ed. 1136.

Taking possession of after-acquired property under prior chattel mortgage not violation of bankruptcy act.—In Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, it was held that taking possession of after-acquired property under a mortgage given prior to the passage of the present bankrupt act was not a violation of any of the provisions of the bankrupt act though done within four months of the filing of the petition in bankruptcy.

Effect of general assignment two years prior to petition in bankruptcy.—In Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512, S, in the year 1876, made a general assignment for the benefit of creditors. In 1878, he filed a petition in bankruptcy and was adjudicated a bankrupt. It was held, that if the estates and interests of the bankrupt sought to be subjected in the present suit were assignable and liable to be taken at law or appropriated in equity, for the payment of the debts of S they

passed by the previous deed of assignment. If nothing passed by such prior assignment, it was because such interests were not liable for the payment of his debts, and under the rule as to exemptions would not pass to the assignee in bankruptcy.

14. Intent to hinder, delay or defraud creditors.—Bards v. First Nat. Bank, 178 U. S. 524, 44 L. Ed. 1175; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577; Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481. And see cases cited ante, n. 10, p. 933.

In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene. Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

Property conveyed by a voluntary deed but without fraud, not within Rev. Stat., §§ 5046, 5047.—A deed conveying land as an advancement to a daughter by her father, on the occasion of her marriage, made at a time when the father was indebted only to a small extent in comparison with the value of his property, cannot, upon the bankruptcy of the father a number of years later, be set aside by the assignee in bankruptcy on the ground that the deed was void under the Alabama laws, as voluntary, there being no fraud alleged as to creditors. Such deed did not constitute a conveyance in fraud of creditors under act of 1867, Rev. Stat., §§ 5046 and 5047. Warren v. Moody, 122 U. S. 132, 30 L. Ed. 1108.

See, also, Adams v. Collier, 122 U. S. 382, 30 L. Ed. 1207, in which a voluntary conveyance was made by the guarantor to his children several years before the adjudication in bankruptcy. It was held that the conveyance not being fraudulent and void under the Georgia law, on account of the fraud since the property conveyed was only an inconsiderable part of the estate of the guarantor's and was not made with the purpose of delaying or defrauding creditors, it could not be impeached by the assignee in bankruptcy.

15. Meaning of "transfer," under act, 1898.—By the act of 1898, § 1, cl. (25), the term "transfer" shall include the sale or every other and different mode of disposing of or parting with the property, absolutely or conditional, as a payment, pledge, mortgage, gift or security. Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171; New York, etc., Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380.

Payment of money as transfer within meaning of statute.—"It is insisted that this court in the case of Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171, held a payment of money to be a transfer

not exempt from execution and liability for debts by the law of his domicile,¹⁶ be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee.¹⁷

of property within the terms of the bankrupt act, and when made by an insolvent within four months of the filing of the petition in bankruptcy, to amount to a preference, and that case is claimed to be decisive of this. In the *Pirie* case the turning question was whether the payment of money was a transfer within the meaning of the law, and it was held that it was. There the payment of the money within the time named in the bankrupt law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property within the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment but creating an obligation upon the part of the bank to repay upon the order of the depositor, would not be. Of the case of *Pirie v. Chicago Title & Trust Co.*, it was said in *Jaquith v. Alden*, 189 U. S. 78, 82, 47 L. Ed. 717: "The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within § 60a, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class." In other words, the *Pirie* case, under the facts stated, shows a transfer of property to be applied upon the debt, made at the time of insolvency of the debtor, creating a preference under the terms of the bankrupt law. That case turned upon entirely different facts, and is not decisive of the one now before us." New York, etc., *Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380.

Transfer by insolvent in compliance with terms on which property acquired by him.—A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted—the purchaser not becoming a member, nor having the right to transact business in the board until he shall be elected by ballot—

is neither contrary to public policy, nor in violation of the bankrupt act. Membership of the board is not a matter of absolute sale. Although property, it is, when purchased, qualified and encumbered by conditions which the creators of it had the right to impose, and a compliance with which is necessary to obtain it. *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, reaffirmed in *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264.

"It is said that it is against the policy of the bankrupt law, against public policy, to permit a man to make in this or any other manner a standing or perpetual appropriation of his property to the prejudice of his general creditors; and it is to this point that the numerous authorities of counsel are cited. They all, however, relate to cases where a man has done this with property which was his own—property on which he himself imposed the direction, or the encumbrance, which impeded creditors. It is quite different where a man takes property by purchase or otherwise, which is subject to that direction or disposition when he receives it. It is no act of his which imposes the burden. It was imposed by those who had a right to do it, and to make it an accompaniment of any title which they gave to it. The principle here contended for by counsel was well considered in the recent case of *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254. In that case, the mother of the bankrupt, *Eaton*, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy." *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264.

16. Exceptions as to exempt property.—Bankrupt Act, 1898, § 67e. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061. See ante, "Exemptions of Property," XI, B; "Vested with Title to All Unexempt Property of Bankrupt," XVI, E, 1, b, (1), (a); "Setting Apart Bankrupt's Exemptions," XVI, E, 2, k.

17. Such property remains part of assets and passes to trustee.—Bankrupt Act, 1898, § 67e. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *McTeall v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *Lockwood v. Exchange*

Conveyances Void under State Laws Null and Void under Present Bankrupt Act.—By the last part of § 67e of the bankrupt act of 1898, it is provided that "all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."¹⁸

2. AVOIDANCE OF TRANSFERS AND RECOVERY OF PROPERTY OR ITS VALUE—a. *Power and Duty of Trustee or Assignee.*—By the present as well as former bankrupt acts it is the right and duty of the trustee or assignee to recover and reclaim by legal proceedings or otherwise, for the benefit of the creditors, the property so conveyed, transferred, assigned, or incumbered, with intent to hinder, delay, or defraud creditors.¹⁹ The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.²⁰ Such property may be recovered from whoever may have re-

Bank, 190 U. S. 294, 47 L. Ed. 1061; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117. See ante, "Enumeration of Specific Property and Rights Passing to Trustee," XVI, E, 1, b. (2) And see cases cited ante, n. 10, p. 933.

The fourteenth section of the bankrupt act of March 2, 1867, provides that the assignment shall vest in the assignee all the estate, real and personal, of the bankrupt, and all the property conveyed by the bankrupt in fraud of his creditors. *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542.

18. Conveyances void under state laws invalid under bankrupt act of 1898, § 67e.—*Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790.

19. Power and duty of trustee to recover property, etc.—Bankrupt Act, 1898, §§ 67e, 70e. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Means v. Dowd*, 128 U. S. 273, 32 L. Ed. 429; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Schott v. Hudson*, 109 U. S. 477, 27 L. Ed. 1003; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Sessions v. Johnson*, 95 U. S. 347, 24 L. Ed. 596; *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489. See cases cited ante, n. 10, p. 933, and also cases cited in note to succeeding text.

Section 14 of the bankrupt act of March 2, 1867, ch. 176, 14 Stat. 522, provides that "all the property conveyed by the bank-

rupt in fraud of his creditors shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and he may sue for and recover the said estate, debts, and effects." This provision is also found in §§ 5046, 5047, Rev. Stat. *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542.

By § 5129, Rev. Stat., an assignee in bankruptcy has the right, in case of a transfer of property to a person not a creditor of the bankrupt, in violation of that section, to "recover the property or the value thereof, as assets of the bankrupt." *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000.

Right to set aside fraudulent conveyance vested in assignee alone.—"We have decided at this term, in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290, in a case very similar in some of its aspects to this, that the right to bring such an action as this—the right to the property so fraudulently conveyed—is vested in the assignee alone, and that his failure to sue within the two years allowed by the bankrupt law does not transfer this right of property or right of action to a creditor of the bankrupt." *Moyer v. Dewey*, 103 U. S. 301, 303, 26 L. Ed. 394.

20. Vested with rights of creditor as to recovery.—Bankrupt Act, 1898, § 70e. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668. And see cases cited in note to preceding text.

A decree in a suit between husband and

ceived it, except a bona fide holder for value.²¹

b. *Jurisdiction*.—The jurisdiction of proceedings by a trustee or assignee in bankruptcy to recover property or its value has already been treated elsewhere in this title.²²

c. *Limitation of Actions*.—Limitation of actions by or against trustees or assignees in bankruptcy will be found treated elsewhere in this title.²³

d. *Parties*.—To a bill filed by the assignee or trustee in bankruptcy to set aside, as a fraud upon creditors, a conveyance of real and personal property by the bankrupt, the latter is not a necessary party.²⁴

C. Preferences—1. *INVALIDITY OF PREFERENCES*—a. *Prohibition of Preferences under Present and Former Bankrupt Acts*.—The earlier bankrupt laws as well as the present bankrupt act contain provisions that preferences of certain creditors over others of the same class should be voidable by the trustee or assignee,²⁵ and that such trustee or assignee might recover the property or its value

wife, confirming a conveyance of real estate made to her by him, does not bind his assignee in bankruptcy suing to set such conveyance aside on the ground that it was made in fraud of creditors. *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51.

Facts held not to authorize recovery by assignee.—A., relying upon the representations of D., that the firm of B., C., and D., of which he was a member, was perfectly solvent, and that B. was wealthy, sold it goods. D. having, without the knowledge of A., retired from the firm, an arrangement was entered into whereby the proceeds of the sale of such goods remaining in the hands of the agents of the firm of B., C., and D., were applied to discharge the debt due to A., and the unsold portion of such goods returned to him. A., at the time, believed that B. and C. were insolvent; and they were within four months from such arrangement adjudged bankrupts. Held, that the representations of D. were a fraud upon A., on account of which he could have rescinded the contract of sale, and followed the goods wherever he could find them; and the goods not having lost their identity, nor become part of the permanent stock of B. and C., upon which they obtained credit, their assignee cannot, in the absence of actual fraud in the arrangement for the payment of such proceeds, recover them in a suit against A. *Montgomery v. Bucyrus Machine Works*, 92 U. S. 257, 23 L. Ed. 656.

21. Recovery against all save bona fide holders for value.—Bankrupt Act, 1898, § 70e. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117.

"It is not enough in order to support a settlement against creditors that it be made for a valuable consideration. It must be also bona fide. If it be made with intent to hinder, delay, or defraud them, it is void against them, although there may be in the strictest sense a valuable or even an adequate consideration." *Blennerhassett v. Sherman*, 105 U. S. 100, 117, 26 L. Ed. 1080.

Recovery by trustee or assignee of partnership.—See post, "Application of Bank-

rupt Act to Partners and Partnership Estates," XX.

22. Jurisdiction.—See ante, "Proceedings between Trustees and Adverse Claimants of Bankrupt's Property," V, B, 1.

23. Limitation of actions.—See ante, "Limitations," XVI, F, 2.

24. Bankrupt not necessary party to bill to set aside conveyance.—*Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381.

"The appellant also insists that the original bill was defective for want of parties in not making the bankrupt a party. This objection is not even made in the bill of review, and was not made in the original cause; and, if it had been made, in our judgment it would not have been a valid objection. The bankrupt had no interest to be affected except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided." *Buffington v. Harvey*, 95 U. S. 99, 102, 24 L. Ed. 381.

Conveyance to wife in fraud of creditors—Judgment in personam against wife not proper.—The court adheres to its ruling in *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. Ed. 591, that, where a husband causes real estate to be conveyed to his wife in fraud of his creditors, a judgment in personam for its value cannot be taken, at the suit of his assignee in bankruptcy, against her, nor, in case of her death, against her executors. *Trust Co. v. Sedgwick*, 97 U. S. 304, 24 L. Ed. 954, followed in *Clark v. Beecher*, 154 U. S. 631, 24 L. Ed. 705.

25. Preferences declared under former and present bankrupt acts.—Bankrupt Act, 1898, §§ 60 a, and 60 b; Bankrupt Act, 1841, § 2; Bankrupt Act, 1867, §§ 23, 35 and 39, Rev. Stat., §§ 5081, 5128. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. Ed. 596; *Thomson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956; *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190; *New York, etc., Bank v.*

from such person.²⁶

Massey, 192 U. S. 138, 48 L. Ed. 380; Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147; Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171; Woolfolk v. Nisbet, 154 U. S. 650, 38 L. Ed. 1091; Streeter v. Jefferson County Nat. Bank, 147 U. S. 37, 37 L. Ed. 68; Rosenthal v. Walker, 111 U. S. 185, 28 L. Ed. 395; Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 L. Ed. 640; Medsker v. Bonebrake, 108 U. S. 66, 27 L. Ed. 654; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Sage v. Wyncoop, 104 U. S. 319, 26 L. Ed. 740; Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164; Grant v. First Nat. Bank, 97 U. S. 80, 24 L. Ed. 971; National Bank v. Warren, 96 U. S. 539, 24 L. Ed. 640; Merchants' Bank v. Cook, 95 U. S. 342, 24 L. Ed. 412; West Philadelphia Bank v. Dickson, 95 U. S. 180, 24 L. Ed. 407; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Fox v. Gardner, 21 Wall. 475, 22 L. Ed. 685; Watson v. Taylor, 21 Wall. 378, 22 L. Ed. 576; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Little v. Alexander, 21 Wall. 500, 22 L. Ed. 625; Avery v. Hackley, 20 Wall. 407, 22 L. Ed. 385; Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866; Tiffany v. Boatman's Sav. Inst., 18 Wall. 375, 21 L. Ed. 868; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Walbrun v. Babbitt, 16 Wall. 577, 584, 21 L. Ed. 489; Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Commercial Bank v. Buckner, 20 How. 108, 15 L. Ed. 862; Buckingham v. McLean, 13 How. 151, 14 L. Ed. 91; United States Bank v. Owens, 2 Pet. 527, 7 L. Ed. 508.

Under the act of 1867 (Rev. Stat., § 5128), preferences as well as fraudulent conveyances were forbidden, if made within four months before the filing of the petition by or against the bankrupt. Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171.

As to the suffering or permitting a preference as constituting an act of bankruptcy, see ante, "Permission of Preferences through Legal Proceedings," IV. A. 3.

26. Avoidance by trustee and recovery

of property or value.—Bankrupt Act, 1898, § 60 b; Bankrupt Act, 1841, § 2; Bankrupt Act, 1867, § 35. Pirie v. Chicago, etc., Co., 182 U. S. 438, 45 L. Ed. 1171. And see cases cited in notes to preceding text.

As to proceedings to avoid preferences and to recover property or its value, see ante, "Institution of Suits to Recover Property of Estate and Subject It to Claims of Creditors," XVI, F. 1, b; and post, "Proceedings by Trustee to Avoid Preferences and Recover Property or Value," XIX, C, 2.

"Subdivisions (a) and (b) are concerned with a preference given by a debtor to his creditor. Subdivision (a) defines what shall constitute it, and subdivision (b) states a consequence of it—gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors." The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered, provided, however, that the preference was given within four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended." Pirie v. Chicago, etc., Co., 182 U. S. 438, 446, 45 L. Ed. 1171.

By the second section of the act of 1841, the amount of preferences which may have been given in the contemplation of bankruptcy were declared to be a part of the bankrupt's estate. Commercial Bank v. Buckner, 20 How. 108, 15 L. Ed. 862.

Right of assignee to proceeds of sale by creditor under execution.—A., in due course of legal proceedings, recovered, March 14, judgment against B., a merchant who, the preceding day, had made an assignment of all his property for the benefit of his creditors. An execution was forthwith sued out upon the judgment, and levied upon certain goods, part of the property so assigned. On the petition of a creditor, filed March 31, alleging that B. had committed acts of bankruptcy by fraudulently suspending and not thereafter resuming payment of his commercial paper due January 1, and by making said assignment, B. was by the proper court adjudged to be a bankrupt, and his estate conveyed in the usual form by the register to the assignee in bankruptcy, who filed his bill against A. to determine the title to the proceeds of the sale of the goods, which by consent had been made without prejudice to the rights, if any, of A. by the levy of the execution. Upon the hearing it appeared by the proofs that the assignment by B. was made in good faith to secure the distribution of his property among all his creditors. Held, that A. acquired no priority by the levy, and that

b. *What Constitutes Preference within Meaning of Bankrupt Act.*—The present bankrupt act expressly provides that "a person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."²⁷ The act of 1841 provided that all future payments, securities, conveyances, or transfers of property or agreements made, or given by any bankrupt, in contemplation of bankruptcy and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, should be deemed utterly void and a fraud upon the act.²⁸ Under the act of 1867 the procurement by the debtor of the attachment, sequestration or seizure on execution of any part of his property with the intention to give a preference, or any payment, pledge, assignment, transfer, or conveyance of any part of his property by the debtor, the one receiving the same and to be benefited thereby, or by the attachment, having reasonable cause to believe the debtor insolvent, and that the transaction was in fraud of the provision of the act, was voidable as being a preference.²⁹

the assignee in bankruptcy is entitled to the proceeds. *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. See, also, *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

27. When preference deemed to have been given under present bankrupt act.—Bankrupt Act, 1898, § 60 a. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717; *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956; *Rector v. City Deposit Bank*, 200 U. S. 405, 50 L. Ed. 527, followed in *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 527, 51 L. Ed. 596; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911.

"These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences." *New York, etc., Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380.

Amendment of §§ 60 a and 60 b.—By the act of February, 1903, subdivision-a and b of § 60 of the act of 1898 were amended so as to read as follows: "a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such

creditors of the same cause. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." "b. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." (32 Stat. L. 799.) Act of Feb. 1903, ch. 487 (amending Bankruptcy Act of July 1, 1898), 38.

For the meaning of "transfer" as used in this section, see ante, "Conveyances, Assignments or Encumbrances to Delay or Defraud Creditors," XIX. B.

28. Provision of act 1841, § 2 (5 Stat. at L. 442).—*Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91.

29. For the provisions of the act of 1867 as to preferences, fraudulent conveyances, etc., see ante, n. 25, p. 939.

Application of provisions to particular transactions.—A transfer by an insolvent debtor with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the bankrupt act. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481.

A debtor "suffers" or "procures" his property to be seized on execution, when, knowing himself to be insolvent, an admitted creditor who has brought suit against him—and who he knows will, unless he applies for the benefit of the bankrupt act, secure a preference over all other

c. Essentials of Invalid Preference—(1) *Must Have Been Given within Specified Time*.—In order that a preference may be voidable as within the prohibition of the bankrupt act, it must have been given within a certain time before the filing of a petition, or after the filing of a petition and before the adjudication.³⁰

creditors—proceeds in the effort to get a judgment until one has been actually got by the perseverance of him the creditor and the default of him the debtor. *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

Such effort by the creditor to get a judgment, and such omission by the debtor to "invoke the protecting shield of the bankrupt act" in favor of all his creditors, is a fraud on the bankrupt act, and invalidates any judgments obtained. *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

The fact that the debtor, just before the judgments were recovered, may have made a general assignment which he meant for the benefit of all his creditors equally, does not change the case. Such assignment is a nullity. *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

The defendant having money received as collections for the bankrupt, delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taking by process under the act, and does not raise the question whether if the defendant had retained the money it could be set off in this suit against the bankrupt's debt to the defendant. *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832.

So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off. *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832.

The giving of a warrant to confess a judgment may be a preference forbidden by the 35th section of the bankrupt act of 1867, though not mentioned in that section in the specific way in which it is in the 39th section. *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542.

A power of attorney to confess a judgment is a security within the second section of the bankrupt act, 5 Stat. at L. 442. And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency. *Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91.

Where a debtor, knowing that his creditor is insolvent, accepts a draft drawn on him by such a creditor, the draft being drawn and accepted with the purpose of giving a preference, the transaction is a fraud on the bankrupt act, and the assignee in bankruptcy can recover from the

acceptor the amount of the draft. *Fox v. Gardner*, 21 Wall. 475, 22 L. Ed. 685.

A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving to him a preference, and in violation of the bankrupt act. The transfer of the equity of redemption of course is void. *Avery v. Hackley*, 20 Wall. 407, 22 L. Ed. 385.

C. having, with intent to give a preference to B., contributed to the rendition of the judgment at an earlier day than without his aid it could have been rendered, an execution was sued out and levied upon his goods. Held, that he thereby procured them to be taken on legal process within the meaning of the thirty-fifth section of the bankrupt law of March 2, 1867 (14 Stat. 534), as modified by the act of June 22, 1874, 18 Stat., part 3, pp. 180, 181. *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164.

The mere nonresistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due and there was no valid defense to it, is not the suffering and giving a preference under the bankrupt act; and the judgment is not avoided by the facts, that he does not file the petition in bankruptcy, and that his insolvency was known to the creditor. *Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees. *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377. See the title **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, ante, p. 599.

Application by clearing house of credit items of insolvent bank to payment of claims of other banks.—The application by a clearing house association of the credits of an insolvent bank in the hands of such clearing house association, to the claims of other banks, made with notice of the failure of the said insolvent bank, is a transfer of property which the trustee under provisions of the bankrupt act as to preferences is entitled to demand and receive. *Rector v. City Deposit Bank*, 200 U. S. 405, 50 L. Ed. 527; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533.

30. Preference must have been given within statutory period.—Under the act of

(2) *Intent to Give Preference or Priority.*—Under the act of 1841 the future payment, security, conveyance, or transfer of property must have been made or given by the bankrupt for the purpose of giving a creditor, endorser, surety, or other person preference or priority over the general creditors of such bankrupt.³¹ Under the act of 1867 in order that the transaction might come within the prohibition against preferences it must be proved that the payment, pledge, assignment, transfer, or conveyance by the debtor was made not only within the prescribed time but also with a view to give a preference to some one of his creditors, or to a person having a claim against him or who was under some liability on his account.³² Under the bankrupt act of 1898 a preference will be deemed to have

1867, unless bankruptcy proceedings were commenced by or against the debtor within four months after such preference it would stand good, though the creditor knew the debtor was insolvent, and that the conveyance was intended to defeat the purposes of the bankrupt law, insuring equality of distribution of the debtor's property. *Dutcher v. Wright*, 194 U. S. 553, 24 L. Ed. 130; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407; *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542; *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

By the act of 1874 this period was reduced to two months. *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Auffm'ordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654. And see *Crawford v. Halsey*, 124 U. S. 648, 31 L. Ed. 572.

Congress, on the twenty-second day of June, 1874, passed an amendatory act, in which is found this clause: "That in cases of involuntary or compulsory bankruptcy the period of four months mentioned in § 35 of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act." *Auffm'ordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262.

In *Crawford v. Halsey*, 124 U. S. 648, 31 L. Ed. 572, it was held that as the assignment of the claim in question was made more than two months before the bankruptcy proceedings, it was not necessary that the assignees should be parties to the submission of such claim to arbitration. See the title ARBITRATION AND AWARD, ante, p. 464.

By the present act the time was again fixed at four months. Bankrupt Act, 1898, § 60 b. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911.

Concealment by creditor of mortgage executed more than two months before petition filed.—"We further declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his

creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the bankrupt act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor. If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the bankrupt act. Where all the other circumstances necessary to render it void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and is void as against its spirit." *Blennerhassett v. Sherman*, 105 U. S. 100, 121, 122, 26 L. Ed. 1080.

In computing the four months before filing the petition in bankruptcy, within which time the assignment of his property by an insolvent debtor, with a view to give a preference to any creditor, is void, the day upon which the petition is filed must be excluded. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, and *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280, cited, and the doctrines therein announced applied to the facts of this case. *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130.

31. Intent to give preference under act of 1841.—*Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91; *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

32. Necessity for intent under act of 1867, § 35 (Rev. Stat., § 5128).—*Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Little v. Alexander*, 21 Wall. 500, 22 L. Ed. 625. And see cases cited ante, n. 25, p. 939.

"In order to bring a security for a debt within the provision of the bankrupt law, relied upon by the appellee, it is necessary that all the prescribed conditions should concur. If either element of the combination be wanting, there is no infringement of the law. Among them, and the cardinal one, is that the security should be given by the bankrupt within the time specified, with the view of giv-

been given if the effect of the enforcement of the judgment suffered to be entered, or transfer made by him, will be to enable any one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.³³

(3) *Insolvency or Contemplation of Insolvency or Bankruptcy.*—Under the act of 1841 if the other elements were present the transaction would, it seems, be deemed a preference if made in contemplation of bankruptcy.³⁴ Under the act of 1867 the person making a payment, pledge, assignment, transfer, or conveyance must have been insolvent or in contemplation of insolvency at the time the preference was given or secured.³⁵ Under the bankrupt act of 1898, and the amend-

ing a preference to a creditor or person having a claim against him.” *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766.

When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the intention of the bankrupt is the turning point of the case, and all the circumstances which go to show such intent should be considered. Hence, when an ordinance of a state gave a preference as to time of trial in the courts in suits on debts contracted after a certain date, and the insolvent debtor gave his son and niece new notes for an old debt, so as to enable them to procure judgments before his other creditors, the fact that the ordinance was void does not repel the inference of intent to give and obtain a preference, and when a judgment was so obtained which gave priority of lien it will to that extent be null and void. *Little v. Alexander*, 21 Wall. 500, 22 L. Ed. 625.

Evidence showing intent.—Under a sound construction of the thirty-fifth and thirty-ninth sections of the bankrupt act something more than passive nonresistance in an insolvent debtor, is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defense. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment. Very slight circumstances, however, which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, or to defeat the operation of the act, may, by giving color to the whole transaction, render the lien void. These special circumstances must be left to decide each case as it arises. The present one held to be destitute of any evidence, and distinguished from *Buchanan v. Smith*, 16

Wall. 277, 21 L. Ed. 280. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

Declarations of bankrupt admissible to show intent.—Where, in a suit by an assignee in bankruptcy to recover moneys paid a creditor within four months prior to the filing of the petition in bankruptcy, the evidence tended to prove that the payment was the result of a conspiracy between the bankrupt and the creditor to give the latter a fraudulent preference within the meaning of the bankrupt act, held, that the declarations of the bankrupt at and prior to the time of such payment, although made in the absence and without the knowledge of the creditor, were, when offered by the assignee, admissible in evidence. *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286.

33. Effect of transactions as controlling under act of 1898.—See ante, “What Constitutes Preference within Meaning of Bankrupt Act,” XIX, C, 1, b.

As to reasonable cause to believe that a preference was intended, see post, “Knowledge or Reasonable Cause for Belief on Part of Creditor as to Debtor’s Intent,” XIX, C, 1, c, (4).

34. Transaction in contemplation of bankruptcy under act of 1841.—*Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91.

By the term “in contemplation of bankruptcy,” as used in the act of 1841, is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency. *Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91.

35. Insolvency or contemplation thereof under act of 1867, § 35 (Rev. Stat., § 5128.—*Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504. And see cases cited ante, n. 25, p. 939.

Contemplation of bankruptcy not essential.—“The present bankrupt act avoids a conveyance, made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy in connection with the conveyance.” *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504.

Facts putting burden of proof upon debtor to show ignorance of insolvency.—The transfer, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as

ment of 1903, a preference will be deemed to have been given if the entry of a judgment against him has been procured or suffered or a transfer of property made by a person "being insolvent."³⁶

(4) *Knowledge or Reasonable Cause for Belief on Part of Creditor as to Debtor's Intent*.—Under the bankrupt act of 1867 in order to constitute any of the transactions therein enumerated a preference within the prohibition of the statute, the person receiving the payment, pledge, assignment, or conveyance, or to be benefited thereby, must have had reasonable cause to believe that the person making the payment or giving or securing such preference was insolvent,³⁷ and

conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481.

36. Transactions must be by insolvent under present bankrupt act.—See ante, "What Constitutes Preference within Meaning of Bankrupt Act," XIX, C, 1, b.

Insolvency question of fact.—See post, "Insolvency and Reasonable Cause to Suspect Intent to Prefer Questions of Fact," XIX, C, 2, c.

37. Reasonable cause for belief as to insolvency of debtor under act 1867 (Rev. Stat., § 5128).—*Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Woolfolk v. Nisbet*, 154 U. S. 650, 38 L. Ed. 1091; *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 37, 37 L. Ed. 68; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395; *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 27 L. Ed. 640; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Merchants' Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481.

Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Merchants' Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412.

Existence of some cause to suspect insolvency insufficient.—In order to invalidate, as a fraudulent preference within the meaning of the bankrupt act, a security taken for a debt, the creditor must have had such a knowledge of facts as to induce

a reasonable belief of his debtor's insolvency. It is not sufficient that he had some cause to suspect such insolvency. *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971.

A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further; he may feel anxious about his claim and have strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law. *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 27 L. Ed. 640.

Existence of reasonable cause for belief as to insolvency to be shown by trustee.—In *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478, the court said: "It has never been denied, so far as we are advised, that it is necessary for the assignee of the bankrupt, in attacking such a conveyance, to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party."

A creditor has reasonable cause to believe his debtor "insolvent" in the sense of the bankrupt act, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business. *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Merchants' Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412.

"Reasonable cause for such a belief cannot arise unless the fact of insolvency actually existed; but if it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have

that the payment, pledge, assignment, transfer or conveyance was made in fraud of the provisions of the bankrupt act.³⁸ Under the bankrupt act of 1898 a

ascertained the fact to be so by reasonable inquiry. *Scammon v. Cole*, 5 N. B. Reg. 263; *Wilson v. City Bank*, 17 Wall. 473, 487, 21 L. Ed. 723." *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130.

"Proof that the respondents had actual knowledge that the mortgagor was insolvent at that time is not required to support the prayer for relief, but the allegation in that behalf is sustained if it appears that they had reasonable cause for such belief, as that is the language of the bankrupt act. Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it should appear that the respondents actually believed that the mortgagor was insolvent, but the true inquiry is whether they, as business men, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them at the time the conveyance was made. Unless the debtor was in fact insolvent it cannot be held that such a grantee had reasonable cause to believe the allegation, but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case." *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504.

Knowledge of attorney as imputable to creditor.—Where the attorney of a creditor knows and intends that his action on behalf of his client will work a fraud upon the bankrupt law, such knowledge is imputable to the client. *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164, citing *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

A judgment in favor of a bank was held an illegal preference within the purview of the bankrupt law, because the attorneys employed to represent the bank, in bringing the suit and obtaining the judgment had been the attorneys of H. V. Cadwell & Co., and, as such, had obtained knowledge of their insolvent condition and of their desire that the bank should obtain a preference. *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 37, 37 L. Ed. 68.

Such imputation of knowledge was held however, not to constitute such actual fraud within the meaning of Rev. Stat., § 5021, as amended by the act of June 22, 1874, as to preclude the creditor from proving his debt against the bankrupt. *Streeter v. Jefferson County Nat. Bank*,

147 U. S. 37, 37 L. Ed. 68. See ante, "Allowance of Claims of Creditors Who Have Received Preferences," XV, B, 4.

Knowledge of attorney of collection agency employed by creditor.—"In *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392, a creditor had procured a confession of judgment and a levy on property of his debtor, who was declared a bankrupt within four months thereafter. The creditor had sent his note to a collection agency in Philadelphia, which forwarded it to their corresponding attorney in Nebraska, where the judgment was taken. The creditor knew nothing of what was done until the money was made by sale of the goods, and had given no direction as to the mode of proceeding, and held no communication with his attorney. This court held that the attorney was the agent in the transaction of the collecting agency and not of the creditor, and that he could not be held to know what the attorney knew in regard to the insolvency of the debtor, and other matters in the case. Three of the judges dissented from this view. But an examination of the opinion will show that all were agreed that if the creditor had sent the note directly to the attorney, the latter would then have been the agent of the creditor, whose acts and whose knowledge, obtained in the course of the employment, would have been the acts and the knowledge of his principal. And such, we think, is the true rule of law." *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164.

Conveyance held fraudulent—Reasonable cause to suspect insolvency.—Facts held to show that conveyance was made with a view to defeat the object and operation of the bankrupt law, and that the creditor had reasonable cause to believe debtor insolvent when conveyance made. *Woolfolk v. Nisbet*, 154 U. S. 650, 38 L. Ed. 1091.

Evidence as to prior dealings admissible to show reasonable cause.—In *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 393, it was held that, to prove that plaintiff in error had reasonable cause to believe that the sale made to him by the bankrupt was in contemplation of insolvency, it was competent to show what had been the business dealings between the bankrupt and the plaintiff in error before the sale in question. Thus, it was competent to show that just one month before such sale the bankrupt had made another sale to the plaintiff in error of goods worth \$45,000; and then within eight days thereafter, by a secret agreement, had reinvested the bankrupt with the ownership of one-half the property so sold.

38. Transaction in fraud of bankrupt act under act, 1867 (Rev. Stat., § 5123).—*Wager v. Hall*, 16 Wall. 584, 21 L. Ed.

preference will be voidable by the trustee if the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.³⁹ If, however, the person receiving a preference, did not have cause to believe it was intended, he may keep the property transferred to him, whether it be a complete or partial discharge of the debt,⁴⁰ but in the latter case it has been held that he may not prove the balance of his debt or other debts.⁴¹

d. *Effect of Statutory Provisions upon Insolvent's Right to Deal with His Property in Good Faith.*—**Exchange of Values.**—It has been often held that an exchange of values may be made at any time, though one of the parties to the transaction be insolvent,⁴² and that there is nothing in the bankrupt acts which prevents an insolvent from dealing with his property—selling or exchanging it for other property—at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors, or to give preference to any one, and does not impair the value of his estate.⁴³

504; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130. And see cases cited in preceding text.

"The obvious meaning of this provision is to require the concurrence of the creditor who gets security for his debt in the purpose of defeating the bankrupt act. Such person must have reasonable cause to believe the grantor in the conveyance was insolvent at the time it was executed, and that it was made with intent to defeat the bankrupt law. Both these must exist as facts which the grantee had reasonable cause to believe." *Barbour v. Priest*, 103 U. S. 293, 296, 26 L. Ed. 478.

Conveyance to satisfy equitable obligation to insolvent's wife.—The promise of a husband to repay money loaned him by his wife, the same being her separate property, creates an equity as to her which is enforceable in equity in the absence of fraud, and a mortgage by the husband though insolvent, to secure such person's debt, will be sustained as against the assignee in bankruptcy in the absence of fraud, or knowledge of the insolvency by the wife. *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 634.

"In the case of the Atlantic National Bank v. Tavenor, 130 Mass. 407, that court says: 'The question whether a loan by the wife to the husband, of money which is her separate property, upon his promise to repay it, creates an equity in her favor, which a court of equity will enforce, has not been decided in this commonwealth. But it has generally, if not uniformly, been decided in the affirmative in other courts,' for which numerous cases are cited. It is added: 'That the jury in this case having found that the money delivered by the wife to the husband was by way of loan, and not of gift, and that his subsequent conveyance of land through a third person to her in repayment of that loan, was not made with the purpose of hindering, delaying, or defrauding creditors, that conveyance, to satisfy his equitable obli-

gation to his wife, was not a voluntary conveyance, and was valid against his creditors. *Bullard v. Briggs*, 7 Pick. 533; *Forbush v. Willard*, 16 Pick. 42; *Stetson v. O'Sullivan*, 8 Allen 321; *French v. Motley*, 63 Maine 326; *Grabill v. Moyer*, 45 Penn. St. 530; *Babcock v. Eckler*, 24 New York, 623; *Steadman v. Wilbur*, 7 R. I. 481.' Such is precisely the case here, as reported by the master." *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 634.

39. Reasonable cause to believe preference intended under act, 1898.—Bankrupt Act, 1898, § 60 b. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. Ed. 596.

Existence of reasonable cause question of fact.—See post, "Insolvency and Reasonable Cause to Suspect Intent to Prefer Questions of Fact," XIX, C, 2, e.

40. Retention of property in absence of reasonable belief as to intent.—*Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

41. May not prove balance of debt.—*Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

As to receipt of preferences as affecting right to prove claims, see ante, "Proof and Allowance of Claims," XV.

42. Exchange of values not a preference within prohibition of act.—*Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 253. And see cases cited to succeeding text.

43. Sale or exchange of property without fraudulent intent.—*Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. 315, 21 L. Ed. 568; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Watson v. Taylor*, 21 Wall. 378, 22 L. Ed. 576; *Fox v. Gardner*, 21 Wall. 475, 22 L. Ed. 685; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 253; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816.

"An insolvent is not bound, in the mis-

Security for Advances.—It has also been held that a man really insolvent, but not having yet openly failed, and hoping to overcome his difficulties and to carry on his business violates no provision of the bankrupt act by pledging his property for money lent; the money being lent at the time when the pledge is made, and the lender having no reason to suppose otherwise than that the purpose of the loan is to give effect to the hopes, such as above described, of the party borrowing.⁴⁴

fortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933.

"It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws (*Stevens v. Blanchard*, 3 Cush. 169); and the same thing has been determined with reference to the bankrupt act. *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Watson v. Taylor*, 21 Wall. 378, 22 L. Ed. 576, and *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766. The reason is, that the exchange takes nothing away from other creditors. It is, therefore, not in conflict with the thirty-fifth section of the act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto." *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

Illustrations of exchanges held permissible.—Where a depository of certain government bonds used some of them without the permission of the owner and substituted in their place a bond and mortgage, and the owner of the bonds upon hearing of the transaction ratified, held, that the creditors of the depository, who had become insolvent when such approval was made, could not complain of the transaction, there being no pretense that the property substituted was less valuable than that taken, or that the estate of the bankrupt was less available to his creditors. *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933.

A chattel mortgage, taken by a creditor, within four months prior to the filing of a petition in exchange for a prior valid bill of sale of the same property, and recorded pursuant to the laws of the state where the transaction took place before any rights of the assignees in bankruptcy

accrued, cannot be impeached by them as a fraudulent preference within the meaning of that act. *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

A creditor, having by execution obtained a valid lien on his debtor's stock of goods, of an amount in value greater than the amount of the execution, may, up to the proceedings in bankruptcy, without violating any provision of the bankrupt act, received from the debtor bills receivable and accounts due him, and a small sum of cash, to the amount of the execution; the execution being thereupon released, and the judgment declared satisfied. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568.

The giving, by a debtor, for a consideration of equal value passing at the time, of a warrant of attorney to confess judgment, or of that which, under the code of New York, is the equivalent of such warrant, and there called a "confession of judgment," is not an act of bankruptcy, though such warrant of "confession" be not entered of record, but on the contrary be kept as such things often or ordinarily are, in the creditor's own custody, and with their existence unknown to others. The creditor may enter judgment of record on them when he pleases (even upon insolvency apparent), and issue execution and sell. Such his action is all valid and not in fraud of the bankrupt law unless he be assisted by the debtor. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568.

Where a person owing money, principal and interest, for some time overdue, but secured by mortgage, accounts with his creditor and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and so open to attack under the bankrupt law if made within four months before a decree in bankruptcy against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt. *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766.

44. Pledge by insolvent for money advanced.—*Tiffany v. Boatman's Sav. Inst.*, 18 Wall. 375, 21 L. Ed. 868.

"In the administration of the bankrupt law in England this subject has frequently

2. **PROCEEDINGS BY TRUSTEE TO AVOID PREFERENCES AND RECOVER PROPERTY OR VALUE**—a. *Jurisdiction*.—The question of jurisdiction of suits by and against trustees generally, and the exceptions under the amendment of February, 1903, relating especially to recovery of property by trustees, has already been treated elsewhere in this title.⁴⁵

b. *Limitation of Actions*.—The limitation of proceedings by and against trustees and assignees in bankruptcy, including actions to avoid preferences and recover property, will be found treated elsewhere in this title.⁴⁶

c. *Mode of Proceeding*.—The method by which the assignee should institute proceedings to avoid a preference by the bankrupt, is, it would seem, by a bill in equity.⁴⁷

d. *Necessity for Notice to Creditor and Demand for Return of Property*.—It has been held, that in order that a trustee may sue for the value of a preference unlawfully given, he need not first give notice to the creditor to whom the preference was given, or demand the return of the property.⁴⁸

e. *Insolvency and Reasonable Cause to Suspect Intent to Prefer Questions of Fact*.—Whether a bankrupt was insolvent at the time of the transaction attacked as a preference, and whether the party benefited had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, to be determined by the verdict of the jury,⁴⁹ and not open to review in supreme court.⁵⁰

f. *Measure of Damages*.—**Value of Property Seized and Sold under Judgment**.—In a suit by the assignee of a bankrupt to recover the proceeds of the bankrupt's property, sold under a judgment given in fraud of the bankrupt act,

come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect." *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. 375, 21 L. Ed. 868.

When a person, borrowing money of another, pledges with that other a large number of bills receivable as collateral security for the loan (many of them overdue) the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a fiduciary capacity for the pledgee. And if a portion of the collaterals are subsequently replaced by others, the debtor's estate being left unimpaired, and the transaction be conducted without any purpose to delay or defraud the pledgor's creditors, or to give a preference to any one, the fact that proceedings in bankruptcy are instituted in a month afterwards and the pledge was declared a bankrupt, will not avoid the transaction. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568.

Effect of further credit by preferred creditor.—If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy

may be set off against the amount which would otherwise be recoverable from him. See ante, "When Proper," XVII, E, 1.

45. **Jurisdiction of suits to avoid preferences and recover property**.—See ante, "Proceedings between Trustees and Adverse Claimants of Bankrupt's Property," V, B, 1.

46. **Limitation of actions**.—See ante, "Limitations," XVI, F, 2.

47. **Proceedings instituted by bill in equity**.—See *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 27 L. Ed. 640; *Auffm'ordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Hudgins v. Kemp*, 20 How. 15, 15 L. Ed. 853. See, generally, the titles CREDITORS' SUITS; EQUITY; FRAUDULENT AND VOLUNTARY CONVEYANCES.

48. **Notice to creditor and demand of property unnecessary**.—*Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. Ed. 596.

Commencement of action itself a demand.—In *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190, it was held that the commencement of the action by the trustee is in itself a demand.

49. **Insolvency and intent to prefer questions for jury**.—*Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190. See, generally, the title QUESTIONS OF LAW AND FACT.

50. **Not reviewable in supreme court**.—*Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

the measure of damages is the actual value of the property seized and sold; not necessarily the sum which it brought on the sale.⁵¹

Recovery of Interest from Commencement of Action.—It has been held that the commencement of the action by the trustee to recover a preference being itself a demand, the plaintiff is entitled to interest from that time.⁵²

D. Validity of Payment or Transfer to Attorneys, etc., for Future Services.—If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.⁵³

XX. Application of Bankrupt Acts to Partners and Partnership Estates.

A. Liability of Partnership to Adjudication in Bankruptcy.—A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.⁵⁴

B. Jurisdiction.—The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.⁵⁵

C. Appointment, Powers and Duties of Trustees—1. **APPOINTMENT.**—The creditors of a partnership are to appoint the trustee or trustees of the bankrupt estate.⁵⁶

2. **POSSESSION AND RECOVERY OF ASSETS.**—The trustee or assignee of a partnership adjudged bankrupt, can reduce to his possession whatever is owing to the bankrupts and also what they have disposed of in fraud of the bankrupt law.⁵⁷

3. **DUTY OF TRUSTEES TO KEEP SEPARATE ACCOUNTS OF PARTNERSHIP AND INDIVIDUAL PROPERTY.**—The trustee is required by law to keep separate accounts of

51. **Actual value of property as measure of damages.**—*Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542, in which it was held, that the sheriff may be asked his opinion as to such actual value. See, generally, the title **DAMAGES**.

52. **Recovery of interest from commencement of action.**—*Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190. See, generally, the titles **DAMAGES**; **INTEREST**.

53. **Validity of payments or transfers to attorneys, etc.**—Bankrupt Act, 1898, § 60 d. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

54. **Partnership may be adjudged bankrupt.**—Bankrupt Act, 1898, § 5 a; Bankrupt Act, 1867, § 36. See ante, "Who May Become Bankrupts," III.

55. **Jurisdiction of partners and administration of property.**—Bankrupt Act, 1898, § 5 c. See ante, "Jurisdiction," V.

As to transfer of case where petitions filed against different members of a partnership, see ante, "Jurisdiction," VII, B. 1.

56. **Appointment of trustees by partnership creditors.**—Bankrupt Act, 1898, § 5 b. Generally, as to appointment of trustees, see ante, "Appointment and Qualification," XVI, C.

57. **Possession and recovery of assets.**—*Wight v. Condict*, 154 U. S. 666, 26 L. Ed. 562.

"By § 36 of the act of 1867, Rev. Stat., § 5121, where two persons, partners in trade, should be adjudged bankrupt, not only was the property of the firm to be taken and administered, but also the separate estate of each partner." *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

Generally, as to the right and title of trustees or assignees to the property of the bankrupt, see ante, "Title and Rights as to Property of Bankrupt," XVI, E, 1, b.

As to the duty of trustees to collect and reduce to money the property of the estate, and to close up the estate, see ante, "Collection and Deduction of Property to Money and Closing Up Estate," XVI, E, 2, b.

No claim against out going member of limited partnership whose interest sold to copartners.—The assignee in bankruptcy has no claim against a member of a limited partnership, whose interest, prior to the bankruptcy, was purchased and paid for by the remaining members. *Wight v. Condict*, 154 U. S. 666, 26 L. Ed. 562.

"The decree in this case is affirmed. There can be no pretence that Condict owed the bankrupts anything. They bought his interest in the limited partnership of which he was once a member and paid him for it. If the creditors of that partnership have any just claims against

the partnership property and of the property belonging to the individual partners.⁵⁸

D. Administration and Distribution of Assets—1. **IN GENERAL**.—Under the present bankrupt act it is provided that so far as possible the estate shall be administered as therein provided for other estates.⁵⁹

2. PROOF OF CLAIMS AND MARSHALING ASSETS.—The court may permit the proof of the claim of a partnership estate against the individual estates, and vice versa,⁶⁰ and may marshal the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates.⁶¹

3. APPLICATION OF PROCEEDS OF PARTNERSHIP AND INDIVIDUAL ESTATES.—**In General**.—The net proceeds of the partnership property is to be appropriated to the payment of the partnership debts,⁶² and the net proceeds of the individual es-

him on account of what has been done, they must proceed as they may be advised to enforce their rights, but the assignee of the bankrupts is in no respect their representative for that purpose. He can reduce to his possession whatever is owing to the bankrupts and also what they have disposed of in fraud of the bankrupt law; but Conduct was not their debtor when the bankruptcy occurred, and there is no allegation that what they did in respect to his interest in the limited partnership was forbidden by the bankrupt law." *Wight v. Conduct*, 154 U. S. 666, 26 L. Ed. 562.

58. Duty to keep separate accounts.—Bankrupt Act, 1898, § 5 d; Bankrupt Act, 1867, § 36. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

59. Administration as in case of other estates.—Bankrupt Act, 1898, § 5 b.

So, also, the act of 1867 provided that in all other respects than those specified, proceedings against partners should be conducted in the like manner as if they had been commenced and prosecuted against one person alone. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

As to the administration and distribution of bankrupt estates generally, see ante, "Administration and Distribution of Estate," XVII.

60. Proof of claims.—Bankrupt Act, 1898, § 5 g.

As to proof and allowance of claims generally, see ante, "Proof and Allowance of Claims," XV.

Under the act of 1867 also, creditors of the firm and the separate creditors of each partner, might prove their respective debts. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

61. Marshaling assets and preventing preferences, etc.—Bankrupt Act, 1898, § 5 g. See, generally, the title **MARSHALING ASSETS AND SECURITIES**.

"Assets are to be marshaled between the creditors of the copartnership and the separate creditors of the partners only when there are partnership assets and separate assets of individual partners, and proceedings have been instituted against

the partnership and the individual members, as provided in the thirty-sixth section of the bankrupt act. Certain exceptions also exist to that rule where both the joint and separate estates are administered by the assignees of the copartnership." *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

62. Payment of partnership debts from partnership property.—Bankrupt Act, 1898, § 5 f; Bankrupt Act, 1867, § 36. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States v. Hack*, 8 Pet. 271, 8 L. Ed. 941.

Seemly, that a debt incurred by the members of a partnership individually, even in a matter where the firm is to profit, will not, in case of bankruptcy of the firm, let the person to whom the debt was incurred come for a dividend upon the assets of the firm as distinguished from the assets of the individual partners. *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207.

"If it be conceded that such a joint request as is pleaded, followed by an assumption of obligation and a consequent payment of money in pursuance of it, raised an implied promise on the part of those who joined in the request to reimburse the defendant, it is, perhaps, still not clear that it was a partnership promise, creating a debt of the partnership, and therefore entitled to priority in bankruptcy over private debts of the partners." *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207.

"Partners are not entitled in any case to come in competition with the joint creditors upon the partnership funds, whatever may be the rights and equities which would otherwise attach between them and the bankrupt partner or partners. Where all the partners become bankrupt the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership

tate of each partner to the payment of his individual debts.⁶³

4. **DISPOSITION OF SURPLUS.**—Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership estates and be applied to the payment of the partnership debts.⁶⁴ Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.⁶⁵

5. **PAYMENT OF EXPENSES.**—The expenses are to be paid from the partnership property and the individual property in such proportions as the court shall determine.⁶⁶

E. Bankruptcy of One or More Partners—Effect as Dissolving Partnership.—Many decided cases support the proposition that the bankruptcy of one partner operates as a dissolution of the copartnership, but such an adjudication obtained by one partner against another, will not be sustained if the real object of the petitioner is to dissolve the firm, and the adjudication is not required for any other purpose.⁶⁷

in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors. Doubt upon that subject cannot be entertained, and it is equally clear that a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership, for the plain reason that he is himself liable to all the joint creditors, which is sufficient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are fully paid. Neither can a solvent partner prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified, for if a dividend were reserved to such a party on such proof, the joint creditors might be injured by such solvent partner stopping the surplus of the separate estate, which would otherwise be carried over to the joint estate, or the separate creditors might be injured by the funds being stopped and the transmission of the same be delayed. Two exceptions are admitted to that rule: (1) Where the property of a partner has been fraudulently applied for the purposes of the partnership. (2) Where a distinct trade is prosecuted by one or more of the members of the firm." *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

Property settled on wife but purchased with assets of bankrupt firm.—The court, upon consideration of the facts in this case, holds that certain real estate settled upon a woman by her husband was purchased with the assets of the firm whereof he was a member, and that the assignee in bankruptcy of the firm is, after the payment of the mortgage thereon, entitled to the proceeds thereof. *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. Ed. 591, followed in *Clark v. Beecher*, 154 U. S. 631, 24 L. Ed. 705.

63. Payment of individual debts from individual estates.—Bankrupt Act, 1898, § 5f; Bankrupt Act, 1867, § 36. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

"Creditors of the firm, and the separate creditors of each partner, may prove their respective debts; and the net proceeds of the joint stock is to be appropriated to pay the former, and the net proceeds of the separate estate to pay the latter. If there be any balance of the separate estate of any partner, after payment of his separate debts, it is to be added to the joint stock to pay the joint creditors; and if there be any balance of the joint stock after payment of the joint debts, it is to be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy. But the act does not contain any provisions by which, when one member alone of a partnership is decreed bankrupt, and there is no decree against the partnership itself, the property of the partnership passes as does the partner's individual property." *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

64. Surplus of individual property.—Bankrupt Act, 1898, § 5f; Bankrupt Act, 1867, § 36. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

65. Surplus of partnership property.—Bankrupt Act, 1898, § 5f. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

The provision of the act, 1867, § 36, is that the net proceeds of the joint stock and property shall be appropriated to pay the creditors of the copartnership, and that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

66. Payment of expenses.—Bankrupt Act, 1898, § 5e.

67. Effect as dissolving partnership.—*Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801. See, generally, the title PARTNERSHIP.

Recovery of Assets by Trustee.—The assignee in bankruptcy of the estate of an individual partner of a debtor copartnership cannot maintain a suit to recover back money previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the bankrupt act. The suit should be by the assignee of the partnership.⁶⁸

Administration of Property.—In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.⁶⁹

Priority of Debts Due Partnership.—Debts due by a bankrupt partner to the partnership are entitled to priority in preference to the debts due by him to his separate creditors, and if the joint funds prove insufficient to discharge his debt to the partnership, the solvent partners have a right to prove the deficiency against the separate estate of the bankrupt *pari passu* with the separate creditors.⁷⁰

XXI. Nature, Operation and Effect of Bankruptcy Proceedings.

A. Nature.—Proceedings in bankruptcy are in the nature of proceedings in equity,⁷¹ and are, generally speaking, in the nature of proceedings in

68. Recovery of assets by trustee.—*Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

"Repeated decisions have settled the rule that an assignee of the estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property, and it is difficult to see why that rule does not dispose of the case before the court." *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

69. Procedure where only portion of the partners adjudged bankrupt.—Bankrupt Act, 1898, § 5h.

"Bankruptcy, it is said, when decreed by a competent tribunal, dissolves the copartnership, but the joint property remains in the hands of the solvent partner or partners, clothed with a trust to be applied by him or them to the discharge of the partnership obligations and to account to the bankrupt partner or his assignee for his share of the surplus. Exceptions undoubtedly exist to that rule where it appears that the partnership or all the partners are insolvent, even though some of them may not be in bankruptcy." *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

The mere fact that one partner of a firm composed of two partners, after a stoppage of payment, suffered the other, who put in two-thirds of the capital, and who was in addition a large creditor of the partnership for money lent, to manage the partnership assets apparently as if they had been his own, proposing to creditors a compromise at seventy cents on the dollar, taking the partnership stock, transacting business in his own name, buying some new stock, selling old and new, and mingling the funds—though keeping separate accounts—does not, of

itself, dissolve the partnership, and vest such acting partner with the partnership property in such way as that on a decree of bankruptcy against him individually, the partnership assets pass to his assignee in bankruptcy. *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 101.

"Robert Bird alone has become a bankrupt under the laws of the United States. Consequently, only his private property and his interests in the funds of the company pass to his assignees. This interest is subject to the claim of his copartners, and if, upon a settlement of accounts, Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionably enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and of consequence, the court consider his interest as being one undivided third of the fund. This third goes to his assignees." *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 101.

70. Priority of debts due partnership.—*Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

71. In nature of proceedings in equity.—*Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, in which case the court held that "the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause four authorizing the trial and punishment of offenses, the ju-

rem.⁷² An adjudication in bankruptcy, however, it has been held, partakes in part of the nature of a judgment in rem, and in part of the nature of a judgment in personam.⁷³

B. Operation and Effect—1. AS DIVESTING JURISDICTION OF STATE COURTS.—As has been already seen, courts of bankruptcy have jurisdiction over the collection and distribution of the estates of bankrupts, and, when the property has become subject to the jurisdiction of the bankruptcy court, as that of the bankrupt, such courts have exclusive jurisdiction to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein.⁷⁴ Thus, after an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun.⁷⁵ Where, however, proceedings are instituted in a state court to set aside a conveyance of property by one subsequently adjudged a bankrupt, and such state court had, at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, it has been held that such jurisdiction will not be divested by the proceedings in bankruptcy, but that it is the duty of the state court to proceed to final decree, notwithstanding such adjudication;⁷⁶ the usual rule being applicable that the court which first obtains rightful jurisdiction over the subject matter should not be interfered with.⁷⁷

risdiction over which must necessarily be at law and not in equity.”

Under the sixth section of the act of 1841 the jurisdiction given to the district court in all matters and proceedings in bankruptcy is to be exercised “summarily in the nature of summary proceedings in equity.” *Commercial Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862.

72. In nature of proceedings in rem.—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Shawhan v. Wheritt*, 7 How. 627, 643, 12 L. Ed. 847; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 556, 23 L. Ed. 336.

73. Nature of adjudication.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57. See, generally, the title JUDGMENTS AND DECREES.

74. Determination of controversies relating to property under jurisdiction of court.—See ante, “Collection and Distribution of Bankrupt Estates, and Determination of Controversies Relating Thereto,” V, A, 2, b, (7).

75. Replevin in state court to recover property of bankrupt at time of adjudication.—*White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183.

76. Duty of state court, having acquired jurisdiction, to proceed to decree.—*Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128. And see *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122.

The jurisdiction of a state court over a suit by a trustee to set aside a chattel mortgage as in fraud of creditors, is not affected by the fact that the bankruptcy court has possession of the proceeds of the mortgaged chattels sold under order of court and to which the lien of the mort-

gage was transferred. *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911.

77. Application of usual rule as to court first acquiring jurisdiction.—*Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128. See, generally, the titles COURTS; EQUITY; JURISDICTION.

“Such being the state of facts, the circuit court of appeals held that the district court had no jurisdiction of the suit, even if it had been brought in the name of the trustee, who could not have sued defendants below in that court in respect of the bankrupt’s property, unless by consent, while the bankrupt himself had no standing in that court after adjudication, *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175; and further, that as the circuit court of Barbour County had at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, that jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject matter should not be interfered with. *Frazier v. Southern Loan and Trust Company*, 99 Fed. Rep. 707. And Goff, J., speaking for the court, said: ‘The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject matter of such controversy.’ The

2. EFFECT UPON RIGHT TO INSTITUTE SUITS.—**By Creditor.**—The effect of proof of claims by a creditor upon his right to sue has already been treated in this title,⁷⁸ and also the subject of what debts and obligations are, and are not, discharged by a discharge in bankruptcy.⁷⁹ The effect of an adjudication of bankruptcy as vesting in the assignee or trustee the sole right to set aside preferences, fraudulent conveyances, etc., has also been treated in previous sections of this title.⁸⁰

By Debtor.—As has been already seen, the adjudication in bankruptcy vests in the trustee or assignee all of the debtor's rights of action relating to the assets of the bankrupt estate.⁸¹

3. EFFECT ON PENDING SUITS—*a. Effect of Proceedings as Stay of Suits in Other Courts*—(1) *Provisions of Former and Present Bankrupt Acts.*—**Under Rev. Stat., § 5106**, formerly § 21 of the act of March 2, 1867 (Ch. 176, 14 Stat. 526), it was provided that no creditor whose debt was provable should be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge should have been determined; and that any such suit or proceedings should, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there was no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.⁸²

court also ruled that the mere fact that complainant Dent (Roy) proved up her judgment as a preferred debt in bankruptcy, when, and as she did, did not operate to deprive the state court of jurisdiction, nor amount to a consent to the exercise of jurisdiction by the district court as invoked. We are of opinion that the circuit court of appeals was right in its rulings. The case in the one aspect came within *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, and in the other within the rule applied. *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122." *Pickens v. Roy*, 187 U. S. 177, 180, 47 L. Ed. 128.

78. **Effect of proof of debt upon right to sue.**—See ante, "Effect of Proving Debt upon Creditor's Right of Action," XV, A, 7.

79. **Effect of discharge.**—See ante, "Effect of Discharge," XII, F.

80. **Right to set aside preferences, etc.**—See ante, "Rights Not Possessed by Bankrupt of Creditors," XVI, F, 1, b, (2); "Prohibition of Preferences under Present and Former Bankrupt Acts," XIX, C, 1, a.

81. **Right of action vested in trustee.**—See ante, "Rights and Powers," XVI, E, 1.

82. **Provisions of Rev. Stat., § 5106 (Act of 1867, § 21).**—*Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Scott v. Ellery*, 142 U. S. 381, 35 L. Ed. 1050; *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57. See, also, *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994.

Section 5106 construed.—"The terms of this enactment are as broad and as peremptory as possible. 'No creditor whose debt is provable shall be allowed to prosecute to final judgment' any suit thereon against the bankrupt; and such suit 'shall,

upon the application of the bankrupt, be stayed.' This provision, like all laws of the United States made in pursuance of the constitution, binds the courts of each state, as well as those of the nation. Upon the application of the bankrupt to the court, state or national, in which the suit is pending, it is the duty of that court to stay the proceedings 'to await the determination of the court in bankruptcy on the question of the discharge,' unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, or unless, the amount of the debt being in dispute, the United States court sitting in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining that amount. If neither the bankrupt nor his assignee in bankruptcy applies for a stay of proceedings, the court may of course proceed to judgment. *Doe v. Childress*, 21 Wall 642, 22 L. Ed. 549; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903." *Hill v. Harding*, 107 U. S. 631, 633, 27 L. Ed. 493.

"The stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment. If the discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of

Under the present bankrupt act, it is provided that a suit which is founded upon a claim from which a discharge would be a release,⁸³ and which was pending against a person at the time of the filing of a petition against him, shall be stayed until the adjudication or the dismissal of the petition;⁸⁴ if such person is ad-

the proceedings in bankruptcy, or for the purpose of charging sureties upon a bond given to dissolve such an attachment. But, so long as the question of the discharge in bankruptcy is undetermined, the suit cannot, against the objection of the bankrupt or of his assignee in bankruptcy, proceed for any purpose, except in one of two events, an unreasonable delay of the bankrupt in endeavoring to obtain his discharge, or an order of the court in bankruptcy granting leave to proceed for the single purpose of ascertaining the amount due." *Hill v. Harding*, 107 U. S. 631, 633, 27 L. Ed. 493.

"The result required by the very words of the statute is confirmed by a consideration of the reasons upon which it rests. Its purpose is not merely to protect the bankrupt, in case he obtains a certificate of discharge, from having the original cause of action against him merged in a judgment, the right of action upon which might not be barred by the discharge; but to prevent him, so long as the question of his discharge is undetermined, from being harrassed by the suit upon any debt provable in bankruptcy, whether it would or would not be barred by a certificate of discharge, and whether the attachment or other security obtained in the suit would or would not be affected by the proceedings in bankruptcy; and also to afford to the assignee in bankruptcy, to whom all the property of the bankrupt has passed, opportunity to assume the defense of the suit, and to contest the existence and amount of the plaintiff's claim, and the validity of his attachment." *Hill v. Harding*, 107 U. S. 631, 634, 27 L. Ed. 493.

Sections 5105 and 5106 distinguished.—

"Section 5105 of the Revised Statutes provided (as did the bankruptcy act, 1841, c. 9, § 5, 5 Stat. 445) that 'no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.' This section was amended by the act of June 22, 1874, by adding thereto the following words: 'But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.' 18 Stat. 179, c. 390, § 7. Section 5106 provided that 'no creditor whose debt is provable shall

be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.' It is clear that §§ 5105 and 5106 related to different classes of cases. Section 5106 applied only to creditors whose debts were 'provable,' but not proved, in bankruptcy. In respect to such debts, when sued for, the right was given to the bankrupt, upon his application, to have the suit and proceedings, in whatever court pending, stayed until the question of his discharge was settled, subject to the condition that there was no unreasonable delay in endeavoring to obtain the discharge, and to the further condition that the court in which the action was pending, with leave of the bankruptcy court, could proceed for the purpose simply of ascertaining the amount of the debt, so that it could be proved in bankruptcy. If the bankrupt failed, in a case of that kind, to make his application for a stay of proceedings, the jurisdiction to proceed to final judgment against him, whether the action was pending in a state or in a federal court, was not impaired by § 5106. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Davis v. Friedlander*, 104 U. S. 570, 575, 26 L. Ed. 818; *Hill v. Harding*, 107 U. S. 631, 634, 27 L. Ed. 493; *Dimmock v. Revere Copper Co.*, 117 U. S. 559, 564, 29 L. Ed. 994; *Boynton v. Ball*, 121 U. S. 457, 466, 30 L. Ed. 985; In the Matter of *Schepeler & Co.*, 4 Ben. 68." *Scott v. Ellery*, 142 U. S. 381, 35 L. Ed. 1050.

83. Suit must be upon claim from which discharge would be a release.—Bankrupt Act, 1898, § 11 a.

As to what claims are released by a discharge, see post, "In General," XII, F, 1, a.

84. Stay until adjudication or dismissal.—Bankrupt Act, 1898, § 11 a.

As to adjudication and dismissal, see ante, "Hearing and Adjudication," VII, A, 5; "Hearing and Adjudication," VII, B, 9.

judged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication,⁸⁵ or, if within that time such person applies for a discharge, then until the question of such discharge is determined.⁸⁶

(2) *Right to Proceed to Judgment Where Amount Due Is in Dispute.*—Under the former bankrupt act it was expressly provided that if the amount due the creditor was in dispute, the suit, by leave of the court in bankruptcy, might proceed to judgment for the purpose of ascertaining the amount due, which amount might be proved in bankruptcy, but execution should be stayed to await the determination of the question of discharge.⁸⁷

(3) *Necessity for Application for Stay.*—In decisions under the former bankrupt laws it has been held that a state court cannot know or take judicial notice of proceedings in bankruptcy unless they are brought before it in some appropriate manner,⁸⁸ but that the stay provided for shall be upon the application of the bankrupt.⁸⁹

85. Stay for twelve months after date of adjudication.—Bankrupt Act, 1898, § 11, a.

86. Stay until question of discharge determined.—Bankrupt Act, 1898, § 11.

87. Right to proceed to judgment where amount in dispute.—Rev. Stat., § 5106. *Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Scott v. Ellery*, 142 U. S. 381, 35 L. Ed. 1050.

"The question presented by this writ of error is quite distinct from that which arose when the case was before this court at a former term, as reported in *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493. The only point then decided was that the defendant, on his application made after verdict and before judgment, was entitled to a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. The question not then passed upon, and now presented, is whether, since he has obtained his discharge in bankruptcy, there is anything in the provisions of the bankrupt act to prevent the state court from rendering judgment on the verdict against him, with a perpetual stay of execution, so as to prevent the plaintiffs from enforcing the judgment against him, and leave them at liberty to proceed against the sureties in the bond or recognizance given to dissolve an attachment made more than four months before the commencement of the proceedings in bankruptcy. Such attachments being recognized as valid by the bankrupt act (Rev. Stat., § 5044) a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt, to be levied only upon the property attached. *Peck v. Jenness*, 7 How. 612, 623, 12 L. Ed. 841; *Doe v. Childress*, 21 Wall. 642, 22 L. Ed. 549. When the attachment has

been dissolved, in accordance with the statutes of the state, by the defendant's entering into a bond or recognizance, with sureties, conditioned to pay to the plaintiffs, within a certain number of days after any judgment rendered against him on a final trial, the amount of that judgment, the question whether the state court is powerless to render even a formal judgment against him for the single purpose of charging such sureties, or, in the phrase of Chief Justice Waite in *Wolf v. Stix*, 99 U. S. 1, 9, 25 L. Ed. 309, whether "the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed," depends not upon any provision of the bankrupt act, but upon the extent of the authority of the state court under the local law." *Hill v. Harding*, 130 U. S. 699, 702, 703, 32 L. Ed. 1083.

88. State court does not judicially notice bankruptcy proceedings.—*Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 24 L. Ed. 994. See, generally, the title JUDICIAL NOTICE.

89. Stay to be granted on application of bankrupt.—*Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

"The next proposition is, that under § 5106 of the Revised Statutes of the United States it was the duty of *Boynton* to make application to the state court, before judgment in that court, to have the proceedings there stayed, to await the determination of the court in bankruptcy on the question of his discharge. That section is in the following language: "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the

(4) *Waiver of Right*.—The provision as to stay of proceedings is, it has been held, primarily for the benefit of the bankrupt, that he may be able to avoid being harassed in both courts at the same time, in regard to the debt. It is, therefore, a right which he may waive.⁹⁰

(5) *Effect of Failure to Procure Stay upon Right to Plead Discharge*.—If the bankrupt permits the case to proceed to judgment in the state court by failing to procure a stay of proceedings, or the assignee in bankruptcy does not intervene as he may do, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court.⁹¹ And if his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution.⁹² Where, however, the defendant in an action in a state court is, pending such action, discharged from all his debts under bankruptcy proceedings, receiving his discharge before final judgment against him in the state court, but does not plead it in bar of that action, nor bring it in any manner to the attention of the court, such certificate of discharge will not bar a suit upon such judgment in the court of another state.⁹³

b. *Prosecution or Defense of Pending Suits*.—(1) *By Trustee or Assignee*.—A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.⁹⁴ So, also, the court may

bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.' This cannot be construed to mean anything more than that where the bankruptcy proceedings are brought to the attention of the court in which a suit is being prosecuted against a bankrupt, that court shall not proceed to final judgment until the question of his discharge shall have been determined. The state court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge. Even the direction that it shall be stayed is coupled with a condition that 'there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;' and with the further provision that 'if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due.' Boynton v. Ball, 121 U. S. 457, 466, 467, 30 L. Ed. 985.

90. *Waiver of right*.—Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985.

"These provisions exclude altogether the idea that the state court has lost jurisdiction of the case, even when the bankrupt shall have made application showing

the proceedings against him. The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid pro rata with his other debts by the assignee in bankruptcy." Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985.

91. *Right to plead discharge not waived by failure to procure stay*.—Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985; Scott v. Ellery, 142 U. S. 381, 35 L. Ed. 1050.

92. *Stay of execution where discharge obtained after judgment in state court*.—Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985; Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578. See, also, Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362.

93. *When discharge not bar to suit on judgment of state court*.—Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 994, reversed and distinguished in Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985.

94. *Prosecution of pending suits*.—Bankrupt Act, 1898, § 11 c; Rev. Stat., § 5047. Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903; Eyster v. Gaff, 91 U. S. 521, 23 L.

order the trustee to enter his appearance and defend any pending suit against the bankrupt.⁹⁵

(2) *By Original Plaintiff or Defendant.*—The fact that the plaintiff in a pending suit has been adjudged a bankrupt will not bar his continuing to prosecute the same in his own name if the assignee expressly consented thereto,⁹⁶ or if the claim

Ed. 403; *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949; *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809. See, also, *Winchester v. Heiskell*, 120 U. S. 273, 30 L. Ed. 464; *S. C.*, 119 U. S. 450, 30 L. Ed. 462.

Certified copy of register's assignment as evidence of assignee's right to sue.—

The fourteenth section of the bankrupt law of 1867 provided that the assignee in bankruptcy might prosecute and defend in his own name all suits at law and in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt was a party, in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt, and made a copy of the register's assignment, duly certified by the clerk of the proper court, conclusive evidence of the right of the assignee to sue. *Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809.

95. Defense of pending suit.—Bankrupt act, 1898, § 11 b; *Rev. Stat.*, § 5047. *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949; *Brown v. Wygant*, 163 U. S. 618, 41 L. Ed. 284. And see cases cited in note to preceding text.

"Power and authority are also vested in the assignee by virtue of the bankruptcy, and his appointment to manage, dispose of, sue for and recover all his property or estate, real or personal, debts or effects, and to defend all suits at law or in equity pending against the bankrupt. 14 Stat. 525." *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, reaffirmed in *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290.

A suit pending against a party at the time he is adjudged a bankrupt, may, after due notice to his assignee, be prosecuted to final judgment against the latter in his representative capacity, where he makes no objection to the jurisdiction and the bankrupt court does not arrest the proceedings. Such judgment may be filed with the assignee as an ascertainment of the amount due to the creditor by the bankrupt, and as a basis of dividends, but it is effectual and operative for that purpose only. *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903.

Intervention of assignee in pending foreclosure proceedings.—Where the assignee in bankruptcy of a mortgagor is appointed during the pendency of proceedings for the foreclosure and sale of the mortgaged premises, he stands as any other purchaser would stand on whom the title has fallen after the commencement

of the suit. If there be any reason for interposing, the assignee should have himself substituted for the bankrupt, or be made a defendant on petition. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

"If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced." *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

96. Trustee may allow suit to proceed in name of bankrupt.—*Brown v. Wygant*, 163 U. S. 618, 41 L. Ed. 284; *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949.

"The further charge of the court to the effect that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defense, was also right. By § 5047, *Rev. Stat.*, the assignee may prosecute or defend suits pending in the name of the bankrupt at the time of the bankruptcy, but there is nothing which renders it necessary for him to make himself a party on the record to do what is thus allowed. What was said in *Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809, must be construed in connection with the case then under consideration, which was an application by an assignee to be substituted in this court for the original appellant, who had become bankrupt after the appeal was taken. The true rule is stated in *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; and *Davis v. Friedlander*, 104 U. S. 570, 26 L. Ed. 818. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest pendente lite. It is no defense to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor." *Thatcher v. Rockwell*, 105 U. S. 467, 469, 470, 26 L. Ed. 949. To same effect, see in *Brown v. Wygant*, 163 U. S. 618, 41 L. Ed. 284.

had been assigned more than four months before the filing of the petition in bankruptcy, and the suit was for the transferee's benefit.⁹⁷ It has been held that as a court cannot take judicial notice of the proceedings in bankruptcy in another court, it is its duty to proceed as between the parties before it, until, by some proper pleadings in the case, it is informed of the changed relations of any such parties to the subject matter of the suit.⁹⁸

4. **EFFECT ON APPELLATE PROCEEDINGS.**—As to the right of the bankrupt to appeal or prosecute writs of error, and the substitution of the assignee or trustee as appellant or plaintiff in error, see the title *APPEAL AND ERROR*, vol. 1, p. 333.

C. Conclusiveness and Effect of Adjudication.—An adjudication in bankruptcy, partaking, as has been seen, in part of the nature of a judgment in rem, and in part of the nature of a judgment in personam,⁹⁹ with regard to the estate of the bankrupt debtor, which has been by the court's warrant of seizure or by the surrender of the debtor, brought within the possession and jurisdiction of the court, its orders, decrees, and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court.¹ As a determination of the legal status of the bank-

97. Suit by bankrupt for transferee's benefit.—*Thatcher v. Rockwell*, 103 U. S. 467, 26 L. Ed. 949.

98. Duty of court to proceed as between original parties unless notified of their changed relations to subject matter of suit.—*Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994.

"It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain, that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit." *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

99. Nature of adjudication.—See ante, "Nature," XXI, A.

1. Effect with regard to bankrupt's estate.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207. See ante, "Collection and Distribution of Bankrupt

Estates and Determination of Controversies Relating Thereto," V, A, 2, b, (7).

"The lands conveyed by Barnes to his children having come to the possession of, and being claimed by, his assignee, and the title thereto being in dispute, the petition filed by the latter in the district court was authorized by § 5063 of the Revised Statutes. Under the pleadings in that suit—all the parties therein having appeared, asserted their respective claims to the lands, and sought a determination of the dispute between them—it was competent for the district court, sitting in bankruptcy, to have determined, at least, the question of title. Had that court adjudged that the lands belonged to the grantor in the deed of 1863 at the time he was adjudged a bankrupt, that judgment, until reversed or modified, would have been a bar to any new action by the defendants for the recovery of the property." *Adams v. Collier*, 122 U. S. 382, 388, 389, 30 L. Ed. 1207.

Conclusiveness of order under which proceedings of sale distributed.—An order of the district court affirmed by the circuit court under which the trustees in bankruptcy distributed the proceeds of the sale of the bankrupt's property is binding and conclusive on creditors. *Merchants' Bank v. Slagle*, 106 U. S. 558, 27 L. Ed. 204.

"Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those

rupt, or of the relations of the creditors to both, its judgment is conclusive in all courts where pleaded.² As a determination of the legal status of a person not a bankrupt and who was not a party to the proceedings, and whose status as a bankrupt has never been a question before the court, it unquestionably is not binding upon any person not a party to such proceeding.³

XXII. Offenses against Bankrupt Act.

Specification of Offenses and Punishment Therefor.—The present bankrupt act specifically enumerates certain acts which shall be deemed offenses and provides punishment for such offenses.⁴

who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 46 L. Ed. 1113.

Decree as evidence of assignee's title.—"The third section of the act declares, that 'all the property, etc., of every bankrupt (except as hereinafter provided), who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee,' etc. As the court had jurisdiction of the subject matter and person of the bankrupt, the decree is thus made conclusive evidence of the title of the assignee." *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847. See ante, "Vested with Title to All Unexempt Property of Bankrupt," XVI, E, 1, b, (a).

2. Effect as determining status of bankrupt.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

Liability to collateral attack.—"Where the record shows jurisdiction, an adjudication of bankruptcy can only be assailed by a direct proceeding in a competent court." *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

An adjudication of bankruptcy, made by a district court having jurisdiction of the bankrupt, cannot be impeached collaterally by any person who was a party to the bankruptcy proceedings. Until vacated in the manner prescribed by the

bankruptcy act, it is binding upon all the parties to it. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 30 L. Ed. 196.

Generally, as to direct and collateral attack on judgments and decrees, see the titles JUDGMENTS AND DECREES; JURISDICTION.

3. Effect as determining status of one not a bankrupt and not a party.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

Generally, as to the conclusiveness and effect of former judgments and decrees, see the titles FORMER ADJUDICATION OR RES ADJUDICATA; JUDGMENTS AND DECREES.

4. Offenses against bankrupt act and punishment therefor.—Bankrupt Act, 1898, 29a, 29b, 29c. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113.

The offenses enumerated in § 29 embrace misappropriation of property; concealing property belonging to the estate; making false oaths or accounts; presenting false claims; receiving property from a bankrupt with intent to defeat the act; extorting money for acting or forbearing to act in bankruptcy proceedings. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 191, 46 L. Ed. 1113.

Jurisdiction to punish for violations of bankrupt act.—See ante, "Punishment of Offenses against Bankrupt Act," V, A, 2, b, (4).

Limitation of prosecution.—Under the present bankrupt act a person may not be prosecuted for any offenses arising under such act unless the indictment is found or information is filed in court within one year after the commission of offense. Bankrupt Act, 1898, § 29d.

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